The Implications of Social Media for Parliamentary Privilege and Procedure

Joanne McNair

Does social media present a substantive challenge to parliamentary procedure? And, if so, can existing parliamentary conventions and practice adequately respond to the challenges of the digital age? In this article, the author explores incidents where social media was used to violate or circumvent a standing order or parliamentary convention, or to challenge parliamentary privilege in order to answer these questions. She concludes that while social media is simply another form of communication which can conflict with and challenge parliamentary conventions and rules in the same way as more traditional forms of communication, parliamentarians should be aware that its "instantness" can set it apart and expand their audience.

In a 2009 interview, UK Conservative Party leader David Cameron was asked if he was on Twitter. Cameron replied he was not, adding: "I think that politicians do have to think about what we say and that the trouble with Twitter – the instantness of it"[1] might result in too many tweets making a twit – to paraphrase the continuation of Cameron's own infamous quote.

Social media has been around for several years now, and its use by elected officials – still a relatively new phenomenon – has led to a number of incidents in various jurisdictions in Canada (and elsewhere) that have challenged age-old parliamentary conventions and rules. While there is a growing body of research focusing on how politicians use social media, particularly during election campaigns, little attention has been paid to the procedural side of this trend. A sufficient number of incidents raised in various parliamentary jurisdictions over the past few years allow us to classify them into two main categories:

1. Social media used to violate or circumvent a standing order or parliamentary convention;

2. Social media used to challenge parliamentary privilege.

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This paper will look at both categories of social media-related incidents and how Speakers and legislatures have sought to address the issues raised by them. The question we hope to answer is if social media presents a unique challenge to parliamentary procedure, can existing parliamentary conventions and practice adequately respond to the challenges of the digital age?

Use of Social Media to Violate or Circumvent a Standing Order or Parliamentary Convention

Within this category, we can distinguish between two types of occurrence, one where the use of social media is incidental to the rule violation, and the other where the use of social media is deliberate.

Incidents which fall under the first type are quite straightforward; what is at issue is the violation of a clear rule or long-standing convention. However, in these instances, the fact that Twitter, or other social media, was involved is not the main focus of the incident; indeed, what occurred would be considered a breach of the standing orders or parliamentary conventions regardless. An example would be an MP tweeting about in camera proceedings during a committee meeting.

Revealing what was discussed during the in camera portion of a committee meeting is a clear breach of parliamentary rules, and possibly constitutes a contempt of parliament. The means by which the MP makes the privileged information public – whether

this is done by tweeting proceedings, by speaking to journalists after the meeting, by emailing the information to other parties, or by making comments on the floor of the House – is secondary. The issue is making public the information discussed in camera. The fact that the violation involved Twitter (or other social media) is incidental.

In other instances, however, social media has been used to deliberately circumvent certain standing orders or parliamentary conventions. These incidents, which would include casting aspersions on the Speaker; making references to certain members being absent; accusing another member of lying or misleading the House, etc., are somewhat more complicated; they are further complicated by the issue of *where* the Member happened to be when the offending comment was made on social media – inside or outside of the Chamber, and *when* the comment was made – while the House was sitting, or after it had adjourned.

Most of the rulings made in respect to such incidents revolve around the convention that MPs cannot do indirectly what they cannot say or do directly. In other words, if what they said on social media would have been ruled out of order (or perhaps worse) in the Chamber during proceedings in Parliament, then the comments probably should not have been posted to social media. There are only a handful of recorded incidents of this nature, but the associated rulings have raised a number of issues which need to be considered:

> 1. Is a comment on social media sent from the floor of the House part of proceedings in Parliament?
>
> 2. Is a comment on social media sent from outside the Chamber, but while the House is sitting, part of proceedings in Parliament?
>
> 3. Should presiding officers treat comments made on social media, from inside or outside the Chamber, differently from comments made by MPs to journalists outside the chamber?
>
> 4. Should a Member be disciplined for comments made on social media which were clearly made outside of House sitting hours?

Defining "Proceedings in Parliament"

"Proceedings in Parliament" has never been defined in Canadian or UK statute law. Section 16(2) of Australia's *Parliamentary Privileges Act, 1987* defines it as:

> all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a Committee, and, without limiting the generality of the foregoing, includes—
>
> a) the giving of evidence before a House or a Committee, and evidence so given;
>
> b) the presentation of submission of a document to a House or a Committee;
>
> c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.[2]

This definition, which predates not only the advent of social media, but of the internet in general, makes no specific reference to the location where the business of a House or Committee takes place. Deborah Palumbo and Charles Robert explain: "Generally, the phrase "proceeding in Parliament" has been considered a somewhat flexible concept, not strictly limited to proceedings that take place within the precincts of Parliament or to debates on the floor of the Chamber."[3]

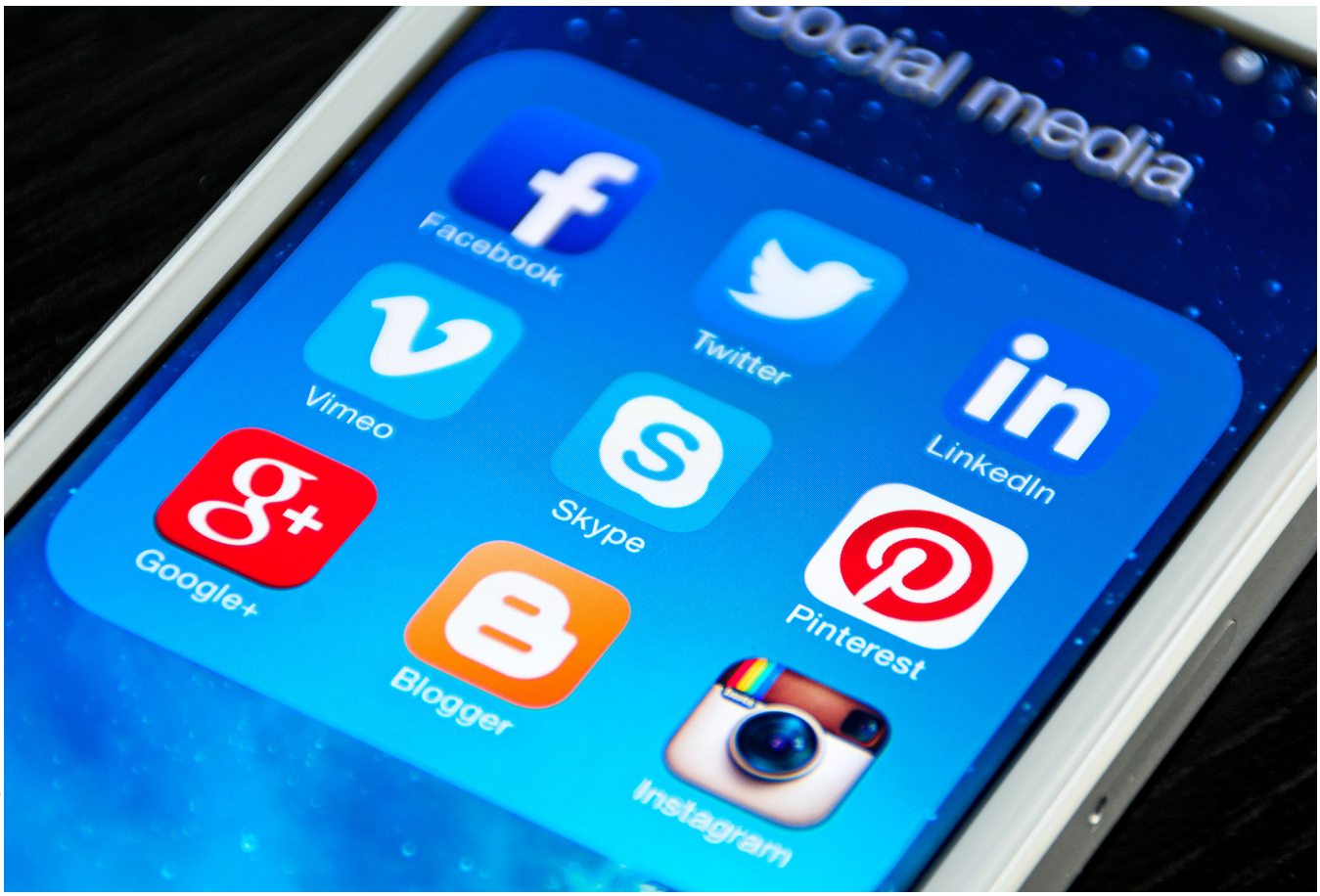
"Proceedings in Parliament," therefore, include all of the formal business of a Parliament or its committees, including everything said or done by Members in the exercise of this business, and of their functions as Members. An exception to this definition, as explained in Maingot's *Parliamentary Privilege in Canada*, is that some matters arising in the House are not necessarily proceedings in Parliament: "[A] casual conversation between two Members that takes place during the process of a debate is not a 'proceeding in Parliament.'"[4]

This distinction is important when considering the use of social media by Members while in the Chamber. Unless what they post on Twitter or other social media is read out during debate, and thus part of the record of proceedings, it is difficult to conceive how one could argue that tweets sent from the floor of the House were part of proceedings in Parliament. And if they're not proceedings in Parliament, should Speakers be expected to rule on matters arising from tweets made from the floor of the House?

Speakers and Social Media: To Rule or Not to Rule

A general consensus is emerging that tweets or other social media comments sent from the floor of the House are not part of proceedings in Parliament and, for that reason, Speakers are limited in what they can do when such incidents are raised in the House.

Guidelines adopted by the UK House of Commons in October 2011 state that because presiding officers cannot police what MPs are saying on social media, the chair should not be expected to rule on any incident



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Is a comment on social media sent from the floor of the House part of the proceedings in Parliament? Rulings regarding the use of social media to deliberately circumvent standing orders or parliamentary conventions have raised such questions.

that might arise from something said on social media by a Member from inside the chamber.[5] There haven't been any points of order or privilege involving social media raised in the UK House of Commons since the adoption of these guidelines.

On April 1, 2010, the Speaker of the Canadian House of Commons ruled on a point of order concerning comments on the presence and absence of Members in the House posted on Twitter by an MP from inside the Chamber. Speaker Peter Milliken ruled that it is impossible for the Chair to police the use of personal digital devices by Members, and more importantly, that the Chair would not want to "change its longstanding practice of refraining from comment on statements made outside the House."[6] On September 5, 2012, a similar incident occurred in the Ontario Legislative Assembly, when an Opposition Member posted a photo of the largely empty Government front bench on Twitter. The Speaker reminded Members that the camera function should never be used in the Chamber.[7]

The Speaker of the Legislative Assembly of New South Wales (Australia) delivered a statement to the Assembly regarding the use of mobile phones and social media on April 3, 2012. He stated unequivocally that "Members who choose to participate in such social engagement are reminded that tweets are not proceedings of parliament."[8]

Some rulings from other jurisdictions have been a bit more problematic. A question of privilege was raised in the Newfoundland House of Assembly on May 9, 2012 regarding a comment made on Twitter by one MHA, in which he accused another MHA of lying in the House during that day's debate. The tweet was posted after the House had adjourned for the day, and did not identify the MHA against whom he was making the accusation.

The Speaker's ruling was somewhat contradictory. He appeared to accept – or at least recognize – that comments made outside of the House were beyond the Speaker's power. Had an accusation of lying been

made in the House during debate, the Speaker would have immediately demanded that it be withdrawn. If a Member made such an accusation while outside the House – perhaps on an open line radio program – it would be regrettable, but there would be nothing the Speaker could do. However, the fact that the tweet was made after the House had adjourned seemed to be the only factor preventing the Speaker from acting: "had this accusation of lying been sent while the House was sitting so as to escape being sanctioned for unparliamentary language while still making the accusation, I believe it would be a *prima facie* case of privilege."[9]

An incident in the Legislative Assembly of Victoria (Australia) raised a number of interesting questions.[10] After a Member tweeted allegedly disparaging comments about the Speaker of the Assembly, the Speaker demanded that the Member apologize for the comments. The Member asked the Speaker which tweets he was being asked to apologize for, but the Speaker refused to say in order to avoid having them read into the official record. Consequently, the Member refused to apologize and the Speaker threatened to expel him. Several Members intervened, pointing out the problems associated with the Speaker's proposed course of action:

> 1. The potential precedent any action or ruling by the Speaker might create since the comment was made outside the Chamber, i.e. was not part of any proceedings of Parliament;
>
> 2. There aren't any standing orders or Speakers' rulings that would support a Speaker's position or the position of any other Member offended by something said outside the House through the use of new technology. Forcing Members to apologize every time they offended another MP on Twitter would set a dangerous precedent;
>
> 3. There isn't any avenue under standing orders enabling the Speaker to seek an apology. He could ask a Member to withdraw a comment made in the Chamber, but the comment in question was not made in the House;
>
> 4. Since the Speaker was unwilling to clarify what he was seeking an apology for, it would be a rather odd precedent to establish and the ramifications would go well beyond any insult or difficulty the Speaker had with the comment; and finally,
>
> 5. If the offending Member refuses to apologize for something he has not been alerted to since the Speaker won't explain what he wants an apology for, what sanction should be applied?

The matter was referred to the Standing Orders Committee, which concluded in its report that "the relevant issue is conduct when using social media, rather than the technology itself."[11] The existing rules and practices of the Assembly were adequate to cover the use of social media and reflections on the Speaker, therefore the issue was one of promoting awareness and understanding of the rules, both among Members and the media. Its final recommendations were that the House reinforce the existing rules and practices by adopting the following guidelines developed by the Committee:

> Members are reminded:
>
> 1. Any comments made on social media are not covered by parliamentary privilege.
>
> 2. Use of social media to reflect on the Office of Speaker or Deputy Speaker, aside from being disorderly under SO 118, may amount to a contempt.
>
> 3. Not to use social media to release confidential information about committee meetings or in camera hearings.[12]

Social Media and Parliamentary Privilege

Social media presents a special challenge when it comes to parliamentary privilege. It can be used to breach an MP's parliamentary privilege, and, perhaps more importantly, it presents a special challenge to MPs' right to freedom of speech.

Social media used to breach an MP's parliamentary privilege

As of this writing, there has been only one successful finding of a *prima facie* breach of privilege involving social media anywhere in the Commonwealth. On February 27, 2012, the Canadian Minister of Public Safety, the Honourable Vic Toews, raised a matter of privilege alleging interference with his ability to discharge his responsibilities due to 1) a Twitter account which was used to reveal details of the minister's private life; 2) his office being inundated with phone calls, faxes and emails; and 3) threats made against him in videos posted to YouTube by "Anonymous"– all in reaction to the Government's introduction of Bill C-30 (*An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts*, aka the *Protecting Children from Internet Predators Act*).

The Speaker's ruling, delivered on March 6, 2012, dismissed the first two points. It was only in the case of the video threats by "Anonymous" that the Speaker found the Minister's privilege had been breached. Regarding the videos, Speaker Scheer stated:

> I have carefully reviewed the online videos in which the language used does indeed constitute a direct threat to the Minister in particular, as well as all other Members. These threats

> demonstrate a flagrant disregard of our traditions and a subversive attack on the most fundamental privileges of this House.[13]

The matter was referred to the Standing Committee on Procedure and House Affairs for further investigation. The Committee's report, tabled on May 2, 2012, concluded that a breach of privilege had indeed occurred, but given the nature of "Anonymous", there was nothing the House or the Committee could do unless the identity of those involved became known.[14]

Social media can indeed be used to breach a Member's privilege; in that regard, it is no different from any other form of media or method of communication. The only obvious difference is that, given the often anonymous nature of social media, it might prove to be very difficult to identify who is behind the social media account used to threaten or otherwise interfere with the parliamentary duties of an MP. This was certainly the case with the videos uploaded to YouTube by "Anonymous". If it is impossible to identify those responsible for the acts, there is very little the House can do in response, other than condemn the action.

Controversial/defamatory statements made in the House by MPs protected by parliamentary privilege transmitted on social media

Parliamentary privilege and social media can conflict in a very different way. In this case, it isn't the Member's privileges which are breached; rather, Members use their privilege – some might say they abuse it – to make controversial comments in the House, knowing full well they are protected from charges of libel or other possible legal action, and this information is then quickly repeated by individuals on social media who are not protected by parliamentary privilege.

There have been two notable and contrasting examples of this in recent years. In September 2011, Australian Senator Nick Xenophon named a South Australian priest as an alleged sexual abuser.[15] Xenophon gave plenty of advance notice of his plans to out the priest, issuing ultimatums to the Church and giving the media constant updates. He then proceeded with his plan to name the priest under parliamentary privilege, despite repeated entreaties by the alleged victim to refrain from doing so.

Xenophon's speech in the Senate was broadcast live. As soon as the priest was named, the details and photograph of the individual were broadcast and printed online by virtually every news outlet. The laws concerning reporting of statements made under parliamentary privilege by the mainstream media are reasonably clear; they are protected from liability for defamation where they report parliamentary proceedings fairly and accurately, what is known as "qualified privilege." The problem was that there was also an immediate response on social media. Those people tweeting and retweeting the name of the alleged abuser were not protected by qualified privilege, and it would have been quite reasonable for the accused to pursue legal action against them.

The second example occurred in the UK House of Commons. MP John Hemming sought to undermine the growing use of super- and hyper-injunctions in the UK by naming certain individuals who had sought out these highly secretive gagging orders. On March 10, 2011, Hemming used parliamentary privilege to reveal that the former chief executive of the Royal Bank of Scotland, who had become a focal point for anger over the 2008 financial crisis, had obtained a super-injunction banning the media from, among other things, identifying him as a banker.[16] Following Hemming's question in the House, the name of the banker and references to him being a banker soon began to trend on Twitter, as users of social media immediately jumped on the revelation. Each tweet was a violation of the super-injuction.

These two examples highlight the delicate balance that exists between a Member's right to freedom of speech and the necessity of exercising that right responsibly. This issue is not a new one; it has been raised many times, in many jurisdictions, long before the advent of social media. In 1987, Speaker John Allen Fraser told the Canadian House of Commons:

> Such a privilege confers grave responsibilities on those who are protected by it. By that I mean specifically the Hon. Members of this place. The consequences of its abuse can be terrible. Innocent people could be slandered with no redress available to them. Reputations could be destroyed on the basis of false rumour. All Hon. Members are conscious of the care they must exercise in availing themselves of their absolute privilege of freedom of speech. That is why there are long-standing practices and traditions observed in this House to counter the potential for abuse.[17]

The UK House of Commons Procedure Committee of session 1988-89 wrote in its *First Report*:

> However, privilege carries with it responsibilities as well as rights; and those responsibilities have to be exercised within the rules laid down by the House and in conformity with the standards it expects of its members. Irresponsible or reckless use of privilege can cause great harm to outside individuals who enjoy no legal redress and, in some circumstances, could be prejudicial to the national interest. The strongest safeguard against so-called abuses is the self-discipline of individual members.[18]

A decade later, the Joint Select Committee on Parliamentary Privilege noted in its *First Report*:

> The privilege of freedom of speech in Parliament places a corresponding duty on every member to use the freedom responsibly. The duty is all the greater now that the debates of the two Houses may be broadcast live anywhere in the world.[19]

The Committee rightly noted that making parliamentary proceedings much more widely available via television broadcast increased the need for MPs and Lords to exercise their freedom of speech more judiciously. The Committee was specifically concerned with the problem of matters currently before the courts, the application of the *sub judice* convention, and of matters of national security. Of course, in 1998-99, the internet was still in its infancy and social media such as Twitter did not exist. Whatever concerns the Committee may have had regarding how television broadcasts of parliament might magnify any potential abuse of freedom of speech by an MP, the reality is that this pales in comparison to the impact of social media.

While it is very difficult to come up with reliable viewership data for parliamentary broadcasts, what numbers are available indicate that these channels aren't widely watched by the general public. In the United Kingdom, for example, according to the Broadcasting Audience Research Board (BARB), the BBC's Parliament channel has an average weekly viewing per person (hours: minutes) of 0.01.[20] That translates to an average daily reach of about 165,000 people. It is fairly safe to assume as well that the bulk of that viewership tunes in for the weekly half-hour of Prime Minister's Questions. Numbers for CPAC, the Canadian Public Affairs Channel which carries live broadcasts of the House of Commons are more difficult to find. Numeris (formerly BBM Canada), which provides broadcast measurement and consumer behaviour data to broadcasters, advertisers and agencies, does not make the same level of statistical data available online as does BARB. However, in her paper, "Can Question Period be Reformed?" Frances Ryan notes that in 2005:

> the Canadian Parliamentary Affairs Channel's (sic) viewership of Question Period during the Sponsorship Scandal, a time when Question Period was quite boisterous, dropped from 70,000 viewers a minute to 14,000 viewers per minute.[21]

Question Period is the most viewed part of the parliamentary day, and if it garners only 70,000 viewers per minute, then it is quite likely that the viewership for the rest of the parliamentary day is significantly lower. An MP misusing his or her freedom of speech during the course of normal debate (i.e. during a proceeding other than Question Period) in the House might largely go unnoticed if this were limited to television viewership. Even the "traditional" media largely limit their coverage of the House to Question Period. However, today, it takes only one person to pick up on a controversial statement made in the House and rebroadcast it on social media. Within minutes, a tweet can propagate throughout the "Twittersphere", potentially reaching an audience far larger than that of the average parliamentary broadcast channel.

Senator Xenophon was widely denounced by his fellow Senators for misusing his parliamentary privilege. One Senator not only stressed that members of the Senate needed to exercise responsibility when availing themselves of their freedom of speech, but highlighted one other important consideration:

> The rapid advances in technology mean that one statement like Senator Xenophon's is immediately broadcast through the social media. Within seconds of him naming that person last week, it was on Twitter. And, when news travels through Twitter, texting and 24-hour news channels, there is a responsibility for us to be aware of the potential damage a single statement can make.
>
> Senator Xenophon wanted to speed up the church's investigations. Will his action necessarily have this intended consequence? Well, they are underway. But what about the dramatic unintended consequences? Who is taking responsibility for them? There is the damage to the priest's reputation, of course. Compare the lightning speed at which the allegations circulated with the snail's pace at which any possible response from the accused will take place—and the small number of recipients who will instantly be fed his side of the story. Frankly, is that justice?[22]

It is this new reality which prompted an editorial in the UK newspaper *The Guardian* calling for a new examination into parliamentary privilege:

> When parliament last examined the question of privilege, the internet was still in its infancy. Social media were embryonic. And the ink on the *Human Rights Act* was barely dry. The possibility that parliamentary privilege might intersect with the online world and the role of the press in all its complexity was not even imagined. At the very least, a new select committee examination is now required. And so, are some clearer new responsibilities to go with MPs' ancient rights.[23]

There is no question that freedom of speech is the most important parliamentary privilege, and necessary to ensure a full and thorough debate in the House. However, given the realities of social media, the accepted tenet that members must not abuse this privilege is more important now than at any time

in the past. While parliamentarians such as Senator Xenophon or MP John Hemming won't have to worry about any legal action taken against them, members of the public who tweet or retweet potentially defamatory comments might well leave themselves open to possible legal action. Many, perhaps even most, might not understand the concept of parliamentary privilege, and assume that if it's "okay" for an MP to name someone as a pedophile or accuse them of some other grievous wrongdoing, then it's perfectly fine for them to repeat those accusations on Twitter or Facebook.

This is perhaps the biggest challenge social media presents to parliamentary privilege. No one would want to see MPs start self-censoring themselves, but parliaments may want to initiate studies into the issue of freedom of speech in the age of social media.

Conclusion

Social media is, as the Legislative Assembly of Victoria Standing Orders Committee concluded, simply another form of communication. Therefore, it can impact, conflict with and challenge parliamentary conventions and rules in the same way as any other, more traditional form of communication. What sets social media apart, however, is its reach and, in the words of David Cameron, its "instantness."

In the past, if a politician said or did something controversial, that gaffe might have been picked up by the local media, and depending on the perceived seriousness of the incident or comment, it might also have eventually been picked up by national media. This has changed. Today, anyone with a social media account can instantly report something untoward done or said by an elected official, bypassing traditional media sources completely, and word of that incident can spread to every part of the globe which has internet access at a speed previously unknown.

The approaches taken by both the UK House of Commons and the Victoria Legislative Assembly seem to be the most sensible. Parliamentarians need to know that what they say on social media is not protected by parliamentary privilege, and that social media should not be used as a means to circumvent existing standing orders and parliamentary conventions. And perhaps more importantly, elected officials need to remember that when it comes to social media, the entire world is, in some way, watching.

Notes

1 Christian O'Connell. Interview: "David Cameron on Twitter", YouTube video, 1:00, posted by AbsoluteRadio, July 29 2009. Despite his earlier misgivings, David Cameron finally did join Twitter in October 2012.

2 Commonwealth of Australia Consolidated Acts, *Parliamentary Privileges Act, 1987*, s.16(2).

3 Deborah Palumbo and Charles Robert, "Videoconferencing in the Parliamentary Setting," *Canadian Parliamentary Review*, Vol. 22, no. 1, 1999, p. 19.

4 Joseph Maingot, Q.C., *Parliamentary Privilege in Canada*, 2nd ed. (Montreal: McGill-Queen's University, 1997), p. 104.

5 United Kingdom, *House of Commons Debates*, October 13, 2011, column 555.

6 Canada, *House of Commons Debates*, April 1, 2010, p. 1284.

7 Canada, *Ontario Legislative Assembly Debates,* September 5, 2012, p. 3361.

8 Australia, *Legislative Assembly of New South Wales Debates*, April 4, 2012, p. 10689.

9 Canada, *Newfoundland and Labrador House of Assembly Debates*, May 9, 2012.

10 Australia, *Legislative Assembly of Victoria Debates*, 9 November 2011, pp. 5255-5260.

11 Australia, Legislative Assembly of Victoria, Standing Orders Committee, *Report into use of social media in the Legislative Assembly and reflections on the Office of Speaker*, December 2012, p. 3.

12 Ibid., p. 9.

13 Canada, *House of Commons Debates*, March 6, 2012, pp. 5834-5.

14 Canada, House of Commons Standing Committee on Procedure and House Affairs, *Report 21 – Question of Privilege Relating to Threats to the Member from Provencher*, May 2, 2012.

15 Commonwealth of Australia, *Senate Debates*, September 13, 2011, pp. 5989-91.

16 United Kingdom, *House of Commons Debates*, March 10, 2011, col. 1069.

17 Canada, *House of Commons Debates*, May 5, 1987, pp. 5765-6.

18 United Kingdom, House of Commons Select Committee on Procedure, *First Report* (1988-89), p. 290, as quoted in the Joint Select Committee on Parliamentary Privilege, *First Report* (1998-99).

19 United Kingdom Parliament, Joint Select Committee on Parliamentary Privilege, *First Report* (1998-99).

20 Broadcasting Audience Research Board, data for the period of September-November 2012.

21 Frances Ryan, "Can Question Period be Reformed?", *Canadian Parliamentary Review*, vol. 32 no. 3, Autumn 2009, p. 18.

22 Commonwealth of Australia, *Senate Debates*, September 19, 2011, pp. 6458-6459.

23 "Editorial: Parliamentary privilege: Responsible behaviour", *The Guardian*, May 25, 2011.