



THIRTY-NINTH PARLIAMENT

REPORT 39

**STANDING COMMITTEE ON PROCEDURE AND
PRIVILEGES**

**REFERENCE FROM THE HOUSE ON
25 FEBRUARY 2015; STANDING ORDER 97:
STRANGERS IN THE COUNCIL; AND STANDING
ORDER 181: WITNESSES' ENTITLEMENTS**

Presented by Hon Barry House MLC (Chair)

June 2016

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Date first appointed: 24 May 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“1. Procedure and Privileges Committee

- 1.1 *A Procedure and Privileges Committee* is established.
- 1.2 The Committee consists of 5 Members, including the President and the Chair of Committees, and any Members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chair, and the Chair of Committees is the Deputy Chair, of the Committee.
- 1.3 With any necessary modifications, SO 163 applies to a co-opted Member.
- 1.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the Council and its Committees, and recommend to the Council such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the Council or its Committees.”

Members as at the time of this inquiry:

Hon Barry House MLC (Chair)

Hon Adele Farina MLC (Deputy Chair)

Hon Martin Aldridge MLC

Hon Kate Doust MLC

Hon Nick Goiran MLC

Staff as at the time of this inquiry:

Nigel Pratt (Clerk of the Legislative Council) Paul Grant (Deputy Clerk)

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REPORT OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

REFERENCE FROM THE HOUSE ON 25 FEBRUARY 2015; STANDING ORDER 97: STRANGERS IN THE COUNCIL; AND STANDING ORDER 181: WITNESSES' ENTITLEMENTS

1 REFERENCE AND PROCEDURE

- 1.1 On 20 June 2016 the *Procedure and Privileges Committee* (“the PPC”) met to discuss a number of items referred to the Committee.
- 1.2 This report canvasses the PPC’s deliberations and recommendations in relation to the —
- Reference from the House on 25 February 2015;
 - Standing Order 97: Strangers in the Council; and
 - Standing Order 181: Witnesses’ Entitlements

2 REFERENCE FROM THE HOUSE ON 25 FEBRUARY 2015 — RECOMMENDATIONS 2(A) AND 2(C) CONTAINED IN REPORT NO. 29 OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Background

- 2.1 On 25 February 2015 the House considered Recommendations 1 and 2 contained in the *Procedure and Privileges Committee Report No. 29 — Review of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament*.
- 2.2 The House agreed to Recommendation 1 which was to acquaint the Legislative Assembly’s *Procedure and Privileges Committee* (“the LA PPC”) with the report. The corresponding report from the LA PPC was tabled in the Legislative Assembly on 25 November 2015.¹
- 2.3 With respect to Recommendation 2, the House agreed to recommendations 2(b) and 2(d), and resolved the following motion in relation to recommendations 2(a) and 2(c):

That Recommendations 2(a) and 2(c) contained in Report No. 29 of the Standing Committee on Procedure and Privileges, Review of the Report of the Select Committee into the Appropriateness of Powers

¹ Legislative Assembly Standing Committee on Procedure and Privileges, Western Australia, *Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament* (2015).

and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament, be referred to the Procedure and Privileges Committee for further consideration and report.

2.4 Recommendations 2(a) and (c) were as follows:

Recommendation 2: The Committee recommends that the State Government instruct the Parliamentary Counsel to draft a bill or bills to:

- (a) amend the *Criminal Code* so as to clarify that the proceedings of Parliament may be used as evidence in the prosecution of an offence under sections 55 to 59 of the *Criminal Code*;
- (c) amend the constitutional and/or electoral legislation to abolish the ability of a House of the Parliament of Western Australia to expel one of its Members;

Further review of the recommendations

2.5 On 24 February 2016 the PPC considered the referral of the recommendations arising from the review of the report of the *Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament* (“the Select Committee”)

Recommendation 2(a)

2.6 The PPC reviewed Recommendation 2(a) and makes the following observations.

2.7 The Select Committee had noted difficulties when determining the extent to which the consent of the Parliament is required to release House or committee transcripts or evidence for the prosecution in the courts of the offences under sections 55 to 59 of the *Criminal Code*. Additionally, it was noted by the Select Committee that any prosecution of the provisions may be constrained where the court’s use of House or committee documentation may be interpreted as a breach of Article 9 of the *Bill of Rights*.

2.8 The Select Committee recommended that sections 55 to 59 of the *Criminal Code* be repealed.

2.9 The PPC disagreed with the recommendation of the Select Committee.

2.10 The PPC noted the value in retaining the *Criminal Code* provisions as a deterrent and favoured a clarifying amendment to the provisions rather than the repeal recommended by the Select Committee. The PPC recommended that the Government

instruct Parliamentary Counsel to achieve this outcome; it did not, however, propose a form of words for the recommended clarifying amendment.

2.11 On the issue of a clarifying amendment, the LA PPC adopted a contrary view from the recommendation of the PPC. Whilst agreeing that the provisions should be retained in the *Criminal Code*, the LA PPC observed that the provisions are almost never invoked and the need for legislative change in this area is not a pressing issue.

2.12 On a further point, the LA PPC noted that a clarifying amendment to the provisions:

*runs the risk of generating greater uncertainty with other statutory provisions which may need to operate on the basis of necessary implication but which have not had clarifying amendments made to them.*²

2.13 The PPC has reflected on each of these two points, and in each instance, the PPC is of the view that the House should not proceed with the recommendation at this time.

Recommendation 2(c)

2.14 With respect to Recommendation 2(c), the PPC had agreed with the recommendation of the Select Committee that the ability of a House of Parliament to expel one of its Members should be abolished.

2.15 During the debate on the referral motion the Attorney General recommended that the PPC reconsider the recommendation and made the following relevant comments:

*The expulsion of a member of this place is one of the powers inherited from the House of Commons. To my knowledge, it has never been used ... the behaviour of a member, may require the removal of the representation of a district or a constituency being taken away by this place or the other place to preserve the integrity and the dignity of Parliament ... if we find we are giving away a power that we one day find is very valuable and may be necessary ... I think it would be a useful thing to consider more fully before the House asks the government to remove one of its powers.*³

2.16 On these points, the LA PPC agreed with the Attorney General and observed that the Westminster jurisdictions seldom used the power to expel and the Western Australian Parliament has never expelled one of its Members in either House. The LA PPC

² Legislative Assembly Procedure and Privileges Committee Report No. 9, *Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament*, 8.

³ Western Australia, *Parliamentary Debates*, Legislative Council, 25 February 2016, 633 (Hon Michael Mischin MLC)

recommended that the Parliament of Western Australia retain the power to expel members for contempt of Parliament.

- 2.17 Of particular interest to the PPC were the LA PPC's comments relating to the differing electoral arrangements and methodologies that exist for each House to fill vacancies in their memberships.
- 2.18 In the Legislative Assembly, the existing electoral arrangements provide for by-elections to fill vacancies in the Assembly as they occur. In the instance of a member being expelled from the Assembly, it is possible that the member could simply recontest the vacated seat. In the Legislative Council, however, the electoral legislation would exclude the expelled member and determine the vacancy caused by their expulsion by way of a calculation using the votes cast at the previous election.
- 2.19 These differing electoral arrangements were not an issue initially explored by the PPC during the review of the Select Committee report and may need to be considered further.
- 2.20 On the question as to whether the Council should proceed with the PPC's recommendation on this matter, the PPC notes the comments of Hon Nick Goiran in his contribution on the referral motion:

I cannot imagine the scenario in which the Legislative Council would want to have a different capacity from the Legislative Assembly. I would not be in favour of the Council not having the capacity to expel and the Assembly having it ... I am persuaded in this instance that, given it has an implication for the whole of the Parliament of Western Australia, it is worthy of reconsideration.⁴

- 2.21 The PPC has reflected on the electoral arrangements for each House and the comments of the member in relation to its Recommendation 2(c). In this instance, the PPC agrees that the Council should retain its equivalent powers as the Legislative Assembly and the House should not proceed with the recommendation at this time.

Recommendation

- 2.22 Accordingly, the PPC recommends the following —

⁴ Western Australia, *Parliamentary Debates*, Legislative Council, 25 February 2016, 645 (Hon Nick Goiran MLC)

Recommendation 1:

That the House does not proceed with the Recommendations 2(a) and 2(c) contained in the Standing Committee on Procedure and Privileges — Report No. 29 — Review of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament.

3 STANDING ORDER 97: STRANGERS IN THE COUNCIL**Background**

- 3.1 Standing Order 97 deals with the manner in which strangers may be admitted to the floor of the Council and the requirement for strangers to withdraw from the Council during a division, or as ordered by the President.
- 3.2 Standing Order 97 states:

97. Strangers in the Council

- (1) *Only the President may admit strangers onto the floor of the Council.*
- (2) *When a division is called or as otherwise ordered by the President, strangers shall withdraw.*

Strangers in the Council

- 3.3 Aside from the Council Chamber attendants, there are times during parliamentary sittings where strangers are admitted to the floor of the House; for instance, advisors to a Minister or Parliamentary Secretary during the consideration of a Bill in the Committee of the Whole House.
- 3.4 The Standing Order as currently worded considers two scenarios regarding the withdrawal of strangers from the Council —
- a) during a division; or
 - b) as otherwise ordered by the President.
- 3.5 During a division, the practice of the Council is that advisors and other strangers admitted to the floor of the House for a particular purpose either leave the Chamber or withdraw behind the bar of the House.
- 3.6 Whilst the PPC does not propose any significant change to the current practice of the House regarding the application of Standing Order 97, the PPC agrees that the

Standing Order should be clarified so as to make clear that, whether there is a division in the Council or not, the ultimate discretion to admit strangers to the floor of the Council resides solely with the President, or in their absence, the member presiding; strangers are at all times subject to this authority.

- 3.7 In relation to this Standing Order, the PPC proposes that whenever a division is called all strangers shall withdraw from the Council, unless instructed otherwise by the President or member presiding.

Recommendation

- 3.8 Accordingly, the PPC recommends the following clarifying amendment to Standing Order 97 as follows —

Recommendation 2:

That **Standing Order 97(2)** be deleted and the following inserted —

- (2) When a division is called strangers shall withdraw unless otherwise ordered by the President.

4 STANDING ORDER 181: WITNESSES' ENTITLEMENTS

Background

- 4.1 Standing Order 181 sets out certain entitlements available to witnesses examined before a committee of the Council.
- 4.2 Standing Order 181 states:

181. Witnesses' Entitlements

Any person examined before a Committee is entitled to —

- (a) access to relevant documents before and during examination;*
- (b) benefit of Counsel;*
- (c) request that the evidence be deemed private or in camera;*
- (d) be informed prior to the examination of the right of objection provided by section 7 of the Parliamentary Privileges Act 1891;*
- (e) a reasonable opportunity to rebut allegations of criminal, improper or unethical conduct made against the witness if the allegations are relevant to the Committee's inquiry;*

-
- (f) *a reasonable opportunity to correct errors of transcription in a transcript of evidence;*
 - (g) *an opportunity to provide supplementary or new evidence;*
and
 - (h) *any additional entitlements as determined by the Council.*

Witnesses' Entitlements

- 4.3 Witnesses' Entitlements were first adopted as Standing Orders of the House on 21 December 1989.⁵ The current Standing Order 181 was adopted by the House on 30 November 2011 following the comprehensive review of the Standing Orders undertaken by the PPC.
- 4.4 The review of the Standing Orders recommended the adoption of a varied arrangement to modernise the Standing Order which included the omission of the words 'Subject to order'. This omission was intended to be captured by new SO 181(h),⁶ however, paragraph (h) considers "additional entitlements as determined by the Council" rather than the ability of a Committee to determine the application or otherwise of the entitlements.
- 4.5 The PPC is concerned that a face value reading of the Standing Order as currently written creates the impression that an absolute entitlement exists for witnesses. The potential for discord to arise between witnesses and a Committee is an undesirable outcome in instances where a Committee is simply exercising its right to determine how to conduct its inquiry.
- 4.6 The PPC is mindful of a potentially detrimental situation occurring whereby a witness seeks to assert an entitlement and thus bring the witness into conflict with the Committee.
- 4.7 It is the view of the PPC that the "entitlements" contained in SO 181 are provided to witnesses in addition to the usual protections afforded to witnesses, and are a courtesy that accords witnesses with a measure of procedural fairness. There may be instances, however, where these entitlements should be subject to the discretion of the Committee and the necessary requirements of the Committee in relation to its inquiry. The entitlements are not entitlements as of a right, which a witness may then use to impede or delay the finalisation of a Committee's inquiry into a certain matter.

⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 21 December 1989, 6881 (Hon R.G. Pike MLC)

⁶ Legislative Council Procedure and Privileges Committee Report No. 22, *Review of the Standing Orders — Comparative Table* (2011), Row 339, 89.

- 4.8 The PPC therefore recommends that the Legislative Council return to the wording used prior to the adoption of the new Standing Orders in 2011 which removed the words ‘Subject to order’.

Recommendation

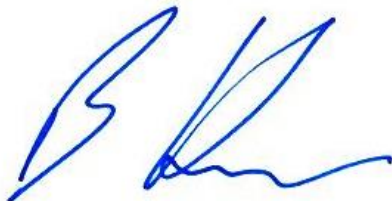
- 4.9 Accordingly, the PPC recommends an amendment to Standing Order 181 as follows —

Recommendation 3:

That **Standing Order 181** be amended as follows —

To delete “Any” and insert —

Subject to order, any



Hon. Barry House MLC

Chair

28 June 2016