



THIRTY-NINTH PARLIAMENT

REPORT 29

**STANDING COMMITTEE ON PROCEDURE AND
PRIVILEGES**

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

Presented by Hon Barry House MLC (Chair)

May 2014

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, Standing Order 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 Nick Goiran MLC

Hon Colin Holt MLC

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REPORT OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

IN RELATION TO 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

1 REFERENCE

- 1.1 On 14 December 2012 the Legislative Council (“the Council”) was prorogued by proclamation of His Excellency the Governor, thereby bringing the 38th Parliament and all remaining proceedings before the Council to an end. As a result of prorogation, all outstanding business listed on the Notice Paper lapsed without being resolved.
- 1.2 The newly constituted *Procedure and Privileges Committee* (“the PPC”) for the 39th Parliament met on Wednesday, 19 June 2013 to consider the outstanding committee matters from the 38th Parliament.
- 1.3 The PPC considered, as one item of business, a memorandum from the then Clerk relating to the unresolved corollary motion to “adopt and agree to” recommendations one to six contained in 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”). Consideration of the motion was adjourned on 14 May 2009 and had lapsed without resolution upon the proroguing of the House.
- 1.4 The PPC commenced a review of the recommendations of the Select Committee for the purpose of bringing these matters back before the House.

2 BACKGROUND TO THE REFERENCE

- 2.1 The Select Committee was established following, but not necessarily in response to, consideration of the report of the *Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations* (“the 2007 Privilege Committee”).¹
- 2.2 The 2007 Privilege Committee had investigated a number of unauthorised disclosures of the deliberations of a standing committee and had found evidence of a range of alleged contempts against the Council. The 2007 Privilege Committee had expressed frustration at the apparently limited penalties available to the Council to punish contempts, especially those contempts committed by non-Members.

¹ Western Australia, Legislative Council, *Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations*, 13 November 2007.

2.3 The powers and privileges of the Council are set out primarily in sections 1 and 8 of the *Parliamentary Privileges Act 1891*, which state:

1. *Privileges, immunities and powers of Council and Assembly*

The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise —

- (a) *the privileges, immunities and powers set out in this Act; and*
- (b) *to the extent that they are not inconsistent with this 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.*

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

- (a) *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;*
- (b) *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;*

- (c) *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;*
- (d) *sending to a member any threatening letter on account of his behaviour in Parliament;*
- (e) *sending a challenge to fight a member;*
- (f) *offering a bribe to, or attempting to bribe a member;*
- (g) *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.*

2.4 The 2007 Privilege Committee summarized the penalties that it believed were available to it for dealing with contempts as follows:

The Committee found that it was extremely limited in the penalties that it could recommend to the Legislative Council for the specific breaches of privilege and contempts that it had identified. However, the Committee was not of the view that it was as limited as some authorities have suggested.

Furthermore, it was noted that due to a generally conservative approach to the exercise of its powers in recent years the House of Commons provided only limited guidance as to appropriate penalties for breaches of privilege and contempts, particularly by non-Members ...

The Committee has formed the following view as to the penalties available for the Committee to recommend to the Legislative Council for those contempts committed by Members of the Legislative Council, in accordance with the Committee's terms of reference:

- *the House does not have power to fine apart from for the limited list of contempts set out in s 8 of the Parliamentary Privileges Act 1891;*

- *reprimand, admonishment or censure at their place in the House, although the Committee chose not to recommend these penalties given the potential of sensationalizing the House's proceedings;*
- *a majority of the Committee is of the view that it is unclear as to whether the House has a power to suspend a Member without pay;*
- *the Committee rejected suspension with pay, as it appeared to the Committee to amount to a holiday for the Member at the taxpayers' expense;*
- *the Committee rejected expulsion, as that is a penalty that should be reserved for only the most serious contempt by Members;*
- *a variety of other penalties of an administrative nature were available to the Committee, such as prohibiting a member from serving on parliamentary committees. (By implication, this carries a financial penalty); and*
- *in addition to the imposition of any other penalty by the Legislative Council, there is also the option of directing the Attorney General to prosecute any contempt which is punishable by law (such as under the Criminal Code) pursuant to s 15 of the Parliamentary Privileges Act 1891.*

...

The Committee also considered the penalties available to punish non-Members for contempts other than those listed in s 8 of the Parliamentary Privileges Act 1891. The Committee noted that the Legislative Council's powers were limited to relatively light punishments, such as:

- *ordering the offender to apologise to the House in writing or at the bar of the House;*
- *reprimand, admonishment or censure at the bar of the House, although the Committee chose not to recommend these penalties given the potential of sensationalizing the House's proceedings;*
- *banning offending persons (particularly in the case of journalists or former Members of Parliament) from the precincts of the Parliament;*

- *imprisonment under s 1 of the Parliamentary Privileges Act 1891, although the Committee notes that this power should only be exercised for serious contempts, or where a requirement under another penalty imposed for a contempt has not been satisfied;*
- *in addition to the imposition of any other penalty by the Legislative Council, there is also the option of directing the Attorney General to prosecute any contempt which is punishable by law (such as under the Criminal Code) pursuant to s 15 of the Parliamentary Privileges Act 1891.*

The Committee notes that the above listed penalties with respect to both Members and non-Members are not exhaustive, but that they outline the general types of penalties available to the Legislative Council.”²

2.5 The 2007 Privilege Committee recommended, *inter alia*, the following:

Recommendation 22: The Committee recommends that the Legislative Council refer to the Procedure and Privileges Committee the urgent examination of the ‘threshold’ test applied by the Australian Senate with respect to the investigation and reporting of suspected breaches of privilege within standing committees, and for that committee to give consideration as to whether it is an approach that should be adopted by the Legislative Council, and to then report its findings to the House.

Recommendation 24: The Committee recommends that the Legislative Council request the Attorney General to give consideration to the appropriateness of amending the *Parliamentary Privileges Act 1891* so as to provide a second head of power to both Houses of Parliament with the express power to fine, suspend without pay or imprison for any breach of privilege or contempt, and that the Attorney General report back to both Houses.

² Western Australia, Legislative Council, *Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations*, 13 November 2007, pp 23, 40-42.

Recommendation 25: The Committee recommends that the Legislative Council refer to the Procedure and Privileges Committee the consideration of an amendment to the Standing Orders of the Legislative Council to expressly provide for the suspension of a Member without pay, and that the committee report back to the House.

Recommendation 27: The Committee recommends that the Attorney General examine the provisions of the *Criminal Code* relating to offences against the Parliament to establish whether an amendment to the *Criminal Code* is necessary in order to expressly abrogate parliamentary privilege, and that the Attorney General report back to both Houses.

- 2.6 All of the above recommendations were adopted and agreed to by the House on 4 December 2007. As at the date of the establishment of the Select Committee, however, none of the recommendations had been fully given effect to. It should be noted, however, that the Senate's "threshold test" for investigating alleged breaches of privilege and contempts referred to in Recommendation 22 has now been incorporated into the Council's Standing Orders (SO 94 and Schedule 4) following the 2010-2011 review of standing orders.
- 2.7 During the final months of the 37th Parliament in 2008 and the first months of the 38th Parliament leading up to the 22 May 2009 change in membership of the Council the Select Committee undertook a detailed review of the *Parliamentary Privileges Act 1891*, and in particular the penalties at the Council's disposal to deal with contempts and breaches of privilege.
- 2.8 On 7 May 2009 the Select Committee tabled its report³. The report of the Select Committee contained the following six recommendations, which were designed to effectively supersede the adopted recommendations of the 2007 Privilege Committee:

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

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

³ See Table Paper No. 719

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.

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.

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.

3 APPROACH BY THE PPC

- 3.1 Following the change of membership of the Council at the beginning of the 39th Parliament in May 2013 the Clerk submitted to the PPC for its consideration a memorandum containing a proposal to progress the Select Committee's recommendations.
- 3.2 The Clerk's memorandum proposed that the PPC itself review the recommendations of the Select Committee and consider whether it was in the Parliament's interest to amend the *Parliamentary Privileges Act 1891*.
- 3.3 The PPC resolved to review the Select Committee's recommendations and to report to the Council on the recommendations of the Select Committee.

4 UNITED KINGDOM PARLIAMENT JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE REPORT (JULY 2013)

- 4.1 The PPC noted with interest that over the past two years there has been considerable discussion in the United Kingdom over parliamentary privilege and, in particular, whether it should be extensively codified in to a single statute (using the Australian National Parliament's *Parliamentary Privileges Act 1987* (Cth) as a possible template).
- 4.2 On 3 July 2013 the United Kingdom Parliament Joint Committee on Parliamentary Privilege ("the UK Joint Committee") presented its report reviewing parliamentary privilege.⁴
- 4.3 The UK Joint Committee cautioned against a comprehensive codification of parliamentary privilege. With respect to the penal powers of Parliament the UK Joint Committee favoured the re-affirmation of Parliament's powers, most notably the ability of the United Kingdom House of Commons to fine persons for contempt. The UK Joint Committee stated:

It is unfortunate that Parliament's restraint has led to doubt about the continuing existence of its powers. They are a part of United Kingdom law and have been so for centuries. ...

The first and most important challenge is to assert the continuing existence of each House's jurisdiction over contempt. This is, fundamentally, a test of institutional confidence. We urge the two Houses to rise to this challenge. As the Clerk of the House of Commons has said, the question is not whether the Houses' penal

⁴ United Kingdom, House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, Report of Session 2013-14, HL Paper 30, HC 100, 3 July 2013.

powers exist; it is whether they can be enforced. Desuetude is not a legal doctrine in England and Wales, and there is no need for statute to confirm what already exists. The power to fine (based on the power possessed by the United Kingdom House of Commons) has only recently been asserted and used in New Zealand.⁵

- 4.4 With respect to the penal powers of the Parliament, the UK Joint Committee recommended that:

Penal Powers of the Houses

6. *We consider that it is in the public interest to ensure that committees have the powers they need to function effectively. (Paragraph 60)*
7. *We reject the option of doing nothing to clarify Parliament's penal powers. (Paragraph 61)*
8. *We reject the approach of criminalising specific contempts. It would entail a radical shift of power between Parliament and the courts. It would introduce delay. It would increase uncertainty about how contempts which were not covered by criminal statute could or should be dealt with, and remove the flexibility which is the chief advantage of the current system. (Paragraph 70)*
9. *We consider that the disadvantages of legislating to confirm Parliament's penal powers outweigh the advantages. We accordingly recommend against such legislation. (Paragraph 75)*
10. *If the House of Commons were to adopt our proposals on how its penal jurisdiction should be exercised, we would expect the House of Lords to adopt similar procedures, adapted to the conventions prevailing in that House, in due course. (Paragraph 79)*
11. *Where a Committee is simply seeking evidence as part of the normal inquiry process, the standards of fairness should include the opportunity for witnesses to ask for matters to be dealt with in private, to give a clear account of their side of*

⁵ United Kingdom, House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, Parliamentary Privilege, Report of Session 2013-14, HL Paper 30, HC 100, 3 July 2013, p23.

the story and to respond to any potentially damaging allegations made by other witnesses. In most cases, this is already common practice, but we recommend that such good practice should be formalised as part of Standing Orders. (Paragraph 85)

12. *This Report itself begins the process of reasserting Parliament's penal powers, by clarifying our view on those powers and setting out fair procedures which can be followed if those powers need to be invoked. (Paragraph 99)*

13. *We recommend that the two Houses should build on our work to set out clearly the powers they reserve the right to exercise, what is expected of witnesses, and the means by which they will consider allegations of contempt, including procedural safeguards to ensure that witnesses are treated fairly. (Paragraph 100)⁶*

4.5 The PPC has taken these recommendations into account when reviewing the Select Committee's recommendations.

5 LEGISLATIVE ASSEMBLY PROCEDURE AND PRIVILEGES COMMITTEE REPORT NO. 8: PROCEDURAL FAIRNESS AND POWERS OF THE HOUSE (JUNE 2010)

5.1 On 24 June 2010 the Legislative Assembly Procedure and Privileges Committee ("the LA PPC") presented its eighth report⁷ reviewing the procedures of committees and the House in relation to matters of procedural fairness, and generally, the powers of the House to apply suitable penalties for various contempts.

5.2 Of particular interest to the PPC was the LA PPC's Recommendation 10 which considered that House's limitations to fine and punish for contempts. With respect to the penalties available to the House to punish for contempts, the LA PPC made the following recommendation:

⁶ United Kingdom, House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, Parliamentary Privilege, Report of Session 2013-14, HL Paper 30, HC 100, 3 July 2013, pp71-72.

⁷ Western Australia, Legislative Assembly, *Procedure and Privileges Committee Report No. 8: Procedural Fairness and Powers of the House*, 24 June 2010

Recommendation 10: That the *Parliamentary Privileges Act 1891* be amended to reflect generally section 7 of the *Parliamentary Privileges Act 1987* (Cth), in particular to establish a better regime for the Legislative Assembly to impose a fine on natural persons and corporations for offences against the House, and to retain and define the power to imprison.⁸

5.3 The PPC noted the recommendation with interest given that it is apparent that the Procedure and Privileges Committee of the Legislative Assembly has in recent years contemplated similar issues relating to breaches of privilege and contempts of Parliament.

5.4 The PPC has taken recommendation 10 of the LA PPC into account when reviewing the Select Committee’s recommendations.

6 THE SELECT COMMITTEE RECOMMENDATIONS

6.1 The PPC has reviewed each of the recommendations of the Select Committee and, without repeating the full detail of the Select Committee report, makes the following observations as outlined below:

Recommendation 1

6.2 The PPC reviewed the recommendation that the Western Australian Parliament adopt guidelines as to what constitutes a contempt of Parliament.

6.3 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.⁹

6.4 The power to declare any particular act as constituting a contempt, and to punish that act, resides with each House of Parliament. Accordingly, each House shares the equivalent power as that enjoyed by the courts, that being the power to protect themselves from acts that, either directly or indirectly, impede them in the performance of their functions.

⁸ Western Australia, Legislative Assembly, *Procedure and Privileges Committee Report No. 8: Procedural Fairness and Powers of the House*, 24 June 2010, pp 18-19.

⁹ C.J. Boulton (Ed), *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st ed, 1989, p115.

- 6.5 The PPC notes that whilst this power is not disputed, in relation to the Council, the recommendation of the Select Committee has been addressed with the adoption of new Standing Order 94 and Schedule 4 in December 2011.
- 6.6 Standing Order 94 of the Council reaffirms its power to determine that any particular act constitutes a contempt. The criteria and examples for the Council to consider when making a determination are provided in Schedule 4 of the Standing Orders. Rather than being constrained by the criteria and examples set out in Schedule 4, the PPC notes that SO 94(3) provides that these examples do not derogate from the power of the Council to determine that any particular act constitutes a contempt.
- 6.7 In effect, SO 94 has reasserted the Council's powers to deal with and adjudge matters of contempt. The recommendation of the Select Committee has, on the whole, been adopted by the Council by incorporating it into its Standing Orders.
- 6.8 Whilst the PPC agrees with the recommendation and is satisfied that the Council has adequately adopted the principles therein, the PPC notes that the recommendation was framed in terms that express the adoption of guidelines for the whole of the Parliament. In this regard, the PPC notes that the Legislative Assembly is yet to adopt relevant guidelines or a similar Standing Order, but further notes that this is a matter for the other House.

Finding 1: The Committee agrees with Recommendation 1 and notes that the Council has adopted Standing Order 94 and Schedule 4 to the Standing Orders which sufficiently address the terms of the recommendation.

Recommendation 2

- 6.9 The Select Committee recommended that sections 55, 56, 57, 58 and 59 of the *Criminal Code* be repealed.
- 6.10 Sections 55 to 59 of the *Criminal Code* ("the Code") establish statutory offences in relation to certain contempts of Parliament:
- Section 55. Interfering with the legislature;
 - Section 56. Disturbing Parliament;
 - Section 57. False evidence before Parliament;
 - Section 58. Threatening witness before Parliament; and
 - Section 59. Witness not attending or giving evidence before Parliament.

-
- 6.11 The inclusion of these statutory offences against Parliament in the Code created an overlap of the Parliament's exclusive jurisdiction with that of the courts', resulting in a 'concurrent jurisdiction' with respect to these specific contempts/offences.
- 6.12 The doctrine of the separation of powers provides that the Parliament is sovereign over its own business to the extent that the exercise of its powers and functions should be confined to the Parliament and should not encroach, for example, on the function of the courts.
- 6.13 The Select Committee noted that the inclusion of the contempt provisions in ss 55 to 59 of the Code raises difficulties when determining the extent to which the approval or consent of the Parliament is required to release House or committee transcripts or evidence for the successful prosecution of these offences in the courts. It was also noted that any prosecution of the Code provisions may be constrained where the court's use of House or committee documentation may be interpreted as breaching Article 9 of the *Bill of Rights* (UK). Finally, the issue of double jeopardy arises where two separate bodies have power to impose penalties based on the same set of facts.
- 6.14 The Select Committee adopted the view that, given all of these practical considerations and a general lack of clarity over the impact on legal proceedings of parliamentary privilege, it was more appropriate that the House take over sole jurisdiction to punish these contempts.
- 6.15 The PPC, however, does not agree with this recommendation.
- 6.16 The PPC, whilst recognising the views and issues raised by the Select Committee, considers that the Code offences provide a significant deterrent against the commission of these specific contempts.
- 6.17 These contempts are also the most serious contempts against the Parliament and, as such, the Council should retain an ability to refer such matters to the courts so that the offences may be adjudged within an environment having the highest standards of fairness and with all the expected legal and evidential safeguards and the strongest penalty provisions. This is a particularly important point given that another recommendation of the Select Committee is that the House remove its power to imprison.
- 6.18 The PPC believes that the courts should retain the ability to adjudge and imprison persons who commit the most serious contempts against the Parliament. The Council still retains its jurisdiction to deal with those contempts that fall towards the comparatively minor end of the spectrum of these specific offences, particularly in those cases where the prosecuting authorities would see no public interest in mounting a prosecution in the courts. The issue of double jeopardy is unlikely to arise often in practice, as the Council would in most circumstances be expected to await the

outcome of any anticipated court action before taking the rare action of considering imposing any significant additional penalty of its own.

- 6.19 As to the purported lack of clarity surrounding the use of privileged documentation in criminal proceedings, the PPC is satisfied that the inclusion of the statutory offences in the *Criminal Code* is a sufficient indication of the Parliament's intent to waive parliamentary privilege for the limited purpose of permitting the use of House and committee transcripts and evidence, which would otherwise be inadmissible, to prosecute those *Criminal Code* offences relating expressly to proceedings in Parliament. This view is consistent with the approach of the courts to a claimed abrogation or modification of a common law privilege or immunity which is:

*"... that the legislature does not intend to abrogate a common law right or privilege unless a contrary intention is clearly expressed or implied in statute."*¹⁰

- 6.20 To the extent that there may be some lingering doubt on this issue, the PPC would favour a clarifying amendment to these *Criminal Code* provisions rather than the repeal of these offences.
- 6.21 The PPC is therefore of the view that any repeal of the offence provisions in ss 55 to 59 of the *Criminal Code* is unnecessary and undesirable at this time. The Committee considers that the offences are properly included within the *Criminal Code* and should not be repealed.

Finding 2: The Committee does not support the repeal of sections 55, 56, 57, 58 and 59 of the *Criminal Code* at this time.

Recommendation 3

- 6.22 The Select Committee recommended that 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.
- 6.23 Whilst the PPC agrees generally with the recommendation to remove the House's ability to itself imprison persons for any length of time for serious contempts, the PPC has some serious reservations as to how the Parliament's ability to "temporarily detain" persons would continue to operate in practice in the absence of a general power of imprisonment.

¹⁰ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 per Brennan J at para 3.

- 6.24 The PPC notes that the temporary detention of persons misconducting themselves within either the House or elsewhere within the precincts of Parliament effectively amounts to imprisonment. In practice, a person ‘temporarily detained’ by the Parliament would be escorted to a Police lock-up or gaol until the matter is dealt with. To abolish the general power of the Parliament to imprison, yet retain a power to ‘temporarily detain’ a person may create a possible ambiguity in the law.
- 6.25 Whilst acknowledging that the Parliament of Western Australia has only applied this penalty twice in its history, the PPC also considers that the power to imprison a person for contempt or a breach of privilege is the ultimate sanction available to the Parliament and notes that it continues to be a powerful deterrent to this behaviour.
- 6.26 The PPC therefore sees no compelling reason to abolish the Council’s power to imprison at this stage.

Finding 3: The Committee agrees that the Council should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament.

Finding 4: The Committee does not support the abolition of the Council’s power to imprison.

Recommendation 4

- 6.27 The PPC reviewed and agreed with the recommendation that the *Parliamentary Privileges Act 1891* be amended to provide that each of the Houses of the Western Australian Parliament may impose a fine for any amount either House considers appropriate in relation to any breach of privilege or contempt of Parliament.
- 6.28 The PPC notes that this recommendation accords, in part, with recommendation 10 of the LA PPC which has likewise recommended that the *Parliamentary Privileges Act 1891* be amended to clarify the range of and limits on penalties that the Legislative Assembly may impose for offences against the House.
- 6.29 Section 8 of the *Parliamentary Privileges Act 1891* provides the Council with an express power to fine in limited circumstances.
- 6.30 There is a strong argument, however, supported by recent re-affirmations in the United Kingdom and New Zealand that the United Kingdom House of Commons still retains its ancient ability to fine for contempt, that a broad power to fine has passed on

to the Council by virtue of section 1 of the *Parliamentary Privileges Act 1891*. Nevertheless, the PPC does see the merit in clarifying this issue expressly in statute.

- 6.31 Whilst considering the recent reports out of the United Kingdom and New Zealand, the PPC was similarly mindful of the recommendation of the LA PPC.
- 6.32 The Council adopted new Standing Order 95 in 2011 which provides that the Council may impose a penalty of ‘such amount as the Council orders’, and a power to ‘temporarily detain’ or imprison a person ‘as ordered by the Council’. The PPC considers that the Council arrangement provides greater flexibility to the Houses than an amendment that reflects generally the provisions of section 7 of the *Parliamentary Privileges Act 1987* (Cth), which has the additional effect of further limiting maximum terms of ‘temporary detainment’ or financial penalties.
- 6.33 Accordingly, the PPC agrees with the recommendation of the Select Committee.

Finding 5: The Committee agrees that the *Parliamentary Privileges Act 1891* should be amended to provide that each of the Houses of the Parliament of Western Australia may impose a fine for any amount either House considers to be appropriate in relation to any breach of privilege or contempt of Parliament.

Recommendation 5

- 6.34 The PPC reviewed the recommendation that the power of each of the Houses of the Western Australian Parliament to expel its Members should be abolished.
- 6.35 The PPC notes that each House of Parliament has the power to regulate its own business, including the method and manner of punishment of its membership. The PPC, however, considers that the power of a House to punish a Member through expulsion impinges on the democratic right of the electors to put into Parliament a representative of their own choosing.
- 6.36 It is noted that when a Member of the Council is expelled there is no by-election at which the expelled candidate can simply run again for office and thereby leave the ultimate decision to the electors. Instead, the electoral legislation in Western Australia determines an expelled candidate’s replacement in a vacant Council seat by way of a mathematical formula using the votes cast at the previous election and which excludes the expelled Member from the calculations.
- 6.37 The PPC therefore agrees with the view of the Select Committee that it is for the electors themselves to determine who should be a Member of Parliament, rather than a vote of the relevant House.

- 6.38 As the power to expel a Member is a common law right inherited by the Houses from the United Kingdom House of Commons, the PPC notes that this power will need to be either expressly excluded from the grant of powers in section 1 of the *Parliamentary Privileges Act 1891* or excluded by an amendment to the constitutional and/or electoral legislation.

Finding 6: The Committee agrees that the power of each of the Houses of the Parliament of Western Australia to expel its Members should be abolished.

Recommendation 6

- 6.39 The PPC reviewed and agreed with the recommendation that the parliamentary precinct of the Parliament of Western Australia should be clearly defined by statute.
- 6.40 The Committee notes that there currently exists some ambiguity surrounding what actually comprises the current parliamentary precinct, and whether the precinct is contained within the ‘natural’ area bounded by the surrounding roads. The Committee is of the view that a statute that clearly defines the parliamentary precinct and affords minor or temporary changes to the boundaries is beneficial to the Parliament.
- 6.41 Accordingly, the PPC agrees with and endorses the recommendation of the Select Committee that the parliamentary precinct of the Western Australian Parliament be clearly defined by statute.

Finding 7: The Committee agrees that the parliamentary precinct of the Parliament of Western Australia should be clearly defined by statute.

7 FURTHER ACTIONS?

- 7.1 The PPC notes that one of its functions 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.
- 7.2 The PPC is mindful that, depending on the assessment of the House, further action in relation to a number of the Select Committee recommendations requires action by the Legislative Assembly, the Government, the Opposition or a private Member to introduce new guidelines and/or an amendment Bill into the Parliament in order for the full scope of those recommendations to be fully realised.

Recommendation 1: The Committee recommends that the Legislative Assembly's Procedure and Privileges Committee be acquainted with this report.

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*;
- (b) amend the *Parliamentary Privileges Act 1891* to provide that each of the Houses of the Parliament of Western Australia may impose a fine by way of penalty for any amount either House considers to be appropriate in relation to any breach of privilege or contempt of Parliament;
- (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; and
- (d) establish a statutory definition of the 'parliamentary precinct'.



Hon. Barry House MLC
Chair
15 May 2014