



## **Procedure and Privileges Committee**

# **Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament**

**Report No. 9  
November 2015**

Legislative Assembly  
Parliament of Western Australia

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# Procedure and Privileges Committee

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*Protecting the Parliament:  
Exclusive Cognisance and  
Sanctions for Breach of Privilege  
and Contempt of Parliament*

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**Report No. 9**

Presented by

**Hon Michael Sutherland, MLA  
Speaker of the Legislative Assembly**

Laid on the Table of the Legislative Assembly on 25 November 2015



# Recommendations

## **Recommendation 1:**

That no amendments be made to sections 55 to 59 of the *Criminal Code*.

## **Recommendation 2:**

That the *Parliamentary Privileges Act 1891* be amended 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, and if the fine is not paid within 28 days after the day on which the fine was imposed, the offender may be imprisoned in the custody of the respective Constable of the House, in such place within the State as the House directs, until the fine is paid, or until the end of the calendar year in which the offence occurred or any lesser period as the House orders.

## **Recommendation 3:**

That the Legislative Assembly delete Standing Orders 55 and 56 and replace them with the following new Standing Orders:

Standing Order 55

### **Contempts of the Assembly**

- (1) The Assembly has power to determine that any particular act constitutes a contempt.
- (2) The Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its Committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions.

Standing Order 56

### **Penalties for Contempts of the Assembly**

Any person declared guilty of a contempt of the Assembly may be fined a penalty of such amount as the Assembly orders, and if the fine is not paid within 28 days after the day on which the fine was imposed, the offender may be imprisoned in the custody of the Sergeant-at-Arms, in such place within the State as the Assembly directs, until the fine is paid, or until the end of the calendar year in which the offence occurred or any lesser period as the Assembly orders.

**Recommendation 4:**

That the Parliament of Western Australia retain the power to expel Members for contempt of the Parliament.

**Recommendation 5:**

That parliamentary precincts legislation be introduced into the Parliament and that, as a first step, draft parliamentary precincts legislation be tabled for Members' consideration in the form of a green Bill.

# ***Protecting the Parliament: Exclusive Cognisance and Sanctions for Breach of Privilege and Contempt of Parliament***

## **Background to this Report**

On 25 February 2015 the Legislative Council considered a motion to agree to and adopt recommendations 1 and 2 of Report 29 of the Legislative Council's Standing Committee on Procedure and Privileges entitled *Review of the Report of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament*.<sup>1</sup>

The two recommendations were:

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'.

Recommendation 1 was put and passed by the Legislative Council. With respect to Recommendation 2, the Attorney General, Hon Michael Mischin MLC, moved that 2(b) and 2(d) be adopted and agreed to and that 2(a) and 2(c) be referred to the Legislative Council's Procedure and Privileges Committee for further consideration and report. This motion was agreed to by the Legislative Council.

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<sup>1</sup> Western Australia, Legislative Council, 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*, Report 29, May 2014.

Upon being acquainted with Report 29, the Legislative Assembly's Procedure and Privileges Committee (the Committee) resolved to review Recommendations 2(a) to 2(d) and report to the Legislative Assembly.

## **Approach by the Procedure and Privileges Committee of the Legislative Assembly**

In conducting its review of the recommendations in Report 29, your Committee took into consideration reports and recommendations of privilege committees in the Westminster system that have also considered sanctions for breaches of parliamentary privilege and contempt of Parliament—in particular, the reports of the 1999 UK Joint Committee on Parliamentary Privilege and the 2013 UK Joint Committee on Parliamentary Privilege.<sup>2</sup> In addition, given its direct relevance, your Committee also referred to the 2010 report of the Legislative Assembly's Procedure and Privileges Committee entitled *Procedural Fairness and Powers of the House*, the 2007 report of the Legislative Council's Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, and the 2009 report of the Legislative Council's Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament.<sup>3</sup>

With respect to Recommendation 2(b), regarding an enhanced power to fine, your Committee also sought expert legal advice from the State Solicitor's Office.

## **Parliamentary Privilege**

Critical to the effective functioning of a legislature are certain privileges, immunities and powers—customarily referred to as 'parliamentary privilege'. These privileges, immunities and powers enable the Houses and their Members and Committees to perform effectively their constitutional functions of representing, legislating, inquiring and debating in the public interest.

The privileges, immunities and powers of the Legislative Assembly and the Legislative Council of the Parliament of Western Australia are defined in the

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<sup>2</sup> United Kingdom, House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, *Report*, 1998–99 Session, HL Paper 43, HC 214, March 1999; United Kingdom, House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, 2013–14 Session, HL Paper 30, HC 100, July 2013.

<sup>3</sup> Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Procedural Fairness and Powers of the House*, Report No. 8, June 2010; Western Australia, Legislative Council, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, *Report*, November 2007; Western Australia, Legislative Council, Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament, *Report 1*, May 2009.



*Parliamentary Privileges Act 1891*, which was enacted pursuant to section 36 of the *Constitution Act 1889*. Section 36 provides:

**36. 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.

Section 1 of the *Parliamentary Privileges Act 1891* provides:

**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.

It is important to note that when the *Parliamentary Privileges Act 1891* was enacted, section 1 provided that the privileges, immunities and powers to be held by the Houses, Committees and Members of the Parliament of Western Australia:

Are hereby defined to the same as are, at the time of the passing of this Act, or shall hereafter for the time being be, held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland and by the Committees and members thereof ...

However, this ambulatory nexus between the Parliaments ceased in 2004 when the Parliament of Western Australia pegged the linkage of its privileges to the House of Commons as at 1 January 1989.<sup>4</sup>

The matter of Parliaments being able to safeguard their immunities and privileges so that they can continue to discharge their 'high functions' in serving the public interest, is of central importance to Parliaments.<sup>5</sup> Over the past few decades, particularly in response to the judicial arm of Government taking a more interventionist, and on occasion an adversarial, stance towards Parliaments exercising their immunities and powers, there have been a number of inquiries and reports by parliamentary privileges committees into the subject.

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<sup>4</sup> *Constitution (Parliamentary Privileges) Amendment Act 2004* (WA).

<sup>5</sup> Patteson J, *Stockdale v Hansard* (1839) 9 AD & E 1, 214.

One of the major themes of these privilege reports has been the appropriateness, scope and enforceability of the penal powers of Parliaments. These penal powers enable legislatures to discipline Members and non-Members for breaches and abuses of parliamentary privilege and for contempt of Parliament. (Some jurisdictions do not hold penal powers, but can enforce their authority for protective or defensive reasons.<sup>6</sup>) Although designated *penal* powers, these powers are more generally called upon as a shield rather than a sword to protect Parliaments' processes and authority, and derive from Parliaments' exclusive cognisance, that is, their jurisdiction to control their internal affairs, proceedings and procedures without interference from the courts. The sanctions available vary across parliamentary jurisdictions, but generally range from orders to apologise to the House; reprimand, admonishment or censure by the House; exclusion from the parliamentary precincts; fines and imprisonment; and, for Members, can also include disqualification from serving on parliamentary committees and suspension or expulsion from the legislature.

While misgivings are sometimes expressed about Parliaments wielding penal powers, the observations of the 1999 UK Joint Committee on Parliamentary Privilege are worth noting:

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 ... 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>7</sup>

Your Committee endorses the view that Parliaments require penal powers to enable them to carry out their vital constitutional roles and to protect their proceedings from improper interference.

## Legislative Council Report 29 – Recommendations

### Amendments to the *Criminal Code*

**Legislative Council Recommendation 2(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*'.**

This recommendation was referred back to the Legislative Council's Procedure and Privileges Committee for further consideration and report.

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<sup>6</sup> See *Armstrong v Budd* (1969) 71 SR (NSW) 386.

<sup>7</sup> 1999 UK Joint Committee on Parliamentary Privilege Report, p.79.

Sections 55 to 61 of the *Criminal Code* establish statutory offences and/or crimes in relation to certain contempts of Parliament. The Legislative Council's recommendations relate to sections 55 to 59. These sections are:

Section 55	Interfering with the legislature
Section 56	Disturbing Parliament
Section 57	False evidence before Parliament
Section 58	Threatening witness before Parliament
Section 59	Witness not attending or giving evidence before Parliament

The penalties specified under these sections range from being liable for a two-year term of imprisonment and a fine of \$24,000 for violation of section 59, to being liable for imprisonment for seven years for violation of section 57. Sections 55, 56 and 58 provide for two categories of penalty depending on whether the violation is prosecuted summarily or on indictment. The lowest penalty is a twelve-month term of imprisonment and a \$12,000 fine; the highest penalty is a five-year term of imprisonment.

Each House of the Parliament of Western Australia also has jurisdiction to punish for contempts. This power derives from the *Parliamentary Privileges Act 1891* which provides that the two Houses of the Parliament have and may exercise the powers set out in the Act, including powers to punish summarily for contempts. Section 8 of this Act provides:

**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.

Sections 14 and 15 of the Parliamentary Privileges Act 1891 also empower the Parliament to direct the Attorney General to prosecute, at the direction of the House, for contempt. Section 14 relates to directing a prosecution for ‘the publishing of any false or scandalous libel of any member touching his conduct as a member by any person other than a member’. Section 15 empowers a House to direct the Attorney General to ‘prosecute before the Supreme Court any such person guilty of any other contempt against the House which is punishable by law’.

As Attorney General Hon Septimus Burt made clear in 1891 when moving the second reading of the Parliamentary Privileges Bill, specified contempts were enumerated in section 8 to provide a ready reference for Members at a time when it was not easy to ‘ascertain what the powers of the House of Commons would be’ with respect to these contempts.<sup>8</sup> This would have been of significant practical use to Members at this time given that section 2 of the Parliamentary Privileges Bill (and later the Act) provided that ‘prima facie evidence’ of the status of a privilege in the House of Commons would need to be established by means of the printed Journals of the House of Commons. These journals aggregate the corrected version of the Votes and Proceedings, i.e., the formal record of proceedings in the House of Commons on sitting days, and they would not have been easy to access at a time when the quickest form of communication was telegraphy.<sup>9</sup>

Apart from these enumerated contempts, the Parliament of Western Australia’s power to protect its processes also derives more broadly from its linkage, through section 1 of the *Parliamentary Privilege Act 1891*, to the ‘powers’ of the British House of Commons—powers which, at the original date of enactment and at the later pegged date of 1989, included the power to punish for contempt of Parliament.

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<sup>8</sup> Hon Septimus Burt, Attorney General, Western Australia, *Parliamentary Debates* (Hansard), 28 January 1891, p. 96.

<sup>9</sup> See the UK Parliament’s House of Commons Journal webpage: <http://www.publications.parliament.uk/pa/cm/cmjournal.htm>. Accessed on 3 November 2015.

The contempt offences provided for under the *Criminal Code* overlap with those enumerated in the *Parliamentary Privileges Act 1891*. Such concurrent jurisdiction raises difficulties, which is why the 2013 UK Joint Committee on Parliamentary Privilege strongly argued against criminalising contempts.<sup>10</sup> Some of these difficulties include that overlapping jurisdiction undermines the exclusive cognisance that Parliaments exercise over matters that fall directly within their jurisdiction, and that the prosecution of the statutory provisions may be constrained when a court's use of House or Committee documentation may be interpreted as breaching Article 9 of the Bill of Rights. In addition, the issue of double jeopardy may arise where two separate bodies have power to impose penalties based on the same set of facts.

Notwithstanding these difficulties, Report 29 argues that the *Criminal Code* offences relating to Parliament provide a significant deterrent against the commission of the enumerated contempts. Report 29 also contends that inclusion of these offences in the *Criminal Code* is a sufficient indication of the Parliament's intention to permit parliamentary privilege to be set aside for the limited purpose of allowing the use of House and Committee transcripts and evidence to prosecute these offences. However, to remove any 'lingering doubt', the report favours a clarifying amendment to these *Criminal Code* provisions to confirm that proceedings of Parliament may be used as evidence in prosecuting these sections.<sup>11</sup>

Your Committee respectfully disagrees with this recommendation. While it is certainly the case, as expressed by then Attorney-General Gareth Evans and then Solicitor-General M.H. Byers in a 1983 joint opinion that:

... it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away ...<sup>12</sup>

there are cases in which statutes deal specifically with Parliament and it is unequivocal that, by 'necessary implication' or 'necessary intendment', parliamentary privilege will not be a bar to the operation of these statutory provisions. Necessary implication is a recognised principle of statutory interpretation. It has been confirmed by the High Court of Australia in *Coco v The Queen* that even fundamental human rights can be abrogated by necessary implication:

The need for a clear expression of an unmistakable and unambiguous intention does not exclude the possibility that the presumption against statutory interference with fundamental rights may be displaced by implication. Sometimes

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<sup>10</sup> 2013 UK Joint Committee on Parliamentary Privilege Report, pp. 20–21.

<sup>11</sup> Legislative Council Report 29, p. 14.

<sup>12</sup> Joint Opinion from Parliament of the Commonwealth of Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*, May 1985, Appendix 11, p. 86.

it is said that a presumption about legislative intention can be displaced only by necessary implication but that statement does little more than emphasize that the test is a very stringent one. As we remarked earlier, in some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless.<sup>13</sup>

It is your Committee's view that sections 55 to 59 of the *Criminal Code* would be rendered nugatory without the necessary implication that parliamentary privilege would be set aside to the extent that parliamentary proceedings could be led as evidence. Accordingly, your Committee does not agree that it is necessary to amend the Act to clarify this point.

Indeed, your Committee is of the view that doing so 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.

Your Committee also notes that sections 55 to 59 of the *Criminal Code* are almost never invoked, and does not, therefore, consider there is a pressing case for effecting legislative change.

#### **Recommendation 1:**

That no amendments be made to sections 55 to 59 of the *Criminal Code*.

### **Enhanced Power to Fine**

**Legislative Council Recommendation 2(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'.**

This recommendation was agreed to by the Legislative Council.

As discussed above, section 8 of the *Parliamentary Privileges Act 1891* provides the Houses with an express power to fine in circumstances where 'certain contempts' have occurred. With respect to this statutory provision, Legislative Assembly Standing Order 55 provides:

#### **Penalties for certain contempts**

**55.** Any person declared guilty of contempt for an offence defined by Section 8 of "An Act for defining the Privileges, Immunities, and Powers of the Legislative Council and Legislative Assembly of Western Australia respectively," may be fined

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<sup>13</sup> *Coco v The Queen* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

a penalty of such amount as the Assembly orders, and if the fine is not immediately paid, the offender may be imprisoned in the custody of the Sergeant-at-Arms, in such place within the State as the Assembly directs, until the fine is paid, or until the end of the then existing session or such lesser period as the Assembly orders.

With respect to those contempts which are not enumerated in section 8, Legislative Assembly Standing Order 56 provides:

**Other contempts**

**56.** Any member or other person declared guilty of contempt not covered by Standing Order 55 may be fined in a penalty not exceeding one hundred dollars as the Assembly orders, and if the fine is not immediately paid, be committed by warrant of the Speaker, for a period not exceeding fourteen days, to the custody of the Sergeant-at-Arms in such place within the State as the Assembly directs, and will be detained in custody for the period directed unless sooner discharged by order of the Assembly or the fine is paid.

The result of these provisions as they currently stand, is that the Legislative Assembly could impose an uncapped fine on someone who sends a Member a challenge for a duel, for example, but could not impose a fine of more than \$100 for such serious, and more likely, contempts as the interfering with—including threatening of—a Committee witness, the publishing of false and misleading reports of House or Committee proceedings, the unauthorised disclosure of confidential Committee reports or deliberations, and the wilful provision of false evidence to a House or Committee by a witness.

Your Committee is of the view that limiting the Houses to only being able to order a token fine for potentially major contempts, but then vesting the Houses with the power to imprison those who do not pay the said token fine, is anomalous to say the least. This anomaly is principally due to the erosion of financial penalties over time due to the effect of inflation. The original penalty of £50 provided for in the Standing Orders when adopted in 1891, for example, was equivalent to approximately \$5,800 in today's money—a substantial sanction.<sup>14</sup>

A complicating issue with respect to fines, has been the earlier view that as the House of Commons has not imposed a fine since 1666, its power to fine has 'lapsed' and therefore cannot be regarded as a power *inherited* under the general grant in section 1

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<sup>14</sup> Given the Reserve Bank of Australia's 'Pre-Decimal Inflation Calculator' only goes back to 1901, this calculation was provided by means of the 'Purchasing Power Calculator' on MeasuringWorth.com. The exact calculation is \$5,794.00 calculated to 2013, which is the latest date available for calculations.  
<http://www.measuringworth.com/australiacompare/relativevalue.php>. Accessed on 5 November 2015.

of the *Parliamentary Privileges Act 1891*.<sup>15</sup> The 1967 and 1976–77 House of Commons Select Committees on Parliamentary Privilege and the 1999 UK Joint Committee on Parliamentary Privilege recommended legislation to clarify and confirm the power of the House of Commons to fine.<sup>16</sup> More recently, however, the 2013 UK Joint Committee on Parliamentary Privilege has affirmed the view that the House of Commons still retains its ability to fine for any contempt:

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.<sup>17</sup>

By extension, the Parliament of Western Australia, which has the privileges, immunities and powers of the House of Commons as at 1 January 1989, also holds this power under section 1 of the *Parliamentary Privileges Act 1891* and would not need to seek legislative ratification.

The subject of the fines available to punish contempt of Parliament in Western Australia, and the diminution of the value of these fines over time, has been considered by various committees.

In 1989 the Western Australian Parliamentary Standards Committee observed that the penalty provisions in the *Parliamentary Privileges Act 1891* (specifically section 14 which caps the fine for the ‘publishing of any false or scandalous libel of any member touching his conduct as a member by any person other than a member’ at \$200) were ‘vastly outdated and should be brought in line with current values’.<sup>18</sup>

In 2010 the Legislative Assembly’s Procedure and Privileges Committee, having also considered the matter of fines for contempt, recommended:

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 ...<sup>19</sup>

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<sup>15</sup> 1999 UK Joint Committee on Parliamentary Privilege Report, p. 73.

<sup>16</sup> House of Commons, Select Committee on Parliamentary Privilege, *Report*, 1966–67 Session, 34, pp. xlvii–xlvi; House of Commons, Select Committee on Parliamentary Privilege, *Third Report*, 1976–77 Session, 417, pp. viii–ix; 1999 UK Joint Committee on Parliamentary Privilege Report, p. 84.

<sup>17</sup> 2013 UK Joint Committee on Parliamentary Privilege Report, p. 23.

<sup>18</sup> Western Australia, Parliamentary Standards Committee, *Report of the Parliamentary Standards Committee*, Perth, 1989, p. 21.

<sup>19</sup> 2010 Legislative Assembly Procedural Fairness Report, p. 19.



Section 7 of the *Parliamentary Privileges Act 1987* (Cth) provides that a House may impose on a person a fine not exceeding \$5,000 in the case of a natural person and not exceeding \$25,000 in the case of a corporation for offences against the House. A House cannot fine *and* imprison a person for the same offence.

Again, your Committee notes that according to the Reserve Bank of Australia's inflation calculator, the \$5,000 fine set in 1987 in the *Parliamentary Privileges Act 1987* (Cth) is equivalent to \$11,424 in 2014.<sup>20</sup> Mindful that capped fines suffer attrition through inflation, your Committee sought advice as to whether penalty units or some other indexing mechanism could be used to obviate the devaluation of monetary penalties.

The State Solicitor's Office provided advice to the effect that apart from penalty units, there are no provisions which allow for indexation of penalties in Western Australia, and that 'Neither would be an appropriate solution to the diminishing value of a fine over time given the general position in Western Australia'. State Counsel further advised that:

Amending the Act would remove the flexibility and discretion the WA Parliament currently has to deal with contempt of parliament pursuant to ss 8, 14 and 15 of the Act.<sup>21</sup>

While appreciative of this advice, your Committee notes that it is only with respect to the enumerated 'certain contempts' of section 8 that the Parliament holds 'flexibility and discretion'. Other contempts cannot receive more than the capped \$100 penalty. Your Committee concurs with the Legislative Council that this situation is not satisfactory.

Your Committee also sees the merit of the position taken by the Legislative Council in 2011 to adopt a specific Standing Order which confirmed and clarified the authority of the Council 'to determine that any particular act constitutes a contempt', and similarly sees value in the Council's recommendation that the Houses should be able to impose a fine for any amount they consider appropriate for a contempt of the Parliament.

Indeed, your Committee notes that a statement confirming that the Legislative Assembly was authorised to punish for contempt was included in the original Standing Orders adopted following Western Australia's accession to responsible self-government in 1890. The relevant Standing Orders were as follows:

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<sup>20</sup> Calculations provided by the Reserve Bank of Australia's 'Inflation Calculator' can only be determined to 2014. <http://www.rba.gov.au/calculator/annualDecimal.html>. Accessed on 5 November 2015.

<sup>21</sup> Mr George Tannin SC, State Counsel, to Hon Michael Sutherland MLA, letter, 3 June 2015.

71. If any Member shall misconduct himself in the Assembly, or interrupt the orderly conduct of business, or wilfully disobey any order of the Assembly, he may be declared guilty of contempt.

...

76. Any Member or other person declared guilty of contempt may, on the resolution of the Assembly, be fined in a penalty not exceeding Fifty Pounds; and, in default of immediate payment, be committed, by warrant, under the hand of the Speaker, for a period not exceeding fourteen days, to the custody of the Sergeant-at-Arms, and shall be detained in custody for the period directed unless sooner discharged by order of the Assembly, or the fine be sooner paid.

In 1904 the Assembly adopted a new Standing Order, 76A, which enabled the House to impose a fine of 'such amount as the Assembly may, in its discretion, think fit' with respect to the enumerated contempts in section 8 of the *Parliamentary Privileges Act 1891*.<sup>22</sup> This change was effected because the Members did not consider that the £50 fine then provided for constituted an adequate sanction for major contempts. Further, as the Member for Guildford argued, it was desirable as a general principle that the:

... House itself should be able to determine what is the amount of fine or the degree of punishment to be inflicted on a person guilty of contempt of the House ...<sup>23</sup>

Your Committee is also of the view that the House should have greater flexibility in determining financial penalties on a case-by-case basis and that this flexibility should apply to all contempts, rather than only to the somewhat arbitrary subset that was enshrined in statute more than a century ago.

Accordingly, your Committee supports Legislative Council Recommendation 2(b). However, your Committee considers that it would be appropriate to provide a 28-day period for the payment of any fines imposed under this provision—as is standard practice under legislation and, therefore, in line with community expectations—and would amend the recommendation to this effect.<sup>24</sup>

In addition, your Committee also recommends that the *Parliamentary Privileges Act 1891* be amended to reflect the changed practice in Western Australia whereby a parliamentary session now extends for the full length of the quadrennial term rather

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<sup>22</sup> Western Australia, *Parliamentary Debates* (Hansard), 8 November 1904, pp. 1110–1111.

<sup>23</sup> Mr C.H. Rason, Western Australia, *Parliamentary Debates* (Hansard), 8 November 1904, p. 1110.

<sup>24</sup> Under section 32(2)(b)(i) of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), action cannot be taken in relation to the non-payment of a fine until 'a period of 28 days after the day on which the fine was imposed has elapsed'.

than a usually annual period, as was the practice before 2003, and would amend the Council's recommendation to accommodate this change.<sup>25</sup>

**Recommendation 2:**

That the *Parliamentary Privileges Act 1891* be amended 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, and if the fine is not paid within 28 days after the day on which the fine was imposed, the offender may be imprisoned in the custody of the respective Constable of the House, in such place within the State as the House directs, until the fine is paid, or until the end of the calendar year in which the offence occurred or any lesser period as the House orders.

In addition to recommending amendment to the *Parliamentary Privileges Act 1891*, your Committee recommends that the Assembly amend its Standing Orders to enhance the capacity of the House to protect its proceedings. Your Committee recommends the deletion of Standing Orders 55 and 56 and their replacement by new Standing Orders. New Standing Order 55 should make explicit the power of the Assembly to determine that any particular act constitutes a contempt. Your Committee also recommends that this Standing Order include 'threshold' criteria to guide the House in determining whether to find an act constitutes a contempt. Your Committee notes that similar broad statements confirming the power of a House to adjudge what constitutes a contempt and threshold tests for guidance have worked well in other Australian jurisdictions.

Given the quantum of a fine for a contempt is within the jurisdiction of the House to determine, your Committee recommends that new Standing Order 56 confirm the power of the Assembly to impose a fine of any amount for any contempt.

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<sup>25</sup> See 'Prorogation of Parliament', Statement by the Leader of the House, Hon J.C. Kobelke, Legislative Assembly, Western Australia, *Parliamentary Debates*, (Hansard), 25 June 2003, pp. 9227–9228.

### **Recommendation 3:**

That the Legislative Assembly delete Standing Orders 55 and 56 and replace them with the following new Standing Orders:

Standing Order 55

#### **Contempts of the Assembly**

- (1) The Assembly has power to determine that any particular act constitutes a contempt.
- (2) The Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its Committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions.

Standing Order 56

#### **Penalties for Contempts of the Assembly**

Any person declared guilty of a contempt of the Assembly may be fined a penalty of such amount as the Assembly orders, and if the fine is not paid within 28 days after the day on which the fine was imposed, the offender may be imprisoned in the custody of the Sergeant-at-Arms, in such place within the State as the Assembly directs, until the fine is paid, or until the end of the calendar year in which the offence occurred or any lesser period as the Assembly orders.

## **Abolition of Power to Expel Members**

**Legislative Council Recommendation 2(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'.**

This recommendation was referred back to the Legislative Council's Procedure and Privileges Committee for further consideration and report.

A Parliament's power to expel a Member due to gross misconduct is a protective measure whereby a Parliament can preserve public confidence in the institution. That is, expulsion is not essentially a penal measure, though some might perceive it this way, and is a primary instance of a House being able to regulate its internal affairs.<sup>26</sup>

The power to expel a member has never been used in the Parliament of Western Australia; only once in the Australian Commonwealth Parliament; only thrice in the UK

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<sup>26</sup> See *Armstrong v Budd* for further discussion of this distinction.

House of Commons in the last century; and never in the Parliament of New Zealand. It has been only sparingly invoked in other Australian parliamentary jurisdictions and most instances are not recent.

However, notwithstanding its infrequent use, your Committee agrees with the observation of the Attorney General, Hon Michael Mischin MLC, that while the power to expel has never been used in the Parliament of Western Australia, we may 'find we are giving away a power that we one day find is very valuable and may be necessary ... Parliament may be helpless to preserve its own integrity and its own dignity'.<sup>27</sup>

As noted above, in Westminster jurisdictions the power to expel a Member is seldom invoked, with most Parliaments tending to follow the threshold test approach adopted by the House of Commons in 1978, that:

In general, the House exercises ... [its penal] jurisdiction ... 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.<sup>28</sup>

Similarly, it is unlikely that if invoked, this reserve power would be abused. In 1984 the Australian Commonwealth Parliament's Joint Select Committee on Parliamentary Privilege endorsed Parliaments retaining their penal jurisdiction because:

Courts lack the flexibility that houses possess in the exercise of their penal jurisdiction since they cannot take into account factors which 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'.<sup>29</sup>

But if the occasion arose that a House felt that a Member's conduct was so egregious that he or she needed to be removed from the Chamber, then the ability to expel and set in train a replacement is, in your Committee's view, preferable to the option of a protracted suspension, potentially for the remainder of a Member's term.<sup>30</sup> In

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<sup>27</sup> Hon Michael Mischin MLC, Attorney General, Western Australia, *Parliamentary Debates* (Hansard), 25 February 2015, p. 633.

<sup>28</sup> As paraphrased in Sir Malcolm Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th edn, LexisNexis, London, 2011, p. 218. The threshold approach was adopted by the House of Commons on 6 February 1978.

<sup>29</sup> Summary of the Committee's reasoning from Enid Campbell, *Parliamentary Privilege*, Federation Press, Sydney, 2003, pp. 192–193.

<sup>30</sup> The UK House of Commons Committee on Standards and Privileges, for example, recommended in its report *Mr Denis MacShane*, 2012–13 Session, HC 635, October 2012, that Mr MacShane be suspended from the service of the House for 12 months for knowingly submitting false invoices. Mr MacShane announced he would be applying for the Chiltern Hundreds [that is, seeking to resign] immediately following the publication of this report. For discussion of this case see

employing this option, as noted in *Odgers' Australian Senate Practice*, 'a place in the House would be effectively vacated, but the House would be powerless to fill it'.<sup>31</sup> This would essentially disenfranchise a whole constituency in the case of the Legislative Assembly, and materially lessen representation in the case of the Legislative Council.

When a House votes to expel a Member, the seat of the Member becomes vacant. In the case of a Member of the Legislative Assembly, the Member is not disqualified from contesting the resultant by-election and the electorate has the opportunity to adjudicate on the Member's conduct. A different situation obtains in the Legislative Council. When a Member of the Legislative Council is expelled there is no by-election at which the expelled Member can run again for office and thereby leave the ultimate decision to electors. Instead, Western Australian electoral legislation determines an expelled Member's replacement in a Council vacancy by way of a mathematical formula using the votes cast at the previous election—and which excludes the expelled Member from the calculations.<sup>32</sup> Legislative Council Report 29 accordingly considers the power of a House to punish a Member through expulsion impinges on the democratic right of electors to put into Parliament a representative of their own choosing.

Of this reservation, the Attorney General noted:

If consequences are felt to be undesirable because no election is held or there is no ability to choose another candidate or to have that person run again, if necessary, maybe that can be effected by other amendments ...<sup>33</sup>

The matter of expulsion and the inability of Legislative Council members to run for re-election was considered by the Parliamentary Standards Committee in 1989. The Committee reported that it was:

... strongly of the belief that the power to expel must be retained if only to deal with a Member or Members who set out deliberately to prevent the Parliament functioning or to bring it into total disrepute. Ultimately in such cases it is the electors who will pass judgement if and when the Member(s) concerned seek re-election.

One problem arising from the above is that in the Legislative Council the present provisions for filling casual vacancies would not permit a Member who is expelled

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Liam Laurence Smyth, 'Privilege, Exclusive Cognisance and the Law', in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law*, Hart Publishing, Oxford, 2013, p. 15.

<sup>31</sup> Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, p. 75.

<sup>32</sup> See Legislative Council Report 29, p. 16.

<sup>33</sup> Hon Michael Mischin MLC, Attorney General, Western Australia, *Parliamentary Debates* (Hansard), 25 February 2015, p. 633.

from that House to seek re-election until the next general election for the Upper House. Accordingly the Committee recommends:

“that remedial legislation be introduced into the Western Australian Parliament to provide for the method of filling a casual vacancy in the Legislative Council of Western Australia to be modified in such a manner as to enable any Member expelled from the House, if legally eligible, to contest an election to fill the vacancy consequent upon his expulsion.”<sup>34</sup>

Given that the Parliament of Western Australia has never expelled a Member, it appears to your Committee that attempting to produce a remedy, for what is most likely to be only a once-in-a-hundred-years situation of an expelled Council Member being unable to re-contest his or her seat, is not a compelling argument against retaining the reserve power to protect the Parliament. But if this issue were to prove an intractable sticking point, then your Committee would recommend preserving the power to expel and call for amendment of the necessary legislation.

#### **Recommendation 4:**

That the Parliament of Western Australia retain the power to expel Members for contempt of the Parliament.

## **Parliamentary Precincts Legislation**

**Legislative Council Recommendation 2(d): ‘establish a statutory definition of the “parliamentary precinct”’.**

This recommendation was agreed to by the Legislative Council.

In Westminster parliamentary jurisdictions the control and management of parliamentary buildings and grounds traditionally vests in the Presiding Officers, and this ‘arrangement can be understood as an affirmation of the independence of Parliament from the Executive’ and, on a more practical note, as a ‘necessary adjunct to the proper functioning of a legislature’.<sup>35</sup> However, your Committee notes that in the absence of parliamentary precincts legislation there can be ambiguity as to the defined geographical area over which the Presiding Officers (and their authorised delegates) may be confident they exercise this authority. Specifically in the case of the Parliament of Western Australia, there is uncertainty as to whether the parliamentary precincts are ‘contained within the “natural” area bounded by the surrounding

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<sup>34</sup> 1989 Parliamentary Standards Committee Report, p. 63.

<sup>35</sup> Gareth Griffith and Lenny Roth, NSW Parliament, NSW Parliamentary Research Service, *Security in the Parliamentary Precinct*, Sydney, 2013, p. 4; David McGee, *Parliamentary Practice in New Zealand*, 3rd edn, Dunmore Publishing, Wellington, 2005, p. 674.

roads'.<sup>36</sup> Without a delineated geographical area, the Parliament of Western Australia lacks certainty as to those areas over which the Presiding Officers can enforce control to admit or exclude. This can have practical implications with respect to security, law enforcement, and emergency situations by creating uncertainty as to what can and cannot occur in which places and, as a corollary, who can or cannot take action. Imprecision regarding the precincts can also have implications for parliamentary privilege: which parts of the grounds are off-limits to someone excluded by a resolution of the House, or to someone attempting to serve a summons on a Member? Additionally, this geographical uncertainty can complicate planning control for the Parliament.

Legislative Council Report 29 is of the view that a statute which 'clearly defines the parliamentary precinct and affords minor or temporary changes to the boundaries' would be beneficial to the Parliament of Western Australia.<sup>37</sup>

Your Committee concurs with the Legislative Council that there would be advantages to clarifying the extent of the parliamentary precincts in our jurisdiction, and notes that most Australian Parliaments have enacted parliamentary precincts legislation.<sup>38</sup> Accordingly, your Committee recommends that appropriate parliamentary precincts legislation be introduced into the Parliament and that, as a first step, existing draft parliamentary precincts legislation be provided to Members in the form of a green Bill.

**Recommendation 5:**

That parliamentary precincts legislation be introduced into the Parliament and that, as a first step, draft parliamentary precincts legislation be tabled for Members' consideration in the form of a green Bill.



**Hon Michael Sutherland MLA**  
**Chairman of the Committee**  
**25 November 2015**

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<sup>36</sup> Legislative Council Report 29, p. 17.

<sup>37</sup> Legislative Council Report 29, p. 17.

<sup>38</sup> See for example, *Parliamentary Precincts Act 1988* (Cth), *Parliamentary Precincts Act 1997* (NSW), *Parliamentary Precincts Act 2001* (Vic), *Legislative Assembly Precincts Act 2001* (ACT).



# Appendix One

## Committee's Functions and Powers

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Legislative Assembly Standing Order No. 284 provides the following functions, powers and terms of reference to the Procedure and Privileges Committee —

### Procedure and Privileges Committee

- 284.** (1) A Procedure and Privileges Committee will be appointed at the beginning of each Parliament to —
- (a) examine and report on the procedures of the Assembly; and
  - (b) examine and report on issues of privilege; and
  - (c) wherever necessary, confer with a similar committee of the Council.
- (2) Membership of the committee will consist of the Speaker and four other members as the Assembly appoints.
- (3) Standing Order 278 will apply except that where possible any report of the committee will be presented by the Deputy Speaker.
- (4) When consideration of a report from the committee is set down as an order of the day it will be considered using the consideration in detail procedure.