

CONSTITUTION (PARLIAMENTARY PRIVILEGES) AMENDMENT BILL 2004

Declaration as Urgent

MR P.G. PENDAL (South Perth) [4.20 pm]: I move -

That the Bill be considered an urgent Bill.

I will limit my remarks to no more than two minutes. I have consulted as many parties as possible about using the device under standing orders to have the Bill declared an urgent Bill within private members' business today. My understanding is that we should be able to dispose of the Bill and the second reading debate in under 30 minutes. I am very much aware that in private members' business, no less than government business, there is a lot of competition for parliamentary time at this time of the year. The Attorney General today delivered a brief ministerial statement in which he indicated his preparedness for the Government to support the Bill that I introduced into the Parliament as late as last Wednesday. I remind members that no smoke, tricks or mirrors are involved. The Bill I sponsored last Wednesday is no more nor less than a Bill recommended to the House in May by the Procedure and Privileges Committee. There were no minority reports. What is at stake? As we go towards the end of the parliamentary session, at stake is the fear that our parliamentary privileges and immunities are still attached to the House of Commons and, in turn, subject to the European courts and, in turn, subject to decisions that recently arose in the European courts because of an incident in the Maltese Parliament. If that sounds a little convoluted, I remind members that this effectively means that after 113 years, this Parliament has never detached itself from the British Parliament in its parliamentary privileges and immunities. Therefore, the Bill I propose, relying on the bipartisan committee, seeks to detach us from the House of Commons. In turn, that will mean that our privileges will no longer be affected by the European courts or the Parliaments that make up the European Union.

Finally, I simply support something the Attorney General said today in his brief ministerial statement, which reflected what I said in my second reading speech last week: that is, when we get to the Bill, which I hope will be in a minute or two, there is an imperative that the Bill to repatriate parliamentary privilege to Western Australia after 113 years pass with an absolute majority. There is a fear on the part of the law officers of the State that unless we do that, we could run into problems relating to the Constitution of the House itself. I do no more than urge members to support the motion to declare the Bill an urgent Bill. If there is no further discussion on that aspect, the House will revert to a limited debate in the next half-hour to allow this House to endorse the contents of a Bill recommended by a committee that was chaired by the Speaker, although in substance by the member for Wanneroo, some months ago. That report brought great credit to the Parliament. I hope the Chamber supports not only the motion I have moved for the Bill to be declared urgent, but also the Bill that I hope will pass in the next 30 or so minutes to repatriate parliamentary privilege to Western Australia.

MR J.C. KOBELKE (Nollamara - Leader of the House) [4.25 pm]: The Government supports the motion to have the Constitution (Parliamentary Privileges) Amendment Bill declared an urgent Bill. This is required because the Bill had its second reading in the House only last week, not three weeks ago. Given that the Bill is in keeping with the unanimous report of the Procedure and Privileges Committee, which has been available to the members for some time, and given that the Opposition has allocated its time to this debate as it suits its purposes to deal with the matter this week, the Government is willing to give its full support to the motion that the Bill be declared urgent so that debate can proceed today. The Government also gives an undertaking to assist, so that the measure will proceed expeditiously and not take an undue amount of private members' time.

Question put and passed.

Second Reading

Resumed from 18 August.

MR J.C. KOBELKE (Nollamara - Leader of the House) [4.26 pm]: I speak briefly on why the Government supports the Constitution (Parliamentary Privileges) Amendment Bill 2004 introduced by the member for South Perth. I need speak only briefly because the Attorney General made a short ministerial statement today in response to the Procedure and Privileges Committee report No 5 concerning parliamentary privilege and its linkage to the United Kingdom House of Commons. It is clearly an issue that relates to the privileges of this House and the other place. Our privileges have been tied to those of the House of Commons. With the Australia Acts of 1986, we sought nationally to break that connection between Australian Parliaments and the British Parliament. That was not in any way to move away from the importance of the historical link of our Parliament and other Australian Parliaments to the British Parliament; however, the fact is that Australia in the world in which we now live is a sovereign State, and Western Australia, as a State of the Commonwealth, wishes to be able to track its own path. That in no way reflects negatively on the fine tradition and heritage we have inherited from the British Parliament. We need to move on and clearly establish our place as an independent Parliament;

therefore, it is appropriate that another mechanism should determine the privileges that exist in this place. Although these will build on our heritage, they should be controlled by this Parliament, not the British Parliament or the European Parliament. As the member for South Perth indicated, a number of models could have been adopted. However, given that the Procedure and Privileges Committee put forward a sound model, we are not in a position to debate whether a slight change may provide another model. This is a sound model - the work has been done on it. Therefore, it has the Government's support.

The Bill will establish the privileges for this Parliament as they were at 1 January 1989, which follows the 1986 Australia Acts. It also means that *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament (Parliamentary Practice)*, twenty-first edition, is a useful reference and basis of privilege for this Parliament, given that other things have changed in the British Parliament through various precedents since that time. This will give a clear cut-off point regarding the privileges. Henceforth, it will be a matter for the Parliament to establish whether those privileges should be varied or amended in any way.

I turn now to procedures. The Government saw the need to make this change, but it simply did not have the priority in its busy legislative program that the member for South Perth clearly wanted this measure to have. This place has done very well with its program, and it would have been possible to bring on this Bill in government time. Nevertheless, the chances are that it would not have passed the other place. The member for South Perth has an interest in the matter, and he understands parliamentary procedures. I may take issue with him on occasions and have different views on how procedures might be applied, but I recognise that he has extensive experience in both Chambers and takes cognisance of the standing orders, the procedure and the way in which this House should function. He has a natural interest in making sure something like this is addressed.

Mr P.G. Pendal: There is a real possibility I will address this in private members' business.

Mr J.C. KOBELKE: The Government had a mind to introduce it as a government Bill, but it was not our number one priority. The issue is that it would be unlikely to receive priority over any of the Bills in the other place. If the member for South Perth can get a colleague in the other place to sponsor it in non-government time, there is a very good chance it will be passed because we will give it our support. This has the support of the Government and the party room; it is not support given by only Labor members in the Assembly. For the reasons I have outlined briefly, we did not give it priority because we did not think we would get it through both Houses in the few remaining weeks of this session. I congratulate the member for South Perth for taking the initiative. I hope his powers of persuasion mean non-government members in the other place will see that it is given time there. The Government undertakes to ensure that Labor members work cooperatively to get it through the Parliament. I congratulate the member for bringing it before the Assembly, and we will give it our support in passing it expeditiously through this place.

MRS C.L. EDWARDES (Kingsley) [4.31 pm]: I support the Bill; it is important legislation. I am a member of the Legislative Assembly Procedure and Privileges Committee, which prepared the report that was tabled in this Parliament. Although we all refer to parliamentary privilege from time to time, I am not sure that all members know or even understand it or the reason for this legislation, which relates to the danger of our privileges being automatically altered by Britain without reference to this Parliament. A privilege in the legal sense is an exemption from some duty or burden, attendance or liability to which others are subject. Parliamentary privilege has been an important part of the law of Australia and the Westminster tradition. It is a necessary immunity that the law provides. It is the authority and power of each House of Parliament to enforce that immunity.

Page 69 of Erskine May's twenty-first edition of *Parliamentary Practice*, our main authority on parliamentary procedure, states -

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.

In volume 1, page 46, of "The Procedure of the House of Commons", Redlich says that the particular privileges of the Commons have been referred as the sum of the fundamental rights of the Houses and of its individual members as against the prerogatives of the Crown, the authority of the ordinary courts of law and the special rights of the House of Lords. In *Precedents of Proceedings in the House of Commons*, Hatsell says that there are rights that are absolutely necessary for the due execution of its power.

Parliamentary privilege originated from the struggle by the House of Commons to establish itself against the power of the royal courts. Successive sovereigns attempted to limit the House of Commons' freedom to go about its business. The revolution of 1688 and abdication of James II was a victory for the Parliament in its struggle with the Crown. In 1689, at the time of William and Mary succeeding to the throne, the House of

Commons prepared the Bill of Rights, a watershed in British constitutional history, and it has become part of our history. The Bill of Rights introduced no new principle of law but merely confirmed the existing rights of Parliament and the subjects that had been violated by James II. Among the declaration of privileges in the Bill of Rights is the freedom of speech in the Houses of Parliament and exclusive control over their own proceedings. Article 9 of the Bill of Rights states -

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

That is one of the reasons the Opposition supports this legislation.

Freedom of speech in debate is one of the fundamental principles recognised as essential to the workings of Parliament. This was accepted in a case in New South Wales in 1881 when Justice Sir William Manning stated -

Doubtless there may be members of strong energy, easy credibility and compulsive temperament, who in discussing a question of public interest, may injure an individual by reckless and injudicious statements, but it is of greater importance to the community that its legislators should not speak in fear of actions for defamation; it is most important there should be perfect liberty of speech in Parliament even though it may some times degenerate into licence.

To some extent not much has changed since 1881. The former President of the other place, Hon Clive Griffiths, also prepared a paper for a proceeding in 1989. In his paper he referred to privileges and stressed that it is the rights of Parliament that go under the heading of "privilege". He states -

Members benefit from Parliament's upholding and enforcing its privileges but they are for Parliament to waive or decline to uphold for individual members.

Equally, members, in taking the benefit of privilege, are obliged to exercise care and responsibility. Freedom of speech is not a licence to libel or slander persons unable to defend themselves. Freedom of speech enables members to speak without fear of private retaliation where the public interest demands that they speak out. The right to require answers to questions in the course of an inquiry is not a means of gaining information for personal use or benefit.

He goes on to make one of the critical points for all of us as members of Parliament -

Abuse of privilege is to be despised. Immunity from the legal consequences of what a person says or does will quickly lead to corruption of that person if nothing is done to punish abuse. For Parliament, it means that all members owe a responsibility to those who put us here to ensure the privilege remains as a conduit to better and more informed government and does not become an uncontrollable weapon placed in the hands of the immature. Parliament's shield deserves better.

The status of parliamentary privilege in Western Australia comes under section 36 of the Constitution Act 1889, which provides for the right to claim the same powers, privileges and immunities held for the time being by the House of Commons. Section 1 of the Parliamentary Privileges Act claims for both Houses of Parliament the same privileges, immunities and powers that for the time being are held by the House of Commons. Accordingly, it is argued that in the event of changes to the privileges held by the House of Commons, there would be a corresponding effect on the privileges held by the Western Australian Parliament. That is the basis of the Procedure and Privileges Committee's report No 5 of 2004. The legislation will ensure that we can change the law in Western Australia if the need arises but not be automatically subject to the legislation and legal system of the United Kingdom. We are taking back our own sovereignty for parliamentary privilege and, as such, the Opposition totally supports this legislation.

MRS D.J. GUISE (Wanneroo - Deputy Speaker) [4.38 pm]: On 13 May this year I presented to the House the Procedure and Privileges Committee report on parliamentary privilege and its linkage to the House of Commons. At that time, I stressed to members of the Legislative Assembly that the report addressed an issue that affects the most fundamental right of not only the members in this place today but also future Western Australian parliamentarians; namely, the issue of parliamentary privilege. The basis for parliamentary privilege in Britain and Australia is article 9 of the Bill of Rights 1689 UK. It is worth repeating -

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

Other members have alluded to the fact that parliamentary privilege for the Western Australian Parliament is derived from that of the United Kingdom's House of Commons and enacted in section 36 of the Western Australian Constitution Act 1889, which states -

It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by

the members thereof respectively. Provided that no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof.

The preamble and section 1 of the Western Australian Parliamentary Privileges Act 1891 repeat the limitation of the proviso in the Constitution that refers to those privileges for the time being that are held, enjoyed and exercised by the Commons House of Parliament, or the members thereof. The Standing Committee on Procedure and Privileges report advises that under the current law - the member for Kingsley and others alluded to this - if the House of Commons chooses to diminish or change its privilege in any way, that will affect the Parliament of Western Australia and our Acts and privileges will be diminished or changed at exactly the same time.

In his second reading speech the member for South Perth referred to advice received about the judicial committee of the Privy Council's decision in the New Zealand case of *Jennings v Buchanan* in which the judgment notes state that there is no distinction to be drawn between the law of New Zealand and the law of the United Kingdom. That means that that law will automatically become the law that applies here. I again put to members that for the Western Australian Parliament the issue of linkage of its privileges to those of the House of Commons is as much about sovereignty as it is about parliamentary privilege. I agree with the sentiments expressed by the member for South Perth that in this day and age it is no longer appropriate for this arrangement to continue. In fact, it is time we cut our apron strings and ensured that the legislative control of parliamentary privilege is placed in our own hands; that is, in the hands of the Western Australian Parliament.

The twenty-first edition of Erskine May's *Parliamentary Practice* will be used as a primary privilege reference, subject, of course, to legislative changes made from time to time by the statute of the Houses of the Western Australian Parliament. I urge members to support the legislation in the interests of freedom of speech and in the spirit of section 1 of the United Kingdom's Australia Act 1986, which states -

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

In closing, I commend my fellow committee members and colleagues on the Standing Committee on Procedure and Privileges, who were the authors of this report. I thank also the Clerk and Deputy Clerk for the excellent support they gave the committee. I especially commend and acknowledge the sponsorship of this legislation by the member for South Perth.

MS K. HODSON-THOMAS (Carine) [4.42 pm]: I also rise and support the private member's Bill that the member for South Perth introduced and sponsored. I also take the opportunity to commend the member for his foresight and for introducing this timely legislation into this Chamber. While I am on my feet, I take this opportunity to place on record my high regard for the member for South Perth's principles, integrity, intellect and encouragement. I say that not just because I got the name of his electorate wrong in an outburst earlier - I wrote that down - but because I admire the member's intellect, his encouragement of new members and for his encouragement of me.

This is a timely piece of legislation and I support it. For the past three and a half years I have been a member of the Standing Committee on Procedure and Privileges, which tabled a report into this matter in May. I place on record that although I do not want to reiterate comments that have already been made, it is important for me to state that the committee proposed that section 36 of the Western Australian Constitution Act 1889 and the preamble to section 1 of the Western Australian Parliamentary Privileges Act 1891 be amended to peg the Western Australian Parliament's privileges to those applied in the United Kingdom's House of Commons as at 1 January 1989. The legislation introduced by the member for South Perth would have that effect.

I encourage all members to read the member for South Perth's second reading speech. It explains what the legislation outlines, which members need to well and truly understand. The member's second reading speech states in part -

In my experience parliamentary privilege is frequently misunderstood. It is not, and must never be, a licence for a member to do or say as he or she pleases without restraint or respect for others.

I agree with those sentiments. The member's speech continues -

However, properly appreciated and used, privilege is that most important of tools by which members may state what they genuinely believe to be the truth of a matter. In turn, that privilege is extended to the media so long as its reports are a fair portrayal of what was said. Of course, as with any privilege, misuse or abuse can occur. Our response to abuse of parliamentary privilege should not be to abolish or limit it, but to deal effectively with any member who uses it in a capricious or irresponsible manner.

I support the legislation. I am certain it will be speedily dealt with in the Legislative Council. I am absolutely certain that the member for South Perth will be able to negotiate that with Legislative Council members - at least I hope so.

MR P.G. PENDAL (South Perth) [4.46 pm]: I am very pleased with the response to this Bill, which is not surprising given that it originates from a committee with which the member for Carine had a very close involvement. Before we vote for this Bill, I emphasise that parliamentary privilege is often sharply misunderstood by not only the media but also the community. Parliamentary privilege does not institutionalise what some people call the language of the coward's castle; it ensures that the privilege and immunity that a member of Parliament has is protected. By that protection, it is extended to the media in its fair reporting of those remarks and the parliamentary debates. By extension, that means also that the good laws of a society depend enormously on the capacity of members to speak their minds. If members feel that they are constrained because they have no protection, the law making and the public administration capacity of a State or a nation will be impeded. That is what is at stake today. It is stated far more eloquently than that in the report. The members of the Standing Committee on Procedure and Privileges and the officers who took part in that inquiry are to be commended. The passage of this Bill will mean that for the first time in 113 years members will repatriate to Western Australia the right of this Parliament to determine what are the privileges and immunities that we enjoy and, by extension, what are the protections given to the media in particular when reporting what occurs in the House. I hope that when members vote on the Bill in a moment it is passed with a constitutional majority, which the law officers of the State have suggested ought to be done and the Clerks of this House have suggested would be prudent to do to put the law beyond any chance of being challenged in the courts. For those reasons I commend the Bill to the House.

Question put and passed with an absolute majority.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

MR P.G. PENDAL (South Perth) [4.50 pm]: I move -

That the Bill be now read a third time.

Question put and passed with an absolute majority.

Bill read a third time and transmitted to the Council.