



THIRTY-SEVENTH PARLIAMENT

REPORT 14

**STANDING COMMITTEE ON PROCEDURE AND
PRIVILEGES**

**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**

Presented by Hon Nick Griffiths MLC (Chairman)

December 2007

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:

“6. Procedure and Privileges Committee

- 6.1 A *Procedure and Privileges Committee* is established.
- 6.2 The Committee consists of the President and the Chairman of Committees, the Deputy Chairmen of Committees (*all ex officio*), and any members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chairman, and the Chairman of Committees is the Deputy Chairman, of the Committee.
- 6.3 With any necessary modifications, SO 326A applies to a co-opted member.
- 6.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the House and its committees, and recommend to the House 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 House or its committees.
- 6.5 Unless otherwise ordered any rule or order under which a matter of privilege stands referred, or is referred, to a committee (however described) for inquiry and report is a reference to the Committee.”

Members as at the time of this inquiry:

Hon Nick Griffiths MLC (Chairman)	Hon Simon O’Brien MLC
Hon George Cash MLC (Deputy Chairman)	Hon Murray Criddle MLC
Hon Graham Giffard MLC	Hon Ken Travers MLC
Hon Ray Halligan MLC	Hon Giz Watson MLC
Hon Sheila Mills MLC	

Staff as at the time of this inquiry:

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ISBN 1 921243 41 4

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REPORT OF THE STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

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

1 ORDER OF REFERENCE

- 1.1 On Tuesday, 13 November 2007, the House referred a matter as to whether articles appearing in *The West Australian* newspaper on Wednesday, 7 November 2007, and Thursday, 8 November 2007 disclosed the private proceedings of the Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations and, if so, whether such disclosure constitutes a breach of the privileges, or is a contempt, of this House.

2 THE NATURE OF ALLEGED DISCLOSURES

- 2.1 The report from the Select Committee of Privilege states that on 6 November 2007, the Committee was advised that *The West Australian* journalist, Mr Robert Taylor, had made the following inquiries:

- a) at about midday on 6 November 2007, Mr Owen Cole of the Corruption and Crime Commission of Western Australia (CCC) telephoned the Clerk of the Legislative Council, Mr Malcolm Peacock, to advise that the CCC had received a telephone call from Mr Robert Taylor asking the CCC to confirm whether it had provided intercept material to the Committee;
- b) on the afternoon of 6 November 2007, Mr Robert Taylor telephoned Mr Philip Urquhart, Counsel Assisting the Committee asking whether it was true that Mr Brian Burke had objected to him acting as Counsel Assisting the Committee; and
- c) at about 1.30 pm on 6 November 2007, Mr Robert Taylor telephoned the Committee Chairman, Hon Murray Criddle MLC inquiring whether the Committee had used CCC intercept material and whether the Committee would be reporting to the House on 15 November 2007.

- 2.2 The Committee further considered that while the existence of the CCC evidence could have been provided by any number of persons involved in the Committee proceedings, the information concerning Mr Brian Burke's objection could only have been provided by a more limited number of persons who were either involved in the private hearings of Mr Burke before the Committee and/or the preparation of a private written submission and letters for and on behalf of Mr Burke to the Committee.

3 THE ISSUES OF PARLIAMENTARY PRIVILEGE

- 3.1 The House's privileges are those of the House of Commons as at 1 January 1989.¹ The House of Commons's practice since 1977 has been for the House to exercise such jurisdiction in any event as sparingly as possible and only when satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its officers from such improper obstruction or attempt at or threat of obstruction causing or likely to cause, substantial interference with the performance of their respective functions.
- 3.2 The House of Commons practice, in relation to cases of conduct which offends the authority or dignity of the House, is to take no further action if the matter is considered trivial. In 1992, Patricia Leopold, Senior Lecturer in Law at Reading University and a noted commentator on matters relevant to parliamentary privilege, said that the power of the British House of Commons to punish those who are in contempt is '*the important guarantee that its authority will be respected*'.
- 3.3 Colin Munro, Professor of Constitutional Law at the University of Edinburgh when discussing the issue of parliamentary privilege stated:

*which consists of special rules developed by the Houses of Parliament so as to augment their dignity and independence, and in order to protect themselves collectively and their members when acting for the benefit of their House, against interference, attack or obstruction.*²

- 3.4 It is useful to cite the most renowned definition of parliamentary privilege which is found in *Erskine May*:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, 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. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity.

¹ *Parliamentary Privileges Act 1891*, s 1.

² CR Munro, *Studies in Constitutional Law*, Butterworths 1987, p136.

*Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members.*³

3.5 Professor Enid Campbell's definition is in similar terms:

*The privileges of parliament refer to those rights, powers and immunities which in law belong to the individual members and officers of a parliament and the Houses of parliament acting in a collective capacity.*⁴

4 IMMUNITIES AND POWERS

4.1 The distinction between immunities and powers, as this affects parliamentary privilege, is detailed in *Odgers' Australian Senate Practice* where it is said:

*The term "parliamentary privilege" refers to two significant aspects of the law relating to Parliament, the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes.*⁵

4.2 For *Odgers*, the distinction is between the immunity from the ordinary law which attaches to the Houses of Parliament and their Members, on one side, and the powers of the Houses, particularly the power to punish contempts, on the other. *Odgers* continues:

The power of the Houses in respect of contempts is a power to deal with acts which are regarded by the Houses as offences against the Houses.

That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.

5 BREACH OF PRIVILEGE AND CONTEMPT OF PARLIAMENT

5.1 A further distinction is to be made between two terms which tend to be used interchangeably, namely, 'breach of privilege' and 'contempt of parliament'. On one side, a breach of privilege involves a breach of a specified privilege of parliament,

³ Boulton ed, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st edition, Butterworths 1989, p69.

⁴ E Campbell, *Parliamentary Privilege in Australia*, Melbourne University press 1966 p1.

⁵ Evans ed, *Odgers' Australian Senate Practice*, 11th Edition, Department of the Senate, Canberra 2004, p29.

such as where it appears to a court that a parliamentary debate has been called into question during the course of a trial, thereby contravening the protection given by Article 9 of the *Bill of Rights 1689*. On the other side, contempt 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.

- 5.2 Further, whereas a breach of privilege must fall within one of the already existing categories, the Houses of Parliament are said to have ‘complete discretion to decide without legislation what is or is not contempt of the House’⁶. Thus, contempt is not limited to conduct for which there is a precedent. According to Wilding and Laundry:

*The distinction between a contempt and a breach of privilege lies in the fact that the latter is an offence against a specifically established privilege of Parliament, whereas the former is an offence based on precedents which are less easily defined.*⁷

- 5.3 The term ‘contempt of parliament’ is defined in *Erskine May* as follows:

Generally speaking, 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 contempt even though there is no precedent of the offence.

- 5.4 In 1993 the NSW Legislative Council’s Standing Committee on Parliamentary Privilege found that the unauthorised disclosure and subsequent publication in the *Sun Herald* newspaper of evidence given *in camera* before the Joint Select Committee Upon Police Administration constituted a ‘clear breach of privilege’, but that it did not amount to a contempt of the Parliament. The Privileges Committee found no evidence that the publication had ‘obstructed or impeded the performance of the functions of the Select Committee, of either of the House of Parliament, or of the Members or officers of either House’; its conclusion was that “*no substantial interference with the [Select] Committee’s or the House’s functions has resulted or is likely to result from the disclosure of the in camera evidence, which is contrary to the public interest*”⁸.

- 5.5 In 1991 there was a similar incident in Western Australia involving a complaint by Hon SJ Piantadosi MLC.

⁶ The Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, October 1984, p29. (Henceforth, Spender Committee).

⁷ N Wilding and P Laundry, *An Encyclopaedia of Parliament*, 4th edition, Cassell 1972, p175.

⁸ Report concerning the publication of an article in the *Sun Herald* Newspaper containing details of in camera evidence, p16.

- 5.6 The committee suggested that any subsequent committee to which a similar complaint is referred have regard to the approach taken by the Commonwealth Act⁹ as being consistent with the *use of parliamentary privilege as a shield rather than as a sword*.¹⁰
- 5.7 In 1964 the House of Commons select committee of privilege report made the observation “[i]t seems particularly important that the law of parliamentary privilege should not, except in the clearest case, be invoked so as to inhibit or discourage formation and free expression of opinion outside the House by Members equally with other citizens in relation to the conduct of the affair of the nation.”
- 5.8 In the United Kingdom, the Observer newspaper of 26 May 1968, carried an article entitled “Biological Warfare : Dons Named”, signed by two journalists, purporting to give an account of evidence given before the Select Committee on Science and Technology.
- 5.9 After complaint had been made by the Chairman of the Select Committee, Mr Arthur Palmer, MP for Bristol, Central, the Leader of the House, Mr Peart, moved a Motion referring the matter of the complaint to the Committee of Privileges, which Motion was carried.
- 5.10 The committee found that the minutes of evidence had been given to Mr Marks, one of the journalists, by Mr Dalyell, a Member of the Select Committee on Science and Technology and an MP. The Committee accepted that Mr Marks had been assured by Mr Dalyell that there was no question of privilege, but they found that he had committed a contempt of the House since he knew that he was publishing information to which he should not have had access, and which was not intended at that time to be published. The Committee recommended no further action be taken in his case.
- 5.11 The committee found that the other journalist, Miss Slaughter, had only carried out research into the background of the article and so she was in no way implicated. The Editor of the Observer, Mr Astor, was found to be guilty of a contempt of the House since he “*failed to take adequate steps to discover the position*” relating to information which had come into his hands which he must have known was of a highly confidential nature. However, no further action was recommended in his case.
- 5.12 The committee concluded that Mr Dalyell was guilty of a breach of privilege and of a serious contempt of the House. He had handed Mr Marks a proof copy of the Minutes of Evidence and placed no limits regarding their use, save in respect of “D” notices. He admitted that he was blameworthy for disclosing certain of the evidence; for this he had offered “profound apologies”. The Committee recommended that Mr Dalyell be reprimanded.

⁹ *Parliamentary Privileges Act 1987* (Cth).

¹⁰ Report of the Select Committee of Privilege Re a complaint by Hon SJ Piantadosi MLC.

- 5.13 Mr Peart, the Leader of the House, moved a Motion “*That this House doth agree with the Committee of Privileges in their Report and that Mr. Speaker do reprimand Mr. Tam Dalyell for his breach of privilege and his gross contempt of the House.*” It was agreed to. Accordingly Mr Speaker reprimanded Mr Dalyell, which reprimand was ordered to be entered upon the Journals of the House. Corn. Hans. Vol. 765, cc. 1541-8; and Vol. 769, cc. 587-666.
- 5.14 The Committee has considered whether the material or evidence supplied to the newspaper discloses an improper attempt on the part of the person or persons who supplied that material or evidence to influence or intimidate the select Committee, or any of its members, in contravention of the privileges of this House.
- 5.15 The Committee notes that unauthorised disclosure of draft reports or unreported evidence can have a disruptive effect on the work of a select committee, and in some circumstances the House itself. The primary responsibility, and therefore the more serious contempt, rests upon the person who committed the unauthorised disclosure of the document or evidence. But this does not absolve the newspaper from a duty to act responsibly. The media are not, and should not be, exempt from punishment for contempt when the publication substantially interferes with the work of the House or its committees.

6 FINDINGS AND RECOMMENDATION

- 6.1 The Committee finds that the select committee report was close to completion at the time of the newspaper publication and did not interfere with the performance of the select committee’s functions. Further there is little to be gained by applying any further contempt to any witness if the unauthorised disclosure was by a witness.
- 6.2 The Committee recommends that while the conduct offends the dignity of the House, on this occasion no further action should be taken by the House.



Hon Nick Griffiths MLC
Chairman

6 December 2007