

**PUBLIC**

**DIRECTOR OF PUBLIC PROSECUTIONS**  
for WESTERN AUSTRALIA

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**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I think that Western Australia should adopt the recent approach taken by the Queensland Parliament in 2006 when it repealed the corresponding provisions (ss. 57-59) of the *Criminal Code* (Qld)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*.



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