

**PROCEDURE AND PRIVILEGES COMMITTEE**

*Motion*

Resumed from 29 May on the following motion by Hon Kim Chance (Leader of the House) -

That -

- (1) The matters described in paragraphs (a) and (b) are referred to the Procedure and Privileges Committee, and on report to the House after inquiry, the Committee is to advise the House whether, in its opinion -
  - (a) any rule, custom or usage of the House contravenes, or appears not to be in conformity with, a written law or rule of law where the relevant provision is mandatory rather than directory;
  - (b) any rule in force, or any custom or usage observed, as part of the practice or proceedings of the House ought to be amended or repealed, or its observance discontinued because -
    - (i) its provisions are spent or superseded;
    - (ii) application according to its tenor would be in conflict, whether generally or in particular circumstances, with the accepted practice of the House.
- (2) The House desires and intends that its rules, customs and usages should always conform with any relevant and applicable law, and any finding or recommendation on a matter considered under paragraph 1(a) is to be expressed accordingly without regard to the justiciability of questions associated with the validity or application of the rule, custom, or usage to which a finding or recommendation relates.
- (3) A law that is in force in the State by reason of covering clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp) is a written law or rule of law, as the case requires, for the purposes of paragraph 1(a).
- (4) In this order, “rule” includes a resolution of the House and rulings made by the President or other presiding officer.

**HON GEORGE CASH** (North Metropolitan) [9.01 pm]: The motion in its present form is a standing reference that would enable the Procedure and Privileges Committee to initiate of its own motion and inquire into various aspects of the House’s customs, practice and usage, having regard to the standing orders and the statute law. That ability will obviously be used over a period of time. It is not anticipated that the PPC will in fact update its standing orders overnight. However, the opportunity will exist for that committee to initiate of its own motion the various aspects that I have mentioned.

The form of the motion is almost self-explanatory. I assume that is the reason the Leader of the House did not speak at greater length to this motion. The motion in paragraph (4) refers to the word “rule”. It states -

In this order, “rule” includes a resolution of the House and rulings made by the President or other presiding officer.

That is important, because if we are to have an understanding of exactly just what is entailed in the various areas covered by the motion, it is important to recognise that this House operates under the law of Parliament. It is convenient to refer to Erskine May’s *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, wherein it states at page 3 -

The ‘law of Parliament’ includes those aspects of Parliamentary activity that depend for their effectiveness on recognition by the courts, and such law - although it maybe unwritten - is changed only by way of statute. But most Parliamentary procedure and usage derives from the admitted right of each House to regulate its own proceedings, a right which led a former Clerk of the Commons to observe, ‘What does it signify about precedents? The House can do what it likes. Who can stop it?’

It is also worthwhile to look at the comments Erskine May makes on practice. I will quote from the same treatise in which, under the heading of “Practice” it reads -

Practice is that part of procedure which developed spontaneously in the course of the transaction of business in each House. The authority for many of the old-established forms and rules of practice is unrecorded. Some of them were no doubt invented in Parliament itself, but others have been traced to analogies in the medieval courts of law and in the councils of the Church. This older practice is sometimes distinguished as ‘ancient usage’, and needs no other authority than proof of its de facto

existence. It may be defined as the usual and regular method of proceeding not (so far as is known) instituted by express authority, but which is recorded as being already in operation in the volumes of the early Journals.

It is important to recognise that that forms parliamentary law. Obviously the standing orders themselves must be read in conjunction with the custom and usages of the House. I guess it can be said, Mr President, that the standing orders are the rules of procedure that are designed to regulate debate and other activities in the House to enable the efficient dispatch of business in an ordered manner - you will note that I did not say "in an orderly manner". There is a particular standing order in this House which deals with maintaining order. Other parts of the equation make up the parliamentary law. Another part is orders and resolutions. They can be used to give special precedence to specific matters of procedure, and are sometimes in the form of sessional orders that are usually limited to a specific period. From time to time in this House sessional orders have been used to trial changes to the standing orders. I have noted over a period of time in both this House and the other House that members are sometimes reluctant to agree to changes to standing orders without some trial period. Sessional orders are obviously one way of providing that trial. It is amazing that after a period in which sessional orders are used, members then demand that the sessional orders be converted to standing orders.

There are also rulings from the Chair. These are usually specific rulings given by the Chair in answers to points of order. Obviously these rulings become precedents within the House, and presiding officers are required to have regard to earlier precedents.

Of course there is the statute law. Some statutes in Western Australia can require the Parliament to adopt a particular form of procedure. I refer in particular to the Constitution Act, the Constitution Acts Amendment Act and the Parliamentary Privileges Act. In part they can determine or direct the form in which we conduct ourselves in this House. Clause 3 of this motion reads -

A law that is in force in the State by reason of covering clause 5 of the *Commonwealth of Australia Constitution Act 1900 (Imp)* is a written law or rule of law, as the case requires, for the purposes of paragraph 1(a).

It is important that the particular laws in force as a result of that imperial Act be considered by the PPC. As a matter of interest, section 5 of that particular Act states -

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

It is interesting that we must go back to that Act to ensure that we include any laws that are affected by that covering section. Some members will recognise that section 109 of the Constitution in fact deals with the conflict between the valid laws of the Commonwealth and the laws of the State. Obviously the valid law of the Commonwealth will prevail, but it is necessary also to recognise that covering section 5 of the commonwealth Constitution also prevails over state laws, and it is important that it be included.

For a long period this House has talked about amending the current form of its standing orders. I must say that in recent years while I was the President and Hon John Cowdell was Chairman of Committees, discussions were held on the need for those changes. About 18 months ago the Clerk of the Legislative Council, Laurie Marquet, produced a draft of new standing orders to update the current standing orders by framing them in plain English and taking out the conflict that currently exists in a number of the standing orders. That draft was never formally put to the then Standing Orders Committee because some discussion was required on the form in which that draft existed. However, I recognise the huge amount of work the Clerk of the Council has done in preparing the way for updating our standing orders.

This motion is in the form of a standing reference to the Procedure and Privileges Committee. It will enable the PPC - not at its leisure, but at its convenience - to have regard for any rule, custom or usage of the House, and to have regard for the existing standing orders, for the existing statute law, for those matters that are covered by covering section 5 of the Commonwealth of Australian Constitution Act 1900, for other statute law that impacts on the House and generally other matters. We can then update our standing orders, so that, firstly, they are understood by all and, secondly, any conflict that may exist is removed. The Opposition supports this motion.

**HON PETER FOSS** (East Metropolitan) [9.11 pm]: I am grateful for the excellent exposition given by Hon George Cash. It brings to my mind an important matter that came out in the course of his speech, but which is not included in this motion; that is, the distressing disparity between this House and the other place as to the interpretation of our constitutional rights and powers. It always seems that we are too busy and we are always under too much pressure to resolve this. I have had discussions from time to time on the manner in which we

can resolve this. A former Speaker in the other place indicated that the reason for his ruling was the custom and practice of that House. Having observed the custom and practice of that House, I find that ruling somewhat dubious as the custom and practice might have been all of two years old. The fact is that he did so rule that it was the custom and practice of that House, so it was the custom and practice of that House.

Hon Kim Chance: Even if he did not say it three times.

Hon PETER FOSS: One of the most pleasing aspects I found is that members opposite - previously the Opposition, now the Government - always listened to my speeches carefully.

Hon Ljiljanna Ravlich: I did not; I used to fall asleep. The minute you got to your feet, I fell asleep.

The PRESIDENT: Order! I hear a discordant note in the Chamber this evening.

Hon PETER FOSS: Hon Ljiljanna Ravlich could not hear me because she had her mouth open. I hope that the Leader of the House heard me correct his reference to *The Hunting of the Snark* by Lewis Carroll and not Salinger's *The Catcher in the Rye*.

Hon Kim Chance: I am sure that you said *The Catcher in the Rye*.

Hon PETER FOSS: It could be that that was reported by Hansard, and I did not check it. I am sure I mentioned *The Hunting of the Snark*.

The point is that the Speaker at that stage did indicate a method by which that could be resolved. He indicated that it was possible to table in the other place the opinion of the Solicitor General or perhaps a memorandum of agreement between the two Houses - or any document which set out the ruling - and for the House to adopt it as the practice of the House in the future. It does not involve in any way a disagreement with the Speaker's ruling; it is clearly a motion by the House to adopt a particular practice. The Speaker indicated that if that practice were followed, he would obviously regard that as the will of the House and would follow that as the practice of the House. Probably one of the reasons that has not happened, which has been more a frustration to members of this House than to members of the other House - although from time to time it may cause them some problems - is that they never quite feel the frustration in their own bones when it is a vicarious situation compared with the reality. Our Constitution clearly sets out the responsibilities of the respective Houses; it is not unique, it is a formulation that has been used throughout the Commonwealth and it is referred to in the constitutional authorities. However, all members in this House have been irritated and annoyed by the fact that the other House has applied these well-known terms and phrases when it has no authority whatever to rely upon. The biggest difficulty for members in this House is that we cannot even predict how it will be applied. At least if it were in accordance with the constitutional practice in every other Parliament that has exactly the same provisions, we would be able to look at the practice in those Parliaments, read the authorities and know exactly what can and cannot be done. We have wasted so much time when we have tried to not only apply the proper law as contained in our Constitution, but also predict from a series of random rulings in the other House how it applies. We always seem to get it wrong. It seems to be the Chancellor's foot, the length of which is concealed. We are not able to measure anything from the rulings from the other place to determine what we can do in this House. We could jack up and refuse to go along with its rulings, and we could start knocking back some of its measures. However, the Leader of the House sometimes finds it difficult to explain to his cabinet colleagues why this recalcitrant upper House has rejected their legislation.

Hon Kim Chance: I have given up trying.

Hon PETER FOSS: I know. The answer is that all members in this House can assist the Leader of the House by adopting this outrageous attitude and telling the other place that it should play by the rules.

Hon Ljiljanna Ravlich: Why did you not do it when you were in government?

Hon PETER FOSS: That is exactly the point. I am saying that I understand the position of the Leader of the House. I would have liked nothing more than an upper House majority, with a view to ensuring that the proper status of this House and its proper recognition of the constitutional system had been insisted upon. It would have been a great delight to me. We could have told those people the reason for it and that they should do something to stop it happening in the future. I urged on many occasions that something be done. I am making this offer to the Leader of the House because it is a serious matter. He does not need to answer on the floor of the House; I would be happy to be told behind the Chair what his attitude is. The Constitution of this State is clear. It is distressing that the Constitution is being subverted by some rulings by one person in another place. It seems strange that the Constitution can be so easily amended by one person in one House - a person who is not even in the House - making rulings that affect this place. I know this can be done in a number of ways. This may not be capable of instant solution, but it will be remiss of this committee if, while it is taking up all the other points that were so clearly pointed out by Hon George Cash, it does not at the same time start on this lengthy process. It

may not be completed until I have long left this House, but unless the process is started it will never finish. I hope that it can be done considerably faster than that. Maybe a year or even two years will be sufficient to allow it to happen. Perhaps the Leader of the House, as he settles into his position, will realise the convenience of the Constitution operating in the way that it was said it would operate, and he will sympathise and agree with my proposal. Unfortunately, I had not finished writing out my amendments. I will move amendments and I will give you, Mr President, the amendments I have written out.

*Amendments to Motion*

Hon PETER FOSS: I move -

Paragraph (1) - To insert a new subparagraph (c) as follows -

- (c) any rule of the Legislative Assembly has had the effect of limiting the constitutional powers and rights of this House.

I think that will be all right, because “rule” includes a resolution of the House and rulings made by the President or other presiding officer. I do not know whether that is broad enough to pick up the presiding officer of the other place. Maybe it is not. I indicate that another word is required.

I also want to add a new paragraph (3). I move -

Insert the following new paragraph (3) as follows -

- (3) The House wishes to be advised as to a course of action that may be followed in order to resolve any limitation that has been imposed on the constitutional powers and rights of the House.

That will give the committee the room to start telling us what to do about this. I have to make a further amendment. I move -

Paragraph (4) - To delete “the” before “House” and insert “either”.

Paragraph (4) - To insert after the word “President” the word “, Speaker”.

They are the major issues with which I wish to deal. This is a fairly easy sort of motion. It does not put on strict time limits or belt the committee over the head and give it a hard time. It just gives it a fairly broad-ranging brief to go through virtually all the matters that have been slightly troublesome, in a legalistic way, over a period of years. I imagine that would include President’s rulings on such things as the ordinary annual services of government and so forth. It becomes rather futile for us to discuss issues such as the ordinary annual services of government if we do not have a degree of unanimity with the other place, because we might apply one set of rules and it might apply another set of rules. That has been plaguing us all along. Therefore, for the sake of completeness and for this to be a worthwhile exercise, as opposed to a somewhat pointless exercise, there is no point our working out what we think the law should be and what we think we are entitled to do if all we end up with is a greater definition of the difference between the Legislative Council and the Legislative Assembly. We would have achieved nothing, other than perhaps some clarity. We would not have achieved anything in practical terms - we would not have got anything done.

**HON KIM CHANCE** (Agricultural - Leader of the House) [9.25 pm]: I believe that I have now written down the amendments with sufficient accuracy to follow what Hon Peter Foss is doing.

These amendments raise an important issue. In thinking on my feet somewhat and trying to explain the implications of these amendments to the motion in the order of the day, I think I can advise the House that I am happy to support the amendments, even though it would have been preferable if we had had a little more notice of them. However, it seems to me that the application of the principles involved in the amendments is consistent with the thrust of the motion. Members need to be aware that the effect of all the components of the motion, including the amendments, is to provide a scope - a set of terms of reference, if one likes - on which the Procedure and Privileges Committee is able to advise the House. In that light, the issues that Hon Peter Foss raised are of considerable value to the House. Indeed, the examples he has given have been a source of frustration to all of us from time to time. Therefore, with some trepidation, I indicate that the Government will support the amendments.

**HON GEORGE CASH** (North Metropolitan) [9.27 pm]: I support the amendments proposed by Hon Peter Foss. By way of background for the House, I indicate that over a period of years there has been some disputation between the Legislative Council and the Legislative Assembly, particularly in respect of each House’s understanding of section 46 of the Constitution Acts Amendment Act. While we are dealing with this amendment, it is certainly not the time to set out the position of the Legislative Council. However, the amendments proposed will provide an opportunity for both Houses to sit down and work out their respective

positions, but, more than that, as was once proposed some years ago, they will provide an opportunity, where necessary, for a compact to be established between the Houses so that the understanding of the position of each House is clear. As I understand it, that will be able to be achieved if members support these amendments. Of course, Hon Peter Foss may have other matters in his mind. However, as the motion, and the motion as amended, will be very much a standing reference to the Procedure and Privileges Committee, the challenge will be for the PPC to take up the various issues raised in the motion.

**HON DERRICK TOMLINSON** (East Metropolitan) [9.31 pm]: I find myself in the position that Hon Peter Foss referred to in another matter earlier this week. It is difficult for me to consider an amendment when I do not have a copy of it in front of me. I took a longhand note and I believe I noted it accurately. However, I have some unease about legislating on the run in this manner. The primary motion on this matter deals with a process for the House to deliberate and receive guidance on the rules, laws, processes, procedures and customs of the House. I am comfortable with that. Hon Peter Foss appears now to have proposed a process for dealing with conflicts between an interpretation of the rules of this place and the rules of another place. A body deliberating on the rules of this place and giving guidance to the House on conflicts between the interpretation of the rules of this place has a different function from a body deliberating on and giving guidance to the other place. The latter body has the function of a resolution of disputes.

Hon Peter Foss: No.

Hon DERRICK TOMLINSON: That is what I need to understand. Perhaps Hon Peter Foss will explain it. I make the point that I am uncomfortable about making rules on the run.

Hon Peter Foss: I cannot speak.

Hon DERRICK TOMLINSON: In that case, we must consider another way of proceeding with this matter because until it is resolved I am not prepared to support it. There has never been a satisfactory procedure in this Parliament for resolving disputes between the two Houses.

Hon Peter Foss: That is not being suggested.

Hon DERRICK TOMLINSON: I know that. Hon Peter Foss should listen to me. Hon Peter Foss insists that he cannot explain it because he is unable to speak.

Hon Peter Foss: So, I am trying to interject.

Hon DERRICK TOMLINSON: He is therefore trying to explain by interjection. I suggest to Hon Peter Foss that we adjourn this debate, have a discussion and, if necessary, come back and either amend the amendments to the motion, proceed with another form or proceed with the amendments as they are. My concern is that, by amending the motion in the way suggested by Hon Peter Foss, we may be confusing two different processes and two different requirements for the interpretation of the rules. It may be more appropriate to adopt the procedure that Hon Peter Foss is now tacking on - I use those words advisedly - to the original motion, which may be better dealt with as a separate but equally important part of the standing orders.

Amendments put and passed.

Question (motion, as amended) put and passed.