



# DIRECTOR OF PUBLIC PROSECUTIONS

for WESTERN AUSTRALIA

Level 1, 26 St Georges Terrace, PERTH WA 6000

## Office of the Director

Your Ref: A283995  
Our Ref: SELECT COMMITTEE REFERRAL 2007:BF:yab  
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Hon Barry House MLC  
President of the Legislative Council  
Parliament of Western Australia  
Parliament House, Harvest Terrace  
PERTH WA 6000



Dear Mr House MLC

### **REFERRAL FROM THE LEGISLATIVE COUNCIL FOR ASSESSMENT OF POTENTIAL PROSECUTION UNDER S.57 OF THE *CRIMINAL CODE***

I refer to your letters to the Director of Public Prosecutions ("DPP"), Mr Joseph McGrath, dated 9 November 2010 and 16 February 2011 regarding the abovementioned matter. Due to the possibility of a perceived conflict of interest resulting from advice provided by Mr McGrath during his time at the Bar to a family member of an individual identified in the Select Committee's inquiry, he has asked me to deal with this matter on his behalf.

I apologise for the considerable delay in responding. I first became aware of this matter when I was the Acting DPP immediately after the former DPP, Mr Robert Cock QC, ceased in the role. Mr Cock brought the matter to my attention prior to his departure in July 2009. However, it was my understanding that Mr Cock had made clear to the Clerk of the Legislative Council, Mr Malcolm Peacock, his determination that, for reasons I will outline below, he would not be proceeding with prosecutions against the persons in respect of whom the Select Committee made recommendations that consideration be given to charges under section 57 of the *Criminal Code* ("Code"). Indeed, until your last correspondence was brought to Mr Cock's attention, he also believed that he had made his position known to Mr Peacock. Given my understanding, I did not follow the matter up further until we received your letter of 9 November 2010 indicating that a formal response was required. At that stage I did not make further inquiry of Mr Cock, but commenced a review of the matter. The review has taken some time because of the volume of material and complexity of the issues. The materials available to me initially were missing the Submission made by Mr Cock to the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament ("the Powers Select Committee") on 30 April 2009 and that Committee's Report 1 dated 7

May 2009. I became aware of those documents after an inquiry was made with Mr Cock after your letter of 16 February 2011. Those documents and information subsequently provided by Mr Cock in respect of his discussions with Mr Peacock confirmed that it had been his understanding that the Legislative Council was made aware that the DPP would not proceed with any prosecution. Nevertheless, I have examined the issues independently and provide my analysis and conclusions after elaborating on the history of the referral.

### THE REFERRAL TO THE DPP

As you are aware, the Clerk of the Legislative Council referred the matter to the DPP on 6 December 2007. The Legislative Council asked Mr Cock to give consideration to prosecuting Mr Nathan McMahon, the then Hon Shelley Archer MLC, the then Hon Anthony Fels MLC, Mr Brian Burke and Mr Noel Crichton-Browne for a suspected breach in each case of section 57 of the Code, *False evidence before Parliament*, which provides:

- 57. Any person who in the course of an examination before either House of Parliament, or before a committee of either House, or before a joint committee of both Houses, knowingly gives a false answer to any lawful and relevant question put to him in the course of the examination, is guilty of a crime, and is liable to imprisonment for 7 years.*

The referral was in accordance with recommendations 2, 5, 8, 12 and 15 made in the Report of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations (November 2007) after the Select Committee found that each of the individuals in question had knowingly given false evidence to a Parliamentary inquiry regarding royalties in the iron ore industry. The Report also found Mr Fels and Ms Archer had leaked confidential information to Mr Burke and Mr Crichton-Browne who were in communication with the members as lobbyists.

Mr Cock considered the matter and met with Mr Peacock (together with Mr Paul Grant, the Clerk Assistant (Committees) for the Legislative Council and the Hon Adele Farina MLC from the Select Committee) at Parliament in early 2008.

I note that Mr Peacock wrote on three occasions in 2008 to ascertain the progress of the referral.

### THE DETERMINATION AND ADVICE TO THE SELECT COMMITTEE

I understand that Mr Cock initially considered that a prosecution on indictment may be appropriate, as, subject to some evidentiary difficulties, there appeared to be a prima facie case of a breach of section 57 against each identified individual. However, on further analysis there were two issues that delayed a decision whether to commence a prosecution in each case.

First, there was potentially an argument that the covert recordings made by the Corruption and Crime Commission ("CCC") of relevant conversations

essential to prove that the individuals had lied to the Select Committee were inadmissible, having regard to the provisions of the *Telecommunications (Interception and Access) Act 1979* ("TIA Act"). A submission was made on behalf of Mr Burke that the recordings had been provided unlawfully by the CCC to the first Select Committee. More broadly, an argument had been raised (but ultimately not pursued) in the context of prosecutions instituted by the CCC against persons alleged to have knowingly given false evidence during hearings conducted by that body that such recordings were inadmissible under the TIA Act in prosecutions for offences of giving false testimony. It is not necessary to explore the legal arguments here, but I have previously considered this issue and there is no substance in the argument. The exceptions in the TIA Act to the prohibition on the use of telephone intercept material would apply in the type of proceedings contemplated here. Nevertheless, it was thought for a period when Mr Cock was considering this matter that the issue would be agitated in the course of a CCC prosecution and he believed that any opinion on the merits of prosecutions under section 57 in this case should await judicial resolution of the issue. As I say, that did not eventuate, but other considerations overtook the admissibility issue, as I will explain.

I do note, however, that the question that was raised on behalf of Mr Burke about the lawfulness of the disclosure of the intercept material to the Select Committee was, with respect, misconceived, in particular to the extent that it might have been suggested that it affected the appropriateness of a prosecution under section 57. The determination of the issue in any proceedings under section 57 of whether Mr Burke or any of the others knowingly gave false evidence to the Select Committee did not depend on the lawfulness or appropriateness of the provision of the intercept material to the Select Committee. The material was used to test the evidence of the individuals in question during the Select Committee hearings, but that would not be to the point in a section 57 prosecution. In such a prosecution the evidence would be admissible to prove the falsity of the evidence given by the individual in each case to the Select Committee.

The second issue that delayed consideration of this matter was the interaction of a section 57 offence with Parliamentary Privilege and Parliament's penal powers in respect of breaches of its privileges and contempt of Parliament. This was a matter investigated and reported on by the Powers Select Committee, which invited Mr Cock, as the DPP, to make a submission. The analysis conducted for the purposes of the Submission led Mr Cock to the conclusion that prosecutions were not in the public interest in this case. The reasons were essentially contained in the Submission dated 30 April 2009 (a copy of which is **attached** to this letter for ease of reference). Apart from the general proposition that the penal provisions in the Code dealing with contempts and obstruction of Parliament and the giving of false evidence in Parliamentary hearings sat uncomfortably with the penal powers of Parliament and should be abolished, issues that specifically affected the appropriateness of a prosecution in this case included the potential tension between the prosecution under the Code of a member of Parliament and Parliamentary Privilege, and the principles of double jeopardy. The latter arose because steps had already been taken against the individuals (such as the requirement that they apologise in Parliament) that could properly be regarded as forms of

punishment. Further, there was the potential for bringing the processes of Parliament into question if the trier of fact in a Court proceeding under section 57 were to come to a different conclusion from that of Parliament in relation to whether the individuals had knowingly given false evidence, a matter that the Select Committee had effectively pre-determined.

In the course of analysing the issues generally, Mr Cock effectively set out his concerns with instituting a prosecution.

The recommendations of the Powers Select Committee, which reported on 7 May 2009 (Report 1, also **attached** for ease of reference) adopted similar views as those that had been expressed in Mr Cock's Submission. It was assumed by Mr Cock that if Parliament accepted the recommendations it was effectively acknowledging the inappropriateness of proceeding with prosecutions under section 57 in the present case. Mr Cock expressed public support at the time for the Powers Select Committee's recommendations.

Shortly after, both Mr Fels and Ms Archer failed to be endorsed by their respective parties and ceased to be members of Parliament.

In any event, I understand that apart from his meeting with Mr Peacock, Mr Cock left some messages for him about the progress of his consideration of the December 2007 referral. Having received no further follow up from the Legislative Council after the Submission to the Powers Select Committee was made, and given the Committee's recommendation to repeal section 57 and the public support which Mr Cock expressed for it at the time, it was assumed that the Legislative Council well understood that no prosecutions would be instituted against the individuals alleged to have knowingly given false evidence. However, it is accepted that no letter was ever provided expressly to that effect, and we acknowledge that a formal response should have been provided to conclude the matter.

#### FURTHER ANALYSIS

I respectfully agree with the analysis of the law and the issues set out in Mr Cock's Submission to the Powers Select Committee, with two reservations. The general proposition contained in Mr Cock's last dot point on page 6 of his Submission, referring to "the low level of criminality involved in the offences" (which was a reference to sections 51 to 61 of the Code) would perhaps be appropriate in most instances in relation to the offences under sections 55 (interference with the legislature), 56 (disturbing Parliament) and 59 (witnesses refusing to attend to give evidence), but in my opinion would not reflect the potential seriousness of offences committed against sections 57 (false evidence before Parliament), 58 (threatening witness before Parliament), 60 (Member of Parliament receiving bribes) and 61 (bribery of member of Parliament). I note that, while recommending the repeal of sections 55 to 59, the Powers Select Committee recommended the retention of sections 60 and 61. With respect, the reasons set out in paragraph 6.12 of its report provide sound support for the latter recommendation. I would note, however, despite the recommendation to repeal section 57, that the giving of false evidence before Parliament ought not to be regarded, as a matter of course, as involving a low level of criminality. Much would depend on the

circumstances, of course, as in any case of perjury or like offences. The "Summary of Issues and Evidence for the Director of Public Prosecutions" (a copy of which is also **attached** for ease of reference) that was forwarded either with or soon after Mr Peacock's letter of 6 December 2007, refers to a comment made by the then President of the Legislative Council, the Hon Clive Griffiths MLC, in October 1991 in response to a Judge's sentencing remark in respect of what appears to have been the only case prosecuted under section 57. Responding to the proposition apparently stated by the sentencing Judge that the charges were not as serious as perjury, Mr Griffiths made the point that Parliament relies, as much as the Courts, on the accuracy and probity of information it receives in reaching a decision.

However, the circumstances of the present case must be considered in the context that the CCC had evidence by way of telecommunication intercept material and other covert recordings from which the true facts could be gleaned. It would appear there was realistically no risk that the Select Committee could be deceived about the true facts by the false evidence given by the individuals in question, if it be accepted the evidence was false. Further, the gravity of the issue to which the evidence related, namely the leaking of a Standing Committee's consideration of a matter, while important to the need to preserve the confidentiality and integrity of Committee meetings and determinations, was arguably not at the most serious end of the spectrum. These would be matters that would be relevant to the question of whether a prosecution would be in the public interest, particularly when weighed with the other considerations set out in Mr Cock's Submission and the Powers Select Committee's Report 1.

In light of the course which this matter took, as set out above, it would serve no useful purpose, in my respectful opinion, to provide a detailed analysis of the strength of the case against each of the individuals identified by the Select Committee as having knowingly given false evidence. I think it is sufficient to say that in each instance the case would have depended on the interpretation to be given to the statements made by the witnesses in their testimony, but also to the meaning to be attributed to what each had said in conversations or emails of which there was independent evidence. As you would no doubt be aware, the prosecution of similar offences in relation to evidence given at CCC hearings has proven difficult, in terms of securing convictions. While there have been some convictions, the acquittals have tended to follow where some ambiguity either existed in the first place or was created by the evidence subsequently given by the accused during the prosecution.

Here, in the case referred to the DPP against Mr McMahon, the prospects of conviction would have depended on whether the stipulation of a success fee could be said to amount to an engagement of the lobbyists (or "actual engagement", given the language adopted by Mr McMahon at one stage), and, importantly, whether the only reasonable conclusion is that Mr McMahon regarded it in that way. It is only on that basis that it could be found that he knowingly gave false evidence. It is noteworthy that another witness, Mr Clive Jones, Joint Managing Director of Cazaly Resources Pty Ltd, when asked if he would regard it as being the case that Cazaly Resources engaged the services of Mr Grill and Mr Burke for the purpose of trying to achieve a favourable outcome, said: "You can put it that way; that's fine" and "Yes, I guess so"



(Select Committee Report, p 97). He subsequently referred to the circumstance as amounting to a "tacit understanding or arrangement". The point is that this is not the language of certainty as to how one would describe what had taken place, and a finding that McMahon had deliberately told a falsehood would depend on certainty of meaning. Although it may be said that such issues are for the tribunal of fact to determine, they affect the determination of whether there are reasonable prospects of conviction. If there are not such prospects, it is not in the public interest to proceed with a charge. I have not formed a final view about that issue in this case because of the public interest factors that militate against the bringing of a prosecution.

I would add, however, that the cases against each of the other individuals under consideration also would have required an analysis of the meaning of what was said, an exercise which I appreciate the Select Committee undertook, but which would need to be approached afresh by the jury if the matter had proceeded to trial on indictment in each case. Part of what was relied on as false, for instance in the case of Ms Archer, was her claim that she could not recall having discussed certain matters with Mr Burke. While one might rely on the importance of the issue, the amount of contact and the relative proximity in time to when relevant events occurred as tending to establish that such a claim is false, it is a notoriously difficult basis on which to proceed with a charge of knowingly giving false evidence. Again, I am not expressing a concluded view about the strength of the case, but it should be apparent that these would not necessarily have been straightforward prosecutions.

## CONCLUSION

However, the decision whether to prosecute was effectively decided by Mr Cock when he was the DPP. Although he did not provide a direct formal response in writing to the referral by the Clerk of the Legislative Council in December 2007, he made his position clear in his Submission to the Powers Select Committee in relation to the appropriateness of using section 57 to prosecute anyone for giving false evidence before Parliament. I understand he also conveyed his views to that effect to Mr Peacock orally. The report of the Powers Select Committee in May 2009 expressed similar concerns about the use of section 57 and recommended its repeal. In the circumstances, I would not have considered it appropriate to revisit Mr Cock's decision. This is in part because I am of the opinion that the arguments for the abolition of the concurrent jurisdiction of the Courts in relation to a matter affecting Parliamentary business has merit, particularly as it is the approach taken in other jurisdictions. Further, given the time that had elapsed before I commenced as Acting DPP in August 2009, it would have been oppressive to the persons accused of having committed the offence for this Office to proceed with a prosecution in the face of a decision by the previous DPP not to proceed. The time that had elapsed by the time of your letter of December 2010 was obviously more significant.

In all the circumstances it is not in the public interest to proceed with a prosecution against any of the persons identified by the Select Committee for an offence under section 57.

### FURTHER ACTION

Report No 1 of the Powers Select Committee recommended the repeal of sections 55, 56, 57, 58 and 59 of the Code (see recommendation 2 of the Report).

As I have indicated above, I respectfully agree with the reasoning based on a consideration of double jeopardy, the tension with Parliamentary Privilege and the fact that Parliament is best placed to judge the impact of conduct on its processes and procedures. However, there are two areas in respect of which I consider further analysis is required. First, I do not see that, in the ordinary course, there would be any conflict with Parliamentary Privilege or double jeopardy if the alleged offence is interference with a witness (section 58). If the interference is external to Parliament, and if Parliament saw fit to refer the matter for prosecution, I would have thought it would be no different to dealing with interference with a witness called to give evidence to a Court. Secondly, in my opinion, it does not follow necessarily from the arguments put in favour of repealing section 57 that a Court of law could not properly assess and determine whether evidence given before a Parliamentary Committee was knowingly false. Nor do I consider that it would be inappropriate for a Court of law to impose punishment for such an offence. However, the appropriateness of a prosecution would certainly be questionable in either case (i.e. under section 57 or 58) when a Parliamentary Committee has already expressed a view (and effectively made a determination) about the issue, and particularly so when a form of punishment has already been imposed.

I intend to raise with the Director, Mr McGrath, upon my return from leave in August 2011, the need for legislative reform identified by the Powers Select Committee Report 1 with a view to the matter being raised with the Attorney General, if that has not already occurred.

Finally, Mr Cock has asked me to pass on his apology to you and to the Committee for not having written to Mr Peacock to advise him formally of his decision in 2009. Although I spoke with Mr Peacock on 2 March 2011 to inform him of the essence of the conclusions expressed above, I would also like to express my regret that this matter has remained unanswered in writing until now, and apologise for any inconvenience caused as a result.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiannaca', with a stylized initial 'B'.

Bruno Fiannaca SC  
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

29 July 2011



**DIRECTOR OF PUBLIC PROSECUTIONS**  
for WESTERN AUSTRALIA

Level 1, 26 St Georges Terrace, PERTH WA 6000

**SELECT COMMITTEE INTO THE APPROPRIATENESS OF POWERS  
AND PENALTIES FOR BREACHES OF PARLIAMENTARY PRIVILEGE  
AND CONTEMPTS OF PARLIAMENT**

**Submission**

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- A. The Director of Public Prosecutions welcomes the opportunity to provide submissions to the Legislative Council's Select Committee into the appropriateness of powers and penalties for breaches of parliamentary privilege and contempts of parliament.
- B. The Office of the Director of Public Prosecutions (ODPP) is the independent prosecuting authority for the State of Western Australia, responsible for the prosecution of all serious offences committed against State criminal law.
- C. The role of the Office of the Director of Public Prosecutions is to provide the people of Western Australia with an independent and effective criminal prosecution service which is both fair and just.



## General Comments

I have recently had the opportunity of considering the historical and contemporary issues of West Australian parliamentary privilege and its relationship to the criminal law, having, last year, been referred for consideration of potential prosecutions of Members of Parliament and non-Members who were alleged to have given false evidence before a Parliamentary Select Committee.

The accepted view is that ss.55-61 of the *Criminal Code* (WA)<sup>1</sup> (the *Criminal Code*) have a concurrency with parliamentary privilege, and the punitive powers of parliaments recognized in ss.1 and 8 of the *Parliamentary Privileges Act 1891* (WA), and s.36 of the *Constitution Act 1889* (WA).<sup>2</sup> The somewhat awkward concurrency of punitive powers for contempts and breaches of privilege against the Parliament and the *Criminal Code* offences in ss.55-61 has arisen out of a historical context that is worth briefly addressing, below.

My view is that the concurrent *Criminal Code* offences and, in particular, ss.56-58 and the sanctions they contain, while once historically relevant are now, in light of the developments in parliamentary privilege, superfluous provisions. Accordingly, I think that Western Australia should adopt the recent approach taken by the Queensland Parliament in 2006 when it repealed the corresponding provisions (ss. 57-59) of the *Criminal Code* (Qld)<sup>3</sup>.

The present *Criminal Code* offences in Western Australia of disturbing the legislature, refusing to attend or give evidence before Parliament, and giving false evidence, while once historically appropriate, are today more suitably dealt with as contempts under the *Parliamentary Privileges Act*.

## Specific Matters

### ***(a) The appropriate role, if any, for the judiciary in matters relating to breaches of parliamentary privilege and contempts of Parliament.***

#### Concurrency

The *Criminal Code*, drafted by Sir Samuel Griffith, was adopted by Queensland in 1899, and by Western Australia in 1913. Sections 56-61 of the *Criminal Code* were included as provisions to protect the processes of colonial parliaments, as they were not imbued with the full extent of parliamentary powers and privileges as exercised by the House of Commons.

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<sup>1</sup> Section 55 Interference with the Legislature; s.56 Disturbing Parliament; s.57 False Evidence before Parliament; s.8 Threatening witnesses before Parliament; s.59 Witnesses refusing to attend or give evidence before Parliament; s.60 Member of Parliament receiving bribes; and s.61 Bribery of Member of Parliament.

<sup>2</sup> See George Carney, *Members of Parliament: Law and Ethics*, NSW, Prospect Media, 2000 at pp313 and 314. The accepted view since 1989 expressed by the Clerk of the Legislative Council, Mr Laurie Marquet, was that concurrent jurisdiction existed in relation to ss.51-61 of the *Criminal Code* (WA). Mr Marquet recommended that no criminal prosecutions be commenced unless the relevant Member's House had passed an appropriate resolution.

<sup>3</sup> The *Criminal Code Amendment Act 2006* amended the *Criminal Code* (Qld) by deleting s.56 (Disturbing the Legislature), s.57 (False Evidence before Parliament) and s.58 (Witnesses refusing to attend or give evidence before Parliament or parliamentary committee), and inserted s.717 which specifically provided that a person cannot be charged with, prosecuted for, convicted of or punished for any of the repealed offences under the *Criminal Code*. To provide clarity, s.717 provides that a person can still be dealt with for contempt under the *Parliament of Queensland Act 2001*.

Section 36 of the *Constitution Act 1889* provided for the privileges of both Houses:

*"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 parliament of Western Australia enacted legislation that gave the Houses of Parliament a limited penal jurisdiction, compared to other jurisdictions.<sup>4</sup> The insertion of ss.55-61 of the *Criminal Code* complimented restrictive parliamentary privileges and punitive powers in Queensland and Western Australia. The *Parliamentary Privileges Act 1891* conferred on the West Australian Legislative Assembly and Legislative Council the power to punish for enumerated contempts in s.8.

The *Parliamentary Privileges Act* did not enumerate (and still does not) contempts such as giving false evidence. Without, for example, the operation of s.57 of the *Criminal Code*, giving false evidence to Parliament would have been an act that would have gone unpunished.

Unlike the Parliaments of some other colonial jurisdictions, the Legislative Assembly and Legislative Council did not originally have the full privileges (powers, rights and immunities) of the House of Commons; including the contempt power of the House of Commons.

Although the Privy Council had previously held that it was inherent in every assembly that possesses a supreme legislative authority a power to punish contempts (refer to *Beaumont v Barrett* (1836) 1 Moo PC 59 at 76), in *Kielly v Carson* (1842) 1 Moo PC 63 it was held that a colonial legislature did not have the power to order the arrest of a stranger. The Privy Council drew a distinction between immediate impediments to the "*due course of its proceedings*" and the power to punish strangers for "*past misconduct*". The former was seen as necessary to the existence of a legislative body, whilst the latter was a matter reserved for court of record. The House of Commons and the House of Lords both had the power to punish strangers for past misconduct because those bodies had formerly constituted the "*High Court of Parliament*".

There is, as yet, no authoritative determination or binding precedent concerning whether the *Criminal Code* offences in ss.55-61 are inclusive of Parliamentary Members and non-Members, or only applicable to the latter. It is possible that, save for Section 60, the "*person*" whose conduct is rendered criminal is someone other than a Member. The purpose behind their introduction appears to have been primarily to protect the Parliament and its processes, in an historical environment where the House of Commons' parliamentary privileges has a restricted application in Queensland and Western Australia, and possibly to treat the intrusions into Parliamentary processes by Members and non-Members in a comparative manner.

Section 36 of the *Constitution Act* was amended by s.4 of the *Constitution (Parliamentary Privileges) Amendment Act 2004* to delete the last sentence of s.36

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<sup>4</sup> Enid Campbell, p191.

so that, in effect, parliamentary privileges could exceed those of the House of Commons. That legislation was introduced, following similar legislation in Queensland in 2001, in a move to protect parliamentary privilege, there being a perception that changes in the United Kingdom were signaling a diminution of parliamentary privilege. The intention of the West Australian and Queensland parliaments was clear. They intended to secure parliamentary privilege as it had developed in the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Section 1 of the *Parliamentary Privileges Act* now provides that the Legislative Council and Legislative Assembly have the privileges, immunities and powers set out in the Act and also, to the extent they are not inconsistent with the Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its Members and committees as at 1 January 1989.

Queensland introduced similar legislation in 2001 in response to the developments in the House of Commons but pegged parliamentary privilege to the date of federation, 1 January 1901. Western Australia opted for the later date of 1 January 1989, the publication year of the 21<sup>st</sup> edition of *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament*, enabling Parliament to refer to the authoritative procedural text on parliamentary privilege<sup>5</sup>.

Section 1 of the *Parliamentary Privileges Act* provides that the freedom of speech principle, enshrined in Article 9 of the *Bill of Rights 1688*, has full application in Western Australia. The principle confirms the paramountcy of Parliament and ensures that debates or proceedings of Parliament cannot be questioned or impeached in any court or place out of Parliament.<sup>6</sup>

In 2004 amendments clarified the broad scope and application of parliamentary privilege, and it is now quite clear that the Acts captured by ss.55-61 of the *Criminal Code*, while perhaps still not specifically enumerated in s.8 of the *Parliamentary Privileges Act* are contempts or breaches of privilege properly dealt with under the Act.

**(b) *Under the current statutory provisions, whether aspects of parliamentary privilege may make it difficult to undertake a successful prosecution for an offence under ss.55 to 61 of the Criminal Code.***

Considering the developments in parliamentary privilege, there are several difficulties in undertaking successful prosecutions under the relevant *Criminal Code* provisions.

Discrepancies in penalties

The *Criminal Code* offence of disturbing parliament (s.56) attracts a maximum penalty of 3 years imprisonment, the summary offence penalty being 1 year imprisonment and a fine of \$12,000.00. Threatening a witness before Parliament (s.58) carries a maximum penalty of 5 years imprisonment, and if convicted of the

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<sup>5</sup> See Procedure and Privileges Committee Report No 5, Parliamentary Privilege and Its Linkage to the UK House of Commons, Tabled in the WA Legislative Assembly, 13 May 2004, p6.

<sup>6</sup> *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament*, 19<sup>th</sup> Ed at p199.

summary offence a term of imprisonment of 2 years and a fine of \$24,000.00, being the same penalty fixed for a witness who refuses to attend or give evidence before Parliament. The offence of false evidence before Parliament, being the most serious of the offences, carries a term of imprisonment of 7 years.

Section 8 of the *Parliamentary Privileges Act* provides that each House of Parliament is empowered to punish summarily for contempts by fine, and to imprison a person until such a fine is paid. The enumerated contempts include refusing to give evidence, and disturbing Parliament. There are then, two different processes to address contempts and breaches of Parliament, with significantly different penalties. The result is confusing and unsatisfactory, the parliamentary punitive power being limited to a fine, and in exceptional cases imprisonment, and the *Criminal Code* provisions providing for the options of summary or indictable offences, with significant terms of imprisonment.

### Double Jeopardy

A prosecution under the relevant *Criminal Code* provisions raises the issue of double jeopardy: the principle that a person should not be punished twice for that same Act. Section 47 (1) of the *Parliament of Queensland Act 2001* provides that if a person's conduct is both a contempt of the Assembly and an offence against another Act, the person may be proceeded against for the contempt or for the offence against the other Act, but the person is not liable to be punished twice for the same conduct. The *Parliamentary Privileges Act* does not contain a similar provision. If a Member or non-Member is punished as a result of the exercise of parliament's punitive powers, and then the alleged offence is referred to my Office for consideration of prosecution, double jeopardy becomes a live issue as the person will become liable to punishment under the *Criminal Code* for the same act for which he or she has already been punished.

### Conflict

There is also the important consideration that ss.55-61 of the *Criminal Code* conflicts with the powers, rights and immunities inherent in parliamentary privilege. If a prosecution is undertaken against a Member of Parliament the prosecution is undertaken in the courts, and subject to review by appellate courts, and could be challenged under the provisions of the *Parliamentary Privilege Act* and *Constitution Act*. The repeal of the relevant offences in the *Criminal Code* would remove the awkward concurrency with parliamentary privilege. Moreover, as previously observed, there is, as yet, no judicial pronouncement on the proper construction of these provisions or their scope. It is possible that a court might construe the word "person" in Sections 55-59 and 61 to not include a Member of Parliament. This would be a means of incorporating into the provisions an acceptance of parliamentary privilege, and would, to some extent, be consistent with the terms of Section 60, which deliberately includes a Member of Parliament into the term "person".

Currently, the aspects of parliamentary privilege discussed above make it difficult to undertake a successful prosecution for an offence under ss.51-61 of the *Criminal Code*. In my view, the above offences are more properly dealt with under the *Parliamentary Privilege Act* and should be repealed from the *Criminal Code*.

The repeal of these provisions from the *Criminal Code*, as Queensland has recently done, would achieve several objectives:

- The repeal of the concurrent provisions would remove the perception of conflict between the state criminal law and the *Parliamentary Privileges Act*, in particular ensuring the primacy of parliamentary processes expressed in Article 9 of the *Bill of Rights (1688)*.
- The repeal of the provisions would also bring Western Australia into line with Queensland and the parliaments of other States, the Commonwealth Houses of Parliament, and the House of Commons, providing a much desired consistency.
- The repeal of the concurrent provisions also ensures that Members and non-Members are dealt with in the same process with the object of achieving comparative and consistent outcomes.
- The repeal of the relevant Criminal Code provisions reflects the relatively low level of criminality involved in the offences.

## Conclusion

Improper interferences with the free exercise by a House or a Committee of its authority or functions are suitably dealt with under the *Parliamentary Privileges Act*, which, in my opinion, provides appropriate sanctions. Sections 55-61 of the *Criminal Code* were inserted at a time when the application of parliamentary privilege was limited, and contempts against Parliament were narrowly enumerated. The developments in parliamentary privilege in Western Australia have rendered the concurrent *Criminal Code* offences somewhat superfluous, and their repeal would remove or address the inevitable issues of conflict, discrepancies in penalties, potential problems with the construction and ambit of the term "*person*", and double jeopardy. Moreover, the repeal of the criminal provisions would reinforce the independence of the legislature from the executive and the courts, a fundamental principle enshrined in the *Constitution Act* and the *Parliamentary Privilege Act*.



Robert Cock QC  
DIRECTOR OF PUBLIC PROSECUTIONS

30 April 2009

Our ref: ADM2009/129  
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**THIRTY-EIGHTH PARLIAMENT**

**REPORT 1**

**SELECT COMMITTEE INTO THE  
APPROPRIATENESS OF POWERS AND PENALTIES  
FOR BREACHES OF PARLIAMENTARY PRIVILEGE  
AND CONTEMPTS OF PARLIAMENT**

Presented by Hon Nick Griffiths MLC (Chair)

May 2009

# **SELECT COMMITTEE INTO THE APPROPRIATENESS OF POWERS AND PENALTIES FOR BREACHES OF PARLIAMENTARY PRIVILEGE AND CONTEMPTS OF PARLIAMENT**

## **Date first appointed:**

12 November 2008

## **Terms of Reference:**

- 1) Inquire into and report on the appropriateness of the powers and penalties provided for in the Parliamentary Privileges Act 1891 and *The Criminal Code* in respect of breaches of parliamentary privilege and contempt of Parliament.
- 2) The Committee is to report to the House no later than 5 May 2009.

On 7 April 2009, the Select Committee's reporting date was extended to 7 May 2009.

## **Members as at the time of this inquiry:**

Hon Nick Griffiths MLC (Chair)

Hon Kate Doust MLC

Hon George Cash MLC (Deputy Chair)

Hon Norman Moore MLC

Hon Kim Chance MLC

Hon Giz Watson MLC

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**RECOMMENDATIONS FOR THE**  
**REPORT OF THE SELECT COMMITTEE INTO THE APPROPRIATENESS OF POWERS AND**  
**PENALTIES FOR BREACHES OF PARLIAMENTARY PRIVILEGE AND CONTEMPTS OF**  
**PARLIAMENT**

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**RECOMMENDATIONS**

- 1 Recommendations are grouped as they appear in the text at the page number indicated:

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**Recommendation 1: The Committee recommends that the Western Australian Parliament adopt guidelines as to what constitutes a contempt of Parliament.**

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**Recommendation 2: The Committee recommends that sections 55, 56, 57, 58 and 59 of *The Criminal Code* be repealed.**

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**Recommendation 3: The Committee recommends that, subject to the adoption of Recommendation 4, the power of the Western Australian Parliament to imprison be abolished, save that the Parliament should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament.**

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**Recommendation 4: The Committee recommends that the *Parliamentary Privileges Act 1891* be amended to provide that the Western Australian Parliament may impose a fine for any amount it believes appropriate in relation to any breach of privilege or contempt of Parliament.**

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**Recommendation 5: The Committee recommends that, subject to the adoption of Recommendation 4, the power of the Western Australian Parliament to expel a Member be abolished.**



**Recommendation 6: The Committee recommends that the parliamentary precinct of the Western Australian Parliament be clearly defined by statute.**

**REPORT OF THE SELECT COMMITTEE INTO THE APPROPRIATENESS OF POWERS AND  
PENALTIES FOR BREACHES OF PARLIAMENTARY PRIVILEGE AND CONTEMPTS OF  
PARLIAMENT**

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**1 REFERENCE AND PROCEDURE**

- 1.1 On 12 November 2008 the Legislative Council (**Council**) appointed on the motion of the Leader of the House, Hon Norman Moore MLC, the Select Committee into the Appropriateness of the Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament (**Select Committee**), with the following terms of reference:
- i) Inquire into and report on the appropriateness of the powers and penalties provided for in the *Parliamentary Privileges Act 1891* and *The Criminal Code* in respect to breaches of parliamentary privilege and contempts of Parliament.
  - ii) The Select Committee have access to all documents, evidence and other material possessed, obtained, or controlled by the previous Select Committee.<sup>1</sup>
  - iii) The Committee is to report to the House no later than 5 May 2009.
- 1.2 The Select Committee was granted an extension of time in which to report to 7 May 2009.
- 1.3 The Select Committee advertised for written submissions in *The West Australian* newspaper on Saturday 6 December 2008 and in *The Weekend Australian* on Saturday 13 December 2008. Details of the inquiry were also placed on the parliamentary website ([www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)).
- 1.4 The Select Committee wrote to various Parliaments, organisations and individuals requesting submissions. A list of those to whom the Select Committee wrote is attached at **Appendix 1**.
- 1.5 The Select Committee thanks the Parliaments, individuals and organisations that provided written submissions to the inquiry.<sup>2</sup>

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<sup>1</sup> On 5 June 2008 the Legislative Council appointed on the motion of Hon Giz Watson MLC, as amended by Hon Norman Moore MLC, the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament. This Select Committee was to report to the House no later than 9 September 2008. On 7 August 2008 the Legislative Council was prorogued and the Select Committee ceased to exist. The Select Committee was reappointed by the Legislative Council in the new Parliament on 12 November 2008.

<sup>2</sup> For copies of submissions received by the Committee, refer to the Committee's website at <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Committees++Past>.

- 1.6 On 26 November 2008 the House granted leave for the Select Committee to disclose or publish evidence or documents it received prior to it reporting such evidence or documents to the House.<sup>3</sup> The Select Committee also authorised Members and staff of the Select Committee to disclose or publish to any person any information relating to, or arising from, Committee meetings, deliberations or proceedings, except where the Committee expressly resolved that such information should be private to the Committee. This enabled the Select Committee Members the opportunity to discuss issues surrounding the matters being considered outside the Select Committee forum.

## **2 THE NEED FOR THE INQUIRY**

- 2.1 The powers and privileges of the Western Australian Parliament are defined by:
- a) the powers, privileges and immunities of the United Kingdom House of Commons as in existence on 1 January 1989 by virtue of section 1 of the *Parliamentary Privileges Act 1891* (WA); and
  - b) statutes enacted by the Parliament that deal with the matter of parliamentary privilege pursuant to s36 of the *Constitution Act 1889* (WA). These statutes include the *Parliamentary Privileges Act 1891* (WA) and the *Parliamentary Papers Act 1891* (WA).
- 2.2 The need for a review of the *Parliamentary Privileges Act 1891* and the penalties available to the Western Australian Parliament has often been raised in the Council in past years, most notably during consideration of the contempt of Parliament committed by Mr Brian Easton in 1994 and more recently in 2007 during the consideration of the report of the Select Committee into a Matter of Privilege Arising from the Standing Committee on Estimates and Financial Operations.

## **3 BREACHES OF PARLIAMENTARY PRIVILEGE AND CONTEMPT OF PARLIAMENT**

- 3.1 The Western Australian Parliament has the power to punish for breaches of its privileges or other contempts of Parliament.

### **Parliamentary privilege**

- 3.2 Parliamentary privilege is defined in Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* as follows:

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<sup>3</sup> Legislative Council Standing Order 361 prohibits a Select Committee from publishing evidence prior to reporting without leave of the House.

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*Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively ... 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.*<sup>4</sup>

- 3.3 As stated in the 1999 report of the United Kingdom Parliament Joint Committee on Parliamentary Privilege:

*Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.*<sup>5</sup>

- 3.4 The privileges, immunities and powers of each House of the Western Australian Parliament are derived from the *Parliamentary Privileges Act 1891*, enacted pursuant to s36 of the *Constitution Act 1889*.
- 3.5 Section 36 of the *Constitution Act 1889* provides that it is lawful for the Parliament by any Act to define the privileges, immunities, and power to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the respective Members thereof.
- 3.6 In addition to expressly setting out certain privileges, immunities and powers within the provisions of the *Parliamentary Privileges Act 1891*, s1 of the *Parliamentary Privileges Act 1891* also confers on the Legislative Council and Legislative Assembly, their Members and committees all those privileges, immunities and powers (by custom or statute or otherwise) of the United Kingdom House of Commons, its Members and committees as at 1 January 1989.
- 3.7 Parliamentary privilege is part of the common law and is recognised by the courts, although it is important to note that it is also enforceable by Parliament itself through the exercise of its penal powers.<sup>6</sup>

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<sup>4</sup> C.J. Boulton (Ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21<sup>st</sup> ed, 1989, p69.

<sup>5</sup> United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 1, para 3.

<sup>6</sup> *Ibid*, para 5.

*Summary of the privileges of Parliament*

3.8 The rights afforded to the Parliament by parliamentary privilege can be divided into two categories: those extended to Members individually; and those extended to a House collectively. There is no true distinction between the two heads of privilege, as all claims of privilege rest on the proposition that the privilege is necessary for the proper conduct of the business of Parliament.<sup>7</sup>

3.9 The rights and immunities accorded to Members individually are generally categorised under the following headings:<sup>8</sup>

- freedom of speech;
- freedom from arrest in civil actions;
- exemption from jury duty; and
- exemption from attendance as a witness.

3.10 Freedom of speech is arguably the “*single most important*”<sup>9</sup> aspect of parliamentary privilege and is derived from Article 9 of the *Bill of Rights 1689* (UK), which 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.*

3.11 Article 9 of the *Bill of Rights 1689* (UK) is made law in Western Australia by operation of s1 of the *Parliamentary Privileges Act 1891*.<sup>10</sup>

3.12 Members of Parliament and other participants in the parliamentary process enjoy, in certain situations, a special absolute immunity from interference or other action by the executive and the courts.

3.13 The rights and powers of a House as a collective may be categorised as follows:

- the power to discipline, that is, the right to punish (by imprisonment) persons guilty of breaches of privilege or contempts, and the power to expel Members guilty of disgraceful conduct;

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<sup>7</sup> Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, p26.

<sup>8</sup> Robert Marleau and Camille Montpetit (Eds), *House of Commons Procedure and Practice*, Canada, 2000, p3.

<sup>9</sup> United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 2, para 36, cited in Professor Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, p10.



- the regulation of its own internal affairs;
- the authority to maintain the attendance and service of its Members;
- the right to institute inquiries and to call witnesses and demand papers;
- the right to administer oaths to witnesses; and
- the right to publish papers containing material that might otherwise be defamatory.

3.14 Underlying the rights and powers of the House is the concept of exclusive cognisance. This concept was explained in the 1999 report of the United Kingdom Parliament Joint Committee on Parliamentary Privilege as follows:

*The other main component of parliamentary privilege is still called by the antiquated name of ‘exclusive cognisance’ (or ‘exclusive jurisdiction’). Parliament must have sole control over all aspects of its own affairs: to determine for itself what the procedures shall be, whether there has been a breach of its procedures and what then should happen. This privilege is also of fundamental importance. Indeed, acceptance by the executive and the courts of law that Parliament has the right to make its own rules, and has unquestioned authority over the procedures it employs as legislator, is of scarcely less importance than the right to freedom of speech. Both rights are essential elements in parliamentary independence.*

*Parliament’s right to regulate its own affairs includes the **power to discipline its own members** for misconduct and, further, **power to punish anyone**, whether a member or not, for behaviour interfering substantially with the proper conduct of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction exercised by each House to ensure it can carry out its constitutional functions properly and that its members and officers are not obstructed or impeded, for example by threats or bribes.<sup>11</sup>*

#### *Breach of privilege*

3.15 When any of these privileges are disregarded or attacked by any individual or authority, the offence committed is called a breach of privilege and is punishable under the law of Parliament.

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<sup>10</sup> *Halden v Marks*, (1995) 17 WAR 447 at p461.

<sup>11</sup> United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 1, paras 13-14.

## Contempt of Parliament

3.16 Erskine May defines ‘contempt of Parliament’ as follows:

*Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.*<sup>12</sup>

3.17 Each House of Parliament possesses the power to declare an act to be a contempt and to punish such act. As to what constitutes a contempt is determined by the House, which is bound neither by the courts nor precedent.

3.18 Contempt of parliament is not the same as ‘breach of privilege’, although these expressions are often used interchangeably. A breach of privilege is a breach of a specified privilege of Parliament. Contempt (being any obstruction or impediment of the Parliament) is not confined to breaches of privilege, which means that a contempt can occur without there being a breach of any specific right or immunity of Parliament.<sup>13</sup>

## Parliament’s penal power

3.19 Parliament possesses the power to examine and to punish any breach of privilege or other contempt committed against it. This power is one inherited from the United Kingdom House of Commons and is referred to as the Parliament’s penal jurisdiction.

3.20 The penal jurisdiction is the means by which the Parliament protects itself from acts which directly or indirectly impede it in its performance of its functions. This power gives a House the ability to enforce its orders, deal with serious impediments to or interference with its proceedings and also to deal with serious affronts to the dignity of the House.

3.21 The power of Parliament to punish breaches of privilege and contempts is the safeguard to ensure that Parliament, its committees and Members function effectively and freely.

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<sup>12</sup> C.J. Boulton (Ed), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21<sup>st</sup> ed, 1989, p115.

<sup>13</sup> Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 14, *Referral of a Matter of Privilege from the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations*, December 2007, pp3-4.

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*If the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend: those who interrupt the proceedings or destroy evidence, or seek to intimidate members or witnesses; those who disobey orders of the House or a committee to attend and answer questions or produce documents .... But unless a residual power to punish exists, the obligation not to obstruct will be little more than a pious aspiration. The absence of a sanction will be cynically exploited by some persons from time to time.*<sup>14</sup>

- 3.22 Whether a matter complained of is a breach of an undoubted privilege, or an offence against Parliament which does not come within that description, the powers of Parliament to investigate and punish are the same.<sup>15</sup>

#### **4 CODIFICATION OF CONTEMPT**

- 4.1 The Select Committee received a number of submissions advocating for an exhaustive definition of what constitutes or may constitute a contempt of Parliament.<sup>16</sup>
- 4.2 Such a definition might provide clarity as to what constitutes a contempt of Parliament. The Select Committee is of the view, however, that to do so is not practical.
- 4.3 Erskine May states that it would be vain to attempt an enumeration of every act which might be construed into a contempt, the power to punish for contempt being in its nature discretionary.<sup>17</sup> A list of matters found by the United Kingdom House of Commons to be a contempt are attached at **Appendix 2**.
- 4.4 The Clerk of the United Kingdom House of Commons in his memorandum to the House of Commons Committee of Privileges 1976-77 cautioned against too rigidly codifying the House's options in dealing with matters of privilege. He wrote:

*It would be a mistake first and foremost because it would introduce an element of inflexibility into the manner in which the House upholds its privileges and punishes contempts. It is true that the House would be in no danger of abridging its privileges or powers by a mere resolution setting out the sort of cases upon which it normally proposed to act. But formulas which may appear precise and*

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<sup>14</sup> United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 6, para 302.

<sup>15</sup> Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, p29.

<sup>16</sup> See Submission No 10, 11 and 15.

<sup>17</sup> C.J. Boulton (Ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21<sup>st</sup> ed, 1989, p115.

*faultless at the time at which they are drafted, may be found to be defective at a later stage owing to some undiscovered loophole or developments which could not be envisaged at an earlier stage. It would certainly seem undesirable to have to ask the House to amend its resolutions on privileges with any frequency.*<sup>18</sup>

- 4.5 The 1984 Commonwealth Joint Select Committee on Parliamentary Privilege also did not support the codification of a definition of contempt:

*In the search for precision the necessary reach of the contempt power may be unintentionally narrowed, offences may be expressed too rigidly, flexibility may be lost, and matters which should be included may unintentionally be excluded. In short, we think that the wiser course is not to seek to define exhaustively the contempt power. We rest on the broad consideration that it is impossible, in advance, to define exhaustively the circumstances that may constitute contempt of Parliament.*<sup>19</sup>

- 4.6 The Select Committee is of the view that contempt of Parliament should not be exhaustively defined and codified.

### Guidelines

- 4.7 The Select Committee supports the use of other means to give greater clarity to what constitutes contempt of Parliament for both Members of Parliament and non-members.
- 4.8 On 25 February 1988 the Australian Senate adopted a number of resolutions in relation to contempt. The resolutions provide criteria for the Senate to take into account when determining whether a contempt has been committed and also set out, for the guidance of the public, acts which may be treated by the Senate as contempts.
- 4.9 The resolutions are not intended to be an exhaustive or all-inclusive list of contempts and do not derogate from the Senate's power to determine that particular acts constitute contempts.<sup>20</sup> These resolutions are procedures of the Senate and are not subject to judicial interpretation.<sup>21</sup>

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<sup>18</sup> Cited in Robert Marleau and Camille Montpetit (Eds), *House of Commons Procedure and Practice*, Canada, 2000, p59.

<sup>19</sup> Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, p81.

<sup>20</sup> Harry Evans (Ed), *Odgers' Australian Senate Practice*, 12th ed, p66. <http://www.aph.gov.au/senate/pubs/odgers/pdf/chap02.pdf> (viewed on 6 April 2009).

<sup>21</sup> Mr Harry Evans, 'Parliamentary Privilege: Legislation and Resolutions in the Australian Parliament', *The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments*, vol 56, 1988, p33.

**3.      *Criteria to be taken into account when determining matters relating to contempt***

*The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:*

- (a)      the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;*
- (b)      the existence of any remedy other than that power for any act which may be held to be a contempt; and*
- (c)      whether a person who committed any act which may be held to be a contempt:*
  - (i)      knowingly committed that act, or*
  - (ii)     had any reasonable excuse for the commission of that act.*

...

**6.      *Matters constituting contempts***

*That, without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.*

***Interference with the Senate***

- (1) *A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.*

***Improper influence of Senators***

- (2) *A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Senator in the Senator's conduct as a Senator or induce a Senator to be absent from the Senate or a committee.*

***Senators seeking benefits etc.***

- (3) *A Senator shall not ask for, receive or obtain, any property or benefit for the Senator, or another person, on any understanding that the Senator will be influenced in the discharge of the Senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a Senator, or pursuant to which the Senator is in any way to act as the representative of any outside body in the discharge of the Senator's duties.*

***Molestation of Senators***

- (4) *A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Senator on account of the Senator's conduct as a Senator.*

***Disturbance of the Senate***

- (5) *A person shall not wilfully disturb the Senate or a committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Senate or a committee tending to disturb its proceedings.*

***Service of writs etc.***

- (6) *A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or of a person authorised by the Senate to give such consent.*

***False reports of proceedings***

- (7) *A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.*

***Disobedience of orders***

- (8) *A person shall not, without reasonable excuse, disobey a lawful order of the Senate or of a committee.*

***Obstruction of orders***

- (9) *A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Senate or of a committee.*

***Interference with witnesses***

- (10) *A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.*

***Molestation of witnesses***

- (11) *A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.*

***Offences by witnesses etc.***

- (12) *A witness before the Senate or a committee shall not:*
- (a) *without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;*
  - (b) *without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or*

- (c) *give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.*
- (13) *A person shall not, without reasonable excuse:*
  - (a) *refuse or fail to attend before the Senate or a committee when ordered to do so; or*
  - (b) *refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.*
- (14) *A person shall not wilfully avoid service of an order of the Senate or of a committee.*
- (15) *A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.*

***Unauthorised disclosure of evidence etc.***

- (16) *A person shall not, without the authority of the Senate or a committee, publish or disclose:*
  - (a) *a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;*
  - (b) *any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or*
  - (c) *any proceedings in private session of the Senate or a committee or any report of such proceedings, unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.*<sup>22</sup>

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<sup>22</sup> Harry Evans (Ed), *Odgers' Australian Senate Practice*, 12th ed, <http://www.aph.gov.au/Senate/pubs/odgers/pdf/app2.pdf>, (viewed on 6 April 2009).



**Recommendation 1: The Committee recommends that the Western Australian Parliament adopt guidelines as to what constitutes a contempt of Parliament.**

**5 SHOULD THE PENAL JURISDICTION REMAIN WITH PARLIAMENT OR BE TRANSFERRED TO THE COURTS?**

- 5.1 The Select Committee considered whether the penal jurisdiction should remain with Parliament or be transferred to the courts.
- 5.2 In reference to breaches of privilege and contempts of Parliament the Select Committee is of the view that no part of Parliament's jurisdiction should be transferred to the courts. Parliament should maintain responsibility for dealing with breaches of parliamentary privilege and contempt of Parliament both in relation to Members and non-members.
- 5.3 The Select Committee observes that the courts, in dealing with contempt of court, do not refer the jurisdiction to another authority, but deal with the contempt itself.
- 5.4 The Select Committee notes that the transfer of penal jurisdiction is contrary to the concepts of parliamentary sovereignty and the doctrine of separation of powers. The Parliament's ability to punish contempt is a product of its exclusive jurisdiction over its own affairs and is the ultimate guarantee of its independence. If the Parliament delegates the punishment of contempt to the courts it will:
- limit the exclusive jurisdiction of Parliament over its own proceedings.
  - allow the courts to control the ability of Parliament to defend itself from interference and disregard for its authority.
  - cause the Parliament to become bound by precedent, as the courts would use previous decisions to assist in the determination of future decisions.
- 5.5 The Select Committee notes the comments of the then Lieutenant Governor, Sir Francis Burt QC<sup>23</sup> in his submission to the 1989 inquiry of the Parliamentary Standards Committee:

<sup>23</sup> Sir Francis Theodore Page Burt, AC, KCMG, QC (14 June 1918 - 8 September 2004), served as Chief Justice of Western Australia from 1977 until 1988 and as Governor of Western Australia from 1990 to 1993. He was also Lieutenant Governor of Western Australia from 1977 to 1990.

*The absolute privilege accorded to statements made by Members of Parliament in the course or [sic] proceedings within Parliament is based upon a principle of truly fundamental importance. If it were to be abandoned and reduced to a qualified privilege the difficulty of formulating the qualifications would become immediately apparent. In the result a member would find himself unable to speak the truth as he honestly sees it. Debate within the Parliament would be seriously impeded and a delayed and as likely as not inexpensive and sterile debate within the Courts would be promoted and this would in the public perception draw the Judiciary into the political arena. In short the cure would be worse than the disease.*

*That is not to say that the abuse of parliamentary privilege does not occur from time to time and that it does not work both an injustice to the individual who is in that way defamed and at the same time lower the public respect for the Parliament. It does both of those things.*

*Without appearing to preach, the remedy must in the first instance, be based upon an appreciation in the mind of each individual Member of the Parliament that the absolute privilege which he enjoys is not his privilege and that it carries with it a very high and personal responsibility both to the Parliament of which he is a Member and to the subject of his remarks. Should he fail to discharge that responsibility then the other Members of the House for which he is a Member should each recognise that they each have a responsibility to the Parliament which transcends his or her responsibility to the disciplined party of which he or she is a Member.*

*In other words, cases in which a fair objective non-political judgment makes it apparent that the privilege has been abused should be dealt with by the House both promptly and publicly. Abuse of parliamentary privilege is justiciable but only in the Court of Parliament. **It is a jurisdiction which it must exercise to preserve its authority and to do justice to the individual.** Hence the House must recognise its responsibility both to itself and to the person defamed to sit in judgement whenever the occasion arises. Attention should be given to the formulation of a procedure - terms of reference 1,2 and 3 - by which this can be done. However, it is done the solution to the problem is not to qualify the privilege and it must be found within the Parliament. It cannot be found within the Judicial arm of Government.<sup>24</sup> (emphasis added)*

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<sup>24</sup> Western Australia, *Report of the Parliamentary Standards Committee*, Volume 2, Submissions, Advice and Transcripts of Evidence, 1989, p41.

- 5.6 Both the 1967 United Kingdom House of Commons Select Committee on Parliamentary Privilege and the 1984 Commonwealth Joint Select Committee on Parliamentary Privilege rejected any question of transfer of the penal jurisdiction of the House to some other tribunal or court.<sup>25</sup>
- 5.7 The 1984 Commonwealth Joint Select Committee on Parliamentary Privilege supported the penal jurisdiction remaining with the Parliament for the following reasons:<sup>26</sup>
- the jurisdiction exists as the ultimate guarantee of Parliament's independence and its free and effective working;
  - the separateness of the courts from parliamentary institutions and their lack of acquired understanding of parliamentary life would make it difficult for them to assess whether conduct alleged to be in contempt was such as to obstruct or impede Parliament or its Members in the discharge of their functions;
  - courts lack the flexibility that Houses possess in the exercise of their penal jurisdiction since they cannot take into account factors which the Houses may entertain, chiefly the potent force of public opinion and the political consequences for parliament and the principal parliamentary actors if they act harshly, capriciously or arbitrarily when dealing with a complaint of contempt;
  - even if it were to be provided that prosecutions for contempt of Parliament could not be initiated except on the instruction of a House, there would be potential for undesirable clashes between the courts and Parliament regarding what conduct was contemptuous; and
  - transfer of the Houses' penal jurisdiction to the courts would expose the courts to the odium that Parliament sometimes attracts when it exercises that jurisdiction.
- 5.8 Mr Harry Evans, Clerk of the Australian Senate in his submission considered the implications of the transfer of the penal jurisdiction to the courts and highlighted the difficulties which could arise if this took place, which included:<sup>27</sup>

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<sup>25</sup> United Kingdom House of Commons, Third Report from the Committee of Privileges, *Recommendations of the Select Committee on Parliamentary Privilege*, London, 14 June 1977, Appendix A, pxxi, and Odgers' Senate Practice, pp69-71. The reports of these Committee's have not been adopted by the respective Parliaments, although some of the recommendations of the 1984 Commonwealth Joint Select Committee on Parliamentary Privilege are contained in the *Parliamentary Privileges Act 1987* (Cth).

<sup>26</sup> Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, pp91-94.

<sup>27</sup> Submission No 5 from the Australian Senate, 27 January 2009, p4.

- the balance of power between legislature, executive and judiciary would be affected. It would greatly expand the scope for judicial inquiry into and judgement upon parliamentary proceedings, which is what parliamentary privilege is intended to prevent.
- unless the statutory provisions were to include some catch all provision, the category of contempts in respect of which a penalty could be imposed would be closed, and a House would be powerless to deal with obstructions and interferences not covered by the specific statutory provisions.
- issues would arise in court proceedings such as what defences would apply and how would claims of executive privilege or public interest immunity be dealt with?
- what would happen in relation to remedies for continuing offences and remedies against offences directed at potential future proceedings, in the absence of the current parliamentary power of committal?

5.9 Mr Evans concluded that these considerations support the preservation of the current parliamentary power of committal for contempt, as a reserve power, even in the presence of statutory prescription of criminal offences corresponding to contempts.<sup>28</sup>

5.10 The Select Committee notes that the retention of the penal jurisdiction by Parliament allows for timely action regarding a breach of privilege or contempt of Parliament.

## **6 CONCURRENT JURISDICTION**

6.1 The relationship between the courts and Parliament is defined by the principle of separation of powers. The Parliament is sovereign over its own business. The courts have a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and immunities, but they do not have power to regulate and control how Parliament shall conduct its business. Parliament in turn is careful not to interfere with the way judges discharge their judicial responsibilities. Parliament enacts the law, but the courts are then left to interpret and administer it without interference from Parliament.<sup>29</sup>

6.2 In Western Australia this relationship has been complicated by the existence of a concurrent or overlapping jurisdiction between the Parliament and the courts, which has resulted from the inclusion of certain contempts of Parliament as statutory offences in *The Criminal Code*.

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<sup>28</sup> Submission No 5 from the Australian Senate, 27 January 2009, p4.

<sup>29</sup> United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 1, para 23.

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- 6.3 Under *The Criminal Code* conduct that constitutes a contempt of Parliament is also a statutory offence administered by the courts. Parliament therefore, does not have exclusive jurisdiction over these matters.
- 6.4 The relevant offences contained in *The Criminal Code* are:
- s 55: Interference with the legislature;
  - s 56: Disturbing Parliament;
  - s 57: False evidence before Parliament;
  - s 58: Threatening witness before Parliament;
  - s 59: Witnesses refusing to attend or give evidence before Parliament;
  - s 60: Member of Parliament receiving bribes; and
  - s 61: Bribery of member of Parliament.
- 6.5 The Select Committee notes some of the issues raised by a concurrent jurisdiction, including the extent to which the approval or consent of Parliament is required before a prosecution may be initiated in the courts, and the question of double punishment, where the same contempt may be punished by both a House and the courts.
- 6.6 This concurrent jurisdiction conflicts with the fundamental parliamentary privilege of freedom of speech embodied in Article 9 of the *Bill of Rights 1689* (UK) and also with the general principles of common law regarding the ability of courts to intervene in parliamentary proceedings, which include that:
- it is for the courts to determine the powers of a Parliament but for the Parliament to determine the appropriate exercise of such powers;
  - Parliament has exclusive jurisdiction to determine the law regarding its internal proceedings as long as such determinations do not cause substantive violations of individual rights; and
  - as far as possible, the courts will resolve disputes without ruling on the validity of parliamentary proceedings.
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- 6.7 How then, can offences such as wilfully giving false evidence to the House or a committee (s57, *The Criminal Code*) be effectively prosecuted, given the restrictions on questioning the proceedings of Parliament in a court? Prosecutions under sections 57 and 58 of *The Criminal Code* create problems for the court because in order to mount a prosecution the court will need access to material that is subject to parliamentary privilege. This means it is available for a defendant to argue that the use of certain evidence in any court proceedings would breach parliamentary privilege.
- 6.8 The Select Committee notes that it has been previously suggested that *The Criminal Code* provisions constitute an abrogation of parliamentary privilege by virtue of the interpretive rule of necessary implication.<sup>30</sup> This is because the court could only effectively prosecute such an offence if it had access to parliamentary records, and the ability to question the truth of statements made in those records.
- 6.9 These problems can be alleviated by removing a number of these offences from *The Criminal Code*.
- 6.10 The Select Committee is of the view that a number of the relevant offences relate to matters which directly concern the internal operations of the Parliament, and for which any inquiry or prosecution would often involve the questioning of parliamentary proceedings. Accordingly, the Select Committee proposes that the following offences be repealed from *The Criminal Code*:
- s55: Interference with the legislature
  - s56: Disturbing Parliament
  - s57: False evidence before Parliament
  - s58: Threatening witness before Parliament
  - s59: Witnesses refusing to attend or give evidence before Parliament
- 6.11 The remaining two offences deal with *inter alia* bribery and Members of Parliament. The nature of the offences outlined in ss60 and 61 of *The Criminal Code* are such that the investigation and prosecution of many relevant allegations would not require the examination of parliamentary proceedings, and therefore not infringe upon parliamentary privilege. However, there may be other instances where parliamentary privilege would arguably constrain such an investigation or prosecution.

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<sup>30</sup> Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, *Report*, November 2007, p38.

6.12 The serious nature of these offences is such that the Select Committee considers it preferable that these matters are dealt with by the courts, consistent with other bribery offences relating to public officers<sup>31</sup>. The retention of these offences in *The Criminal Code*, and the consequent maintenance of a concurrent jurisdiction in relation to these offences, would allow matters to be dealt with by the courts where parliamentary proceedings are not required to support an investigation or prosecution, or otherwise by the Parliament where parliamentary privilege precludes such action.

6.13 Accordingly, the Select Committee is of the view that the following offences remain in *The Criminal Code*:

- s60: Member of Parliament receiving bribes
- s61: Bribery of member of Parliament

**Recommendation 2: The Committee recommends that sections 55, 56, 57, 58 and 59 of *The Criminal Code* be repealed.**

## 7 PENALTIES

7.1 The Select Committee considered each of the penalties available to the Western Australian Parliament for breaches of privilege and contempts of Parliament against the following criteria:

- its appropriateness for the efficient working of Parliament; and
- if the penalty is considered inappropriate, what changes are considered necessary.

### Current penalties

7.2 The penalties available to the Western Australian Parliament, by virtue of s1 of the *Parliamentary Privileges Act 1891* for breaches of privilege and contempt of Parliament are:

- Imprisonment.
- Reprimand and admonishment: By the Speaker or President of a Member standing in his/her place or a private individual at the bar of the House.

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<sup>31</sup> Section 82, *The Criminal Code*.

- Censure: A censure motion may be put in relation to Members and private individuals.
- Suspension of a Member.
- Suspension of a Member without pay: It is uncertain whether the *Salaries and Allowances Act 1975* has by implication, abrogated the power of the Houses' to suspend Members without pay or whether this power is retained by virtue of s1 of the *Parliamentary Privileges Act 1891* and the powers of the United Kingdom House of Commons.
- Expulsion of a Member.
- Requirement for an apology, either in writing or in person: by a Member standing in his/her place or a private individual at the bar of the House.
- Exclusion from the parliamentary precincts.
- Disqualification of a Member from membership from any parliamentary committee for the remainder of a session.
- Prohibition from petitioning parliament without the consent of the House.

*Offences which are punishable by fine or imprisonment (s8, Parliamentary Privileges Act 1891)*

- 7.3 The Western Australian Parliament has a limited scope to fine persons. The United Kingdom House of Commons does not have an express power to fine.<sup>32</sup>
- 7.4 In Western Australia there is a limited statutory power to fine for the following offences, as provided in s8 of the *Parliamentary Privileges Act 1891*:

**8. *Houses empowered to punish summarily for certain contempts***

*Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing*

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<sup>32</sup> The United Kingdom House of Commons used to have power to fine. This power was last used in 1666. This power is now regarded as lapsed. United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 6, para 272.



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*session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person -*

*Disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid.*

*Refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid.*

*The assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House.*

*The sending to a member any threatening letter on account of his behaviour in Parliament.*

*The sending a challenge to fight a member.*

*The offering of a bribe to, or attempting to bribe a member.*

*The creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.*

- 7.5 If fines for contempt under s8 of the *Parliamentary Privileges Act 1891* are not paid, imprisonment may be enforced under warrant of the Speaker or President.<sup>33</sup>

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<sup>33</sup>

Section 9, *Parliamentary Privileges Act 1891*.

## Imprisonment

- 7.6 Imprisonment is the ultimate power possessed by the House to enforce its privileges. In Western Australia, the Parliament can imprison a person for contempt but only for a period not exceeding the current session of the Parliament. Where the House considers that an offender who has been released at the end of a session has not been sufficiently punished he may be again imprisoned in the next session and detained until the House is satisfied.<sup>34</sup>
- 7.7 The imprisonment of Mr Brian Easton by the Legislative Council in 1995 was carried out under the inherent power of the Legislative Council by virtue of s1 of the *Parliamentary Privileges Act 1891*.
- 7.8 There has been only one other instance where the Western Australian Parliament's power to imprison has been used. In 1904 Mr John Drayton, editor of the *Kalgoorlie Sun*, was imprisoned following his failure to pay a fine for contempt of Parliament.
- 7.9 The Select Committee notes that the 1976-77 United Kingdom House of Commons Committee of Privileges recommended that the power to imprison should be abolished if a sanction of fine was available.<sup>35</sup> The 1999 United Kingdom Joint Committee on Parliamentary Privilege also recommended that the power to imprison be abolished:

324. *We recommend as follows:*

...

2. *Parliament's power to imprison persons, whether members or not, who are in contempt of Parliament should be abolished, save that the Parliament should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament.*<sup>36</sup>

- 7.10 The Select Committee supports the approach of the 1999 United Kingdom Joint Committee on Parliamentary Privilege, notwithstanding that this view has not been adopted by the United Kingdom Parliament. Parliament does not need the power to imprison, except for the purpose of maintaining order and preserving security, for example, the temporary detainment of a person disrupting the proceedings of Parliament either in the legislative chamber, or a place in which a parliamentary committee is meeting.

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<sup>34</sup> C.J. Boulton (Ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st ed, 1989, p109.

<sup>35</sup> United Kingdom House of Commons, Third Report from the Committee of Privileges, *Recommendations of the Select Committee on Parliamentary Privilege*, London, 14 June 1977, px.

<sup>36</sup> United Kingdom, Joint Committee on Parliamentary Privilege, *First Report*, 30 March 1999, Chapter 6, para 324(2).

- 7.11 The Select Committee is of the view that the sanction of imprisonment in the present day is no longer necessary or appropriate to uphold the privileges of Parliament. It is rarely used and it has only been used in the past in Western Australia due to a lack of a suitable alternative penalty, such as a wider power to fine.
- 7.12 Imprisonment should be available only to a court of law.
- 7.13 The Select Committee considers that if the Western Australian Parliament has a broader power to fine (see paragraphs 7.14 to 7.19), then the power to imprison should be abolished.

**Recommendation 3: The Committee recommends that, subject to the adoption of Recommendation 4, the power of the Western Australian Parliament to imprison be abolished, save that the Parliament should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament.**

#### **Power to fine**

- 7.14 As stated above, currently the Western Australian Parliament has a limited statutory power to fine in certain circumstances, as provided by s8 of the *Parliamentary Privileges Act 1891* (see paragraph 7.4).
- 7.15 The Select Committee notes that the 1967 United Kingdom House of Commons Select Committee on Parliamentary Privilege and the 1976-77 United Kingdom House of Commons Committee of Privileges recommended that legislation should be introduced to enable the House of Commons to impose fines.<sup>37</sup>
- 7.16 The 1967 United Kingdom House of Commons Select Committee on Parliamentary Privilege stated the following regarding the use of fines as a penalty:

*Your Committee further consider that the penal jurisdiction of the House is unnecessarily handicapped by the absence of any power to impose a fine. They take the view that the type of contempt likely to be committed in modern times can often best be dealt with by a fine and that the power to impose a fine would resolve the dilemma which may on occasions face the House that a mere rebuke appears to be inadequate penalty whilst imprisonment would be unnecessarily*

<sup>37</sup>

No action has been taken to implement these recommendations.

*harsh. It is moreover the only penalty which can be imposed upon a limited company or other corporate body.*<sup>38</sup>

- 7.17 The Select Committee notes that both the Commonwealth Parliament and the Queensland Parliament have the statutory authority to fine for any contempt of Parliament.<sup>39</sup>
- 7.18 The Select Committee is of the view that the Western Australian Parliament should have the capacity to fine in any circumstance and for any amount in respect to a breach of privilege or contempt. The imposition of a financial penalty is commonly used as a disciplinary sanction and it should be available to the Parliament.
- 7.19 The fine should be treated under legislation as a debt due to the Parliament. In the event that the fine is unpaid, this should be dealt with in accordance with the processes of debt recovery through the courts.

**Recommendation 4: The Committee recommends that the *Parliamentary Privileges Act 1891* be amended to provide that the Western Australian Parliament may impose a fine for any amount it believes appropriate in relation to any breach of privilege or contempt of Parliament.**

### **Suspension without pay**

- 7.20 The Select Committee is of the view that the power of the Parliament to suspend a member from the House for any period up until the end of the current session, together with the proposed capacity to fine an individual (including Members) any amount the House deems appropriate, would provide sufficient sanction for Parliament to impose upon a Member if he/she is found guilty of a serious breach of privilege or contempt of Parliament.
- 7.21 The Select Committee therefore does not consider it is necessary to provide a separate capacity for the House to suspend a member without pay, nor resolve the question of whether that penalty currently exists (see paragraph 7.2).

### **Expulsion of a Member**

- 7.22 The power of expulsion of a Member is a penalty reserved for the most serious of offences committed by a Member. This sanction has never been imposed upon a Member of the Western Australian Parliament.

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<sup>38</sup> United Kingdom House of Commons, *Report from the Select Committee on Parliamentary Privilege*, London, 1 December 1967, pxlvii.

<sup>39</sup> Section 7, *Parliamentary Privileges Act 1987* (Cth) and s40, *Parliament of Queensland Act 2001*.

- 7.23 Erskine May states that expulsion is not so much to punish Members as to rid the House of persons who are unfit for membership. It may be regarded as an example of the House's power to regulate its own constitution as well as a method of punishment available to the House. In the United Kingdom House of Commons, Members have been expelled as being in open rebellion; as having been guilty of forgery; of perjury; of frauds and breaches of trust; of misappropriation of public money; of conspiracy to defraud; of fraudulent conversion of property; of corruption in the administration of justice, or in public offices, or in the execution of their duties as Members; of conduct unbecoming the character of an officer and a gentleman; and of contempts, libels and other offences committed against the House itself.<sup>40</sup>
- 7.24 The Select Committee notes that the 1984 Commonwealth Joint Select Committee on Parliamentary Privilege recommended that the power to expel a Member be abolished. That Committee noted that the Commonwealth Constitution contained detailed provision for disqualification from being or remaining a Member of Parliament and that on the one occasion that the power of expulsion was exercised by the Federal Parliament, the decision was made on party lines, thus highlighting the potential for abuse of the power.<sup>41</sup>
- 7.25 The Select Committee notes that the Commonwealth Parliament has abolished its ability to expel a Member of Parliament from membership of a House.<sup>42</sup>
- 7.26 The Select Committee is of the view that it is for the electors to determine who should be a Member of Parliament, rather than the Houses themselves. Further, provisions exist under the *Constitution Acts Amendment Act 1899* for the disqualification of membership, if a Member is bankrupt or has been convicted of an offence for which the penalty was or included imprisonment for more than 5 years or for life.<sup>43</sup>
- 7.27 The Select Committee is of the view that the power to suspend a Member from the House for any period up until the end of the current session, and the ability to fine up to an unlimited amount, would provide sufficient sanction for Parliament to impose upon a Member if he/she is found in breach of privilege or contempt of Parliament. The penalty of expulsion of a Member, therefore, should be abolished.

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<sup>40</sup> C.J. Boulton (Ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 21<sup>st</sup> ed, 1989, pp112-113.

<sup>41</sup> In 1920 Mr Hugh Mahon, a Member of the House of Representatives, was expelled for what were said to be "seditious and disloyal utterances" made outside of the House, making him, in the judgment of the House, unfit to remain a Member. Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, p96, pp121-127.

<sup>42</sup> Section 8, *Parliamentary Privileges Act 1987*.

<sup>43</sup> Section 32, *Constitution Acts Amendment Act 1899*.

**Recommendation 5: The Committee recommends that, subject to the adoption of Recommendation 4, the power of the Western Australian Parliament to expel a Member be abolished.**

### Exclusion from the parliamentary precinct

- 7.28 Parliament controls its own precinct. The Parliament can make an order that prohibits access by non-members to the parliamentary precinct. This penalty is also imposed on a Member in conjunction with a suspension.
- 7.29 Unlike other jurisdictions, Western Australia has not enacted legislation to define the extent of the parliamentary precinct.<sup>44</sup> The Western Australian parliamentary precinct is currently set out in a Planning Bulletin published by the Metropolitan Region Planning Authority.<sup>45</sup>
- 7.30 The Select Committee believes that the parliamentary precinct of the Western Australian Parliament should be clearly defined by statute, with provision that minor or temporary changes can be made to what constitutes the parliamentary precinct, ‘as from time to time’.

**Recommendation 6: The Committee recommends that the parliamentary precinct of the Western Australian Parliament be clearly defined by statute.**

### Penalties to remain unchanged

- 7.31 The Select Committee is of the view that the following penalties are appropriate and should be maintained:
- reprimand and admonishment by the President/Speaker;
  - censure motion debated by the House;
  - suspension of a Member;
  - apology and withdrawal of the spoken word;

<sup>44</sup> For example, *Parliamentary Precincts Act 1997* (NSW), *Parliamentary Precincts Act 1988* (Cth), *Parliamentary Precincts Act 2001* (Vic), *Parliamentary Service Act 1988* (Qld).

<sup>45</sup> The Metropolitan Region Planning Authority, *Planning Bulletin*, Perth Western Australia, November 1981.

- exclusion from the parliamentary precinct;
- Member disqualified from membership of any parliamentary committee for the remainder of the session; and
- prohibition from petitioning Parliament without the consent of the House.



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**Hon Nick Griffiths MLC**

**Chairman**

**7 May 2009**





# APPENDIX 1

## LIST TO WHOM THE SELECT COMMITTEE WROTE<sup>46</sup>

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Name	Position
Senator the Hon John Hogg MP	President of the Senate Parliament of Australia
Mr Harry Evans	Clerk of the Senate Parliament of Australia
Hon Harry Jenkins, MP	Speaker of the House of Representatives Parliament of Australia
Mr Ian Harris	Clerk of the House of Representatives Parliament of Australia
Hon Shane Rattenbury MLA	Speaker of the Legislative Assembly Parliament of the Australian Capital Territory
Mr Tom Duncan	Clerk of the Legislative Assembly Parliament of the Australian Capital Territory
Hon Jane Aagaard MLA	Speaker of the Legislative Assembly Legislative Assembly of the Northern Territory
Mr Ian McNeill	Clerk Legislative Assembly of the Northern Territory
Hon Sue Smith MLC	President of the Legislative Council Parliament of Tasmania
Mr David Pearce	Clerk of the Legislative Council Parliament of Tasmania
Hon Michael Polley MP	Speaker of the House of Assembly Parliament of Tasmania

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<sup>46</sup> Letters sent 12 December 2008.

<b>Name</b>	<b>Position</b>
Mr Peter Alcock	Clerk of the House of Assembly Parliament of Tasmania
Hon Peter Primrose MLC	President of the Legislative Council Parliament of New South Wales
Ms Lynn Lovelock	Clerk of the Legislative Council Parliament of New South Wales
Hon Richard Torbay MP	Speaker of the Legislative Assembly Parliament of New South Wales
Mr Russell Grove	Clerk of the Legislative Assembly Parliament of New South Wales
Hon Bob Sneath MLC	President of the Legislative Council Parliament of South Australia
Mrs Jan Davis	Clerk of the Legislative Council Parliament of South Australia
Hon Jack Snelling MLA	Speaker of the House of Assembly Parliament of South Australia
Mr Malcolm Lehman	Clerk of the House of Assembly Parliament of South Australia
Hon Bob Smith MLC	President of the Legislative Council Parliament of Victoria
Mr Wayne Tunnecliffe	Clerk of the Legislative Council Parliament of Victoria
Hon Jenny Lindell MLA	Speaker of the Legislative Assembly Parliament of Victoria
Mr Ray Purdey	Clerk of the Legislative Assembly Parliament of Victoria
Hon Michael Reynolds MP	Speaker of the Legislative Assembly Parliament of Queensland

<b>Name</b>	<b>Position</b>
Mr Neil Laurie	Clerk of the Parliament Parliament of Queensland
Hon Margaret Wilson MP	Speaker of the House of Representatives Parliament of New Zealand
Ms Mary Harris	Clerk of the House of Representatives Parliament of New Zealand
Rt Hon the Baroness Hayman	Lord Speaker of the House of Lords Parliament of the United Kingdom
Mr Michael Pownall	Clerk of the Parliaments Parliament of the United Kingdom
The Rt Hon Michael Martin MP	Speaker of the House of Commons Parliament of the United Kingdom
Mr Malcolm Jack PhD	Clerk of the House of Commons Parliament of the United Kingdom
Mr Alex Ferguson MSP	Presiding Officer Parliament of Scotland
Mr Paul Grice	Clerk Parliament of Scotland
Rt Hon Lord Dafydd Elis-Thomas PC AM	Presiding Officer National Assembly for Wales
Ms Claire Clancy	Chief Executive and Clerk National Assembly for Wales
Senator the Honourable Noel Kinsella	Speaker of the Senate Parliament of Canada
Mr Paul C. Belisle B.SC.SOC., LL.L.	Clerk of the Senate and Clerk of the Parliaments Parliament of Canada
Hon Peter Milliken MP	Speaker of the House of Commons Parliament of Canada

<b>Name</b>	<b>Position</b>
Ms Audrey O'Brien	Clerk of the House of Commons Parliament of Canada
Professor Geoffrey Lindell	Academic
Professor Enid Campbell	Academic
Professor Gerard Carney	Academic
Mr John Waugh	Academic
Mr Robert Cock QC	Director of Public Prosecutions for Western Australia
Hon Wayne Martin	Chief Justice of Western Australia
Mr David Price	Chief Executive Officer The Law Society of Western Australia

## **APPENDIX 2**

### **LIST OF CONTEMPTS**

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Matters found to be contempts by the United Kingdom House of Commons include:

- interrupting or disturbing the proceedings of, or engaging in other misconduct in the presence of, the House or a committee;
- assaulting, threatening, obstructing or intimidating a Member or officer of the House in the discharge of the Member's or officer's duty;
- deliberately attempting to mislead the House or a committee (by way of statement, evidence or petition);
- deliberately publishing a false or misleading report of the proceedings of a House or a committee;
- removing, without authority, papers belonging to the House;
- falsifying or altering any papers belonging to the House or formally submitted to a committee of the House;
- deliberately altering, suppressing, concealing or destroying a paper required to be produced for the House or a committee;
- without reasonable excuse, failing to attend before the House or a committee after being summoned to do so;
- without reasonable excuse, refusing to answer a question or provide information or produce papers formally required by the House or a committee;
- without reasonable excuse disobeying a lawful order of the House or a committee;
- interfering with or obstructing a person who is carrying out a lawful order of the House or a committee;
- bribing or attempting to bribe a Member to influence the Member's conduct in respect of proceedings of the House or a committee;
- intimidating, preventing or hindering a witness from giving evidence or giving evidence in full to the House or a committee;

- bribing or attempting to bribe a witness;
- assaulting, threatening or disadvantaging a Member, or former Member, on account of the Member's conduct in Parliament;
- divulging or publishing the content of any report or evidence of a select committee before it has been reported to the House;
- In the case of a Member, accepting a bribe intended to influence a Member's conduct in respect of proceedings of the House or a committee;
- in the case of a Member, acting in breach of any orders of the House; and
- in the case of a Member, failing to fulfil any requirement of the House, as declared in a code of conduct or otherwise, relating to the possession, declaration, or registration of financial interests or participation in debate or other proceedings.

# LEGISLATIVE COUNCIL



6 June 2008

 **COPY**

Mr Robert Cock QC  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
Level 1  
International House  
26 St Georges Terrace  
**PERTH WA 6000**

Dear Mr Cock

**Referral of Matters by the Legislative Council: section 57 of the *Criminal Code*  
Establishment of a Select Committee into the Powers and Penalties provided for in the  
*Parliamentary Privileges Act 1891* and *The Criminal Code***

I am again following up on the referral to you with regard to your assessment as to whether any of a number of identified persons should be prosecuted for a breach of section 57 of the *Criminal Code*, which arose out of the report of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations.

I advise that yesterday the House resolved to establish a Select Committee in the following terms:

That a select committee of 5 members be appointed to -

- (1) Inquire into and report on the appropriateness of the powers and penalties provided for in the *Parliamentary Privileges Act 1891* and *The Criminal Code* in respect to breaches of parliamentary privilege and contempt of parliament.
- (2) The committee is to report to the Houses no later than 9 September 2008.

It would be preferable to have an indication as to whether charges will proceed before this Select Committee reports on the provisions of *The Criminal Code* in respect of parliamentary privilege.

I advise I have received no written correspondence from your office with regard to an update on this referral. I urge you to give this matter your earnest consideration in order for me to advise the committee if they should report on this part of the inquiry.

Please do not hesitate to contact me on 9222 7214 if you have any queries.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'M Peacock', written in a cursive style.

**Malcolm Peacock**  
Clerk of the Legislative Council



# LEGISLATIVE COUNCIL



11 April 2008

 **COPY**

Mr Robert Cock QC  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
Level 1  
International House  
26 St Georges Terrace  
**PERTH WA 6000**

Dear Mr Cock

**Referral of Matters by the Legislative Council: section 57 of the *Criminal Code***

I refer to my letters dated 6 December 2007 and 20 February 2008, and our meetings, with regard to the Legislative Council's referral to you of various matters contained in the report of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations.

My letter to you of 20 February 2008 requested an update on the progress of these referrals. At this stage I have received no correspondence from your office and would appreciate receiving information regarding the status of these issues.

In summary, the matters referred involved your assessment as to whether any of a number of identified persons should be prosecuted for a breach of section 57 of the *Criminal Code*.

Please do not hesitate to contact me on 9222 7214 if you have any queries.

Yours sincerely

**Malcolm Peacock**  
Clerk of the Legislative Council

# LEGISLATIVE COUNCIL



20 February 2008

 **COPY**

Mr Robert Cock QC  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
Level 1  
International House  
26 St Georges Terrace  
**PERTH WA 6000**

Dear Mr Cock

## **Referral of Matters by the Legislative Council**

I refer to my letter dated 6 December 2007, and to our subsequent meetings regarding the Legislative Council's referral to you of various matters contained in the report of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations.

In summary, the matters referred involved your assessment as to whether any of a number of identified persons should be prosecuted for a breach of section 57 of the *Criminal Code*.

As the Legislative Council has now commenced its sittings for 2008, I would appreciate an update on the progress of your consideration of the matters referred.

Please contact me on 9222 7214 if you have any queries and/or to arrange for a further meeting.

Yours sincerely

**Malcolm Peacock**  
Clerk of the Legislative Council





## LEGISLATIVE COUNCIL CHAMBERS



Mr Robert Cock QC  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
Level 1  
International House  
26 St Georges Terrace  
PERTH WA 6000

6 December 2007

Dear Mr Cock

### **Referral of Matters by the Legislative Council**

On 13 November 2007 the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations (**Select Committee**) reported to the Legislative Council (see enclosed report).

Amongst the Select Committee's findings were that a number of witnesses had given false evidence to the Select Committee during its hearings. The Select Committee recommended (at Recommendations 2, 5, 8, 12 and 15) that the Legislative Council direct the Attorney General under s 15 of the *Parliamentary Privileges Act 1891* to assess the false evidence of those witnesses and to commence proceedings under s 57 of the *Criminal Code* where appropriate.

Based on the Government's legal advice and general concerns about the appropriateness of the Attorney General assessing the evidence, the Legislative Council resolved the following on 4 December 2007:

*[N]oting the findings of the Select Committee in recommendations 2, 5, 8, 12 and 15, the House refers the recommendations to the Director of Public Prosecutions to assess whether any of the persons concerned should be prosecuted for a breach of section 57 of the Criminal Code and if of that view to commence such prosecution or prosecutions.*

It should be noted that all of the evidence gathered by the Select Committee, including hearing transcripts and documents, was taken in private and remains private except to the extent that it is disclosed either in the Select Committee's report or by order of the Legislative Council. To facilitate the provision of the Select Committee's private evidence to your Office, the Legislative Council further resolved on 4 December 2007 that:

*[N]oting recommendation 35 [of the Select Committee report], the House authorises the limited disclosure or publication of the evidence received by the Committee to the Director of Public Prosecutions to the extent necessary or expedient so as to enable the Director of Public Prosecutions to assess any false evidence given to the Committee and, if appropriate, to conduct any prosecutions under section 57 of the Criminal Code.*

In light of the resolutions of the Legislative Council, I suggest that a meeting be arranged to discuss the nature of the evidence gathered by the Select Committee, and the requirements of your Office in undertaking the matters referred.

Please contact me on 9222 7214 if you have any queries and/or to arrange a suitable meeting time.

Yours sincerely



**Malcolm Peacock**

Clerk of the Legislative Council

Enc: Report of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations



COPY

Hon Barry House MLC

16 February 2011

Mr Joseph McGrath  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
Level 1 International House  
26 St Georges Terrace  
PERTH WA 6000

Dear Mr McGrath

On 9 November 2010, I wrote to you seeking a formal response from your office regarding the resolution passed by the Legislative Council referring matters to the Director of Public Prosecution for assessment of potential prosecution under s57 of *The Criminal Code*. This letter followed previous correspondence from the Clerk (copies attached).

To date, I have not received a response to my request. As you are aware this matter was referred in 2007. This is very unsatisfactory. If a formal response is not received within the next 4 weeks I propose to make a Statement to the Legislative Council and table the correspondence.

Yours sincerely

**Hon. Barry House**  
President of the Legislative Council

Att:  
A283995



Hon Barry House MLC

9 November 2010

Mr Joseph McGrath  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
Level 1 International House  
26 St Georges Terrace  
PERTH WA 6000

Dear Mr McGrath,

On 6 December 2007, the Clerk of the Legislative Council wrote to your predecessor, Mr Robert Cock QC, advising him of a resolution passed by the Legislative Council referring matters to the Director of Public Prosecutions for assessment of potential prosecution under s57 of *The Criminal Code*. Please find attached a copy of that correspondence.

The Clerk subsequently met with Mr Cock, and further wrote to him on 20 February 2008, 11 April 2008 and 6 June 2008. Please find attached copies of this correspondence.

To date, the Legislative Council has not received a formal response from your office regarding this matter. As this reference arose pursuant to a resolution of the House, it is unsatisfactory that this matter remains outstanding. Accordingly, I would appreciate your prompt response to this correspondence, in order that I may advise the House of what action, if any, your office will be taking in regards to the reference by the Legislative Council on 4 December 2007.

If you have any queries associated with this correspondence, please contact the Acting Clerk of the Legislative Council, Nigel Lake, on 9222-7214.

Yours sincerely

HON. BARRY HOUSE MLC  
PRESIDENT OF THE LEGISLATIVE COUNCIL

Attachments: Letters from Clerk to DPP dated 6 June 2008, 11 April 2008, 20 February 2008 and 6 December 2007

## Grant, Paul

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From: Grant, Paul  
Sent: Wednesday, 20 February 2008 11:00 AM  
To: Peacock, Malcolm  
Subject: Re: DPP



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Hi Malcolm,

Draft letter attached.

Regards,

Paul

>>> Malcolm Peacock 20/02/2008 8:26 am >>>

Paul

I have not had any communication with the DPP since we last met. Could you prepare a follow up letter to the DPP seeking an update on the referral?

Thanks

Malcolm Peacock

Clerk of the Legislative Council

Parliament House, Perth, Western Australia Phone (+618) 92227384

## Grant, Paul

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**From:** Grant, Paul  
**Sent:** Thursday, 24 April 2008 3:54 PM  
**To:** Peacock, Malcolm; Lake, Nigel  
**Subject:** Conversation with Robert Cock

Hi Malcolm/Nigel,

I just spoke on the phone with Robert Cock.

He apologises profusely for the delay in responding to us. He is putting something in writing to us in the next week or so, but gave me a heads up on his views of the likelihood of successful prosecutions against Hon Shelley Archer and Hon Anthony Fels, et al.

Basically it doesn't look good. He has concerns about the admissability into evidence in the courts of the CCC intercepted evidence. Apparently under the Cth telecommunications legislation such CCC intercept evidence may only be tendered as evidence in a court against a public sector "officer", and he does not think that a Member of Parliament would fall within the definition - according to his senior prosecutors, at best it is "arguable".

As discussed with Nigel, Robert did not go into whether parliamentary privilege and the intercepts' status as "committee evidence" affects the applicability of the Cth legislation in this situation.

What Robert proposes to do is meet with us in about 3-4 weeks' time. In approximately three weeks there will be a false evidence trial on behalf of the CCC against a public servant and the relevant provisions of the Cth legislation may get a good airing in the Supreme Court. He also noted that pending CCC false evidence prosecutions against Brian Burke and Julian Grill are directly relevant to this same issue as to whether someone who is not a public sector officer can be convicted of false evidence in relation to CCC telecommunication intercepts. He also noted that Malcolm McCusker's latest report also queries whether any such prosecution could succeed.

The upshot is that Robert Cock is not currently prepared to recommend prosecution without some high level guidance from the courts on the relevant Cth legislative provisions.

Regards,

Paul



## Grant, Paul

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**From:** Grant, Paul  
**Sent:** Wednesday, 21 May 2008 9:25 AM  
**To:** Peacock, Malcolm  
**Subject:** Re: Intercepts

Hi Malcolm,

Yes, I think that is the case.

Mike Allen was clearly "a public officer" and so the Court was always going to accept the intercept evidence. The DPP was, however, hoping that the Court would make some comments in passing about whether intercept evidence would be accepted for persons other than "public officers".

The CCC cases against Burke and Grill and our referred cases depend on whether non-public officers can be prosecuted with intercept evidence.

Regards,

Paul

>>> Malcolm Peacock 21/05/2008 8:25 am >>>  
Paul

I assume the Mike Allen case is what the DPP was referring to the other day in regards to the use of intercept material before the court. If so I also assume the intercept material has been allowed as evidence. If so the DPP so be in a position to advise if the other persons will be prosecuted?

Malcolm Peacock  
Clerk of the Legislative Council  
Parliament House, Perth, Western Australia Phone (+618) 92227384



Your Ref: SELECT COMMITTEE REFERRAL 2007:BF:yab  
Our Ref: A283995

Mr Bruno Fiannaca SC  
Deputy Director of Public Prosecutions  
Office of the Director of Public Prosecutions for Western Australia  
Level 1  
26 St Georges Terrace  
PERTH WA 6000

9 August 2011

Dear Mr Fiannaca

**Referral from the Legislative Council for Assessment of Potential Prosecution under s.57 of the *Criminal Code***

Thank you for your letter of 29 July 2011, addressed to the President of the Legislative Council.

I note the reasons that you have now provided, at some length, as to why prosecutions in relation to the referred matters would not be in the public interest, particularly given both the practical evidential obstacles and the expressed view of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament (2008-09) as to the concurrent jurisdiction established by the *Criminal Code*.

I note that in your letter you have forwarded on an apology from the former Director, Mr Cock, regarding the lack of a written response to the referral from me on 6 December 2007. I wish to clarify, however, that at no stage did I receive either oral advice or a message from Mr Cock to the effect that he would not be prosecuting any or all of the matters that I had referred to him.

The only verbal updates that I have received from Mr Cock were in relation to the progress of various ongoing prosecutions relating to false evidence before the Corruption and Crime Commission and the use of telephone intercept evidence. It was conveyed to me by Mr Cock that the outcomes in such cases may have a bearing on his decision to prosecute the referred matters.

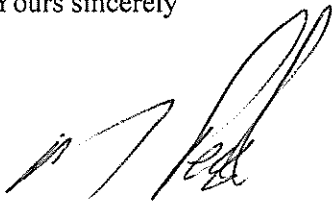
Mr Cock's submission to the 2008-09 Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament was addressed solely to that Committee. That Committee was concerned with the powers of Parliament generally, and did

not consider specific cases, such as the referred matters from the 2007 Select Committee of Privilege. I was not a staff member on the 2008-09 Select Committee and that Committee did not refer Mr Cock's submission (or any other submission it received) on to me. In any event, I understand Mr Cock's submission to have been in general terms relating to practical difficulties posed by the concurrent jurisdiction created by the *Criminal Code*, and not the specifics of the matters referred in 2007.

I further note that there have been repeated written and verbal requests from my office to the Office of the Director seeking updates on the referred matters from early 2008 up until earlier this year.

Accordingly, I wish to record that your letter is the first occasion in which Mr Cock's view as to the inappropriateness of prosecutions in the referred matters has been conveyed to me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Peacock', with a stylized flourish at the end.

**Malcolm Peacock**  
Clerk of the Legislative Council