Parliament of Western Australia

REPORT

OF THE

SELECT COMMITTEE OF PRIVILEGE

CONCERNING THE NON-COMPLIANCE

BY

BRIAN EASTON WITH THE

ORDER OF THE HOUSE OF JUNE 22, 1994

Presented by Hon Peter Foss MLC (Chairman)
December 1994

COMMITTEE MEMBERS

Hon Peter Foss MLC
Hon Kim Chance MLC
Hon Reg Davies MLC
Hon George Cash MLC
Hon Mark Nevill MLC

CLERK TO THE COMMITTEE

Mr Ian Allnutt

Address:
Parliament House
Perth WA 6000
Telephone: 222 7222

TABLE OF CONTENTS

REPORT OF THE SELECT COMMITTEE OF PRIVILEGE CONCERNING THE NON-COMPLIANCE BY MR B M EASTON WITH THE ORDER OF THE HOUSE OF JUNE 22, 1994

1. MATTER GIVING RISE TO ESTABLISHMENT OF THE COMMITTEE

1.1 Tabling of petition

On November 5, 1992 at the commencement of the sitting in the Legislative Council, Hon John Halden MLC tabled a Petition bearing the signature of one person, namely Mr Brian Easton. (Table paper 552).

The Petition was in the following terms:

This petition shows that —

(1) The petitioner is a former Public Service Commissioner and Managing Director of WA Exim Corporation Ltd;

(2) In the course of proceedings in the Family Court of Western Australia —

(a) the petitioner's then wife and wife's sister gave false evidence on oath alleging that the petitioner would receive $200 000 additional to moneys that he was otherwise entitled to on his retirement;

(b) documentary evidence of a highly confidential nature was adduced by the petitioner's then wife who testified that it had been obtained by her from Mr Richard Court MLA,

and in relation to paragraph (a):

(3) The Family Court's acceptance of the petitioner's then wife's evidence as to the entitlement to $200 000 in dividing the matrimonial property obliged him to declare himself bankrupt;

(4) On a reference from the Official Corruption Commission to the WA Police Force, the Police could find no basis for the allegation that the petitioner would receive or be paid $200 000 in what could not be other than corrupt circumstances;

(5) The petitioner's former wife by Minute of Agreed Facts dated September 19, 1991 admitted that the petitioner was neither promised nor received $200 000 or any other amount except that to which he was lawfully entitled;

(6) The petitioner's former wife and her sister are both solicitors employed under the Public Service Act 1978;

(7) *Subsequent to its being shown to the Public Service Commissioner that the petitioner's former wife and her sister had given false evidence, the sister was nonetheless appointed to a position of trust in the WA Legal Aid Commission.*

In relation to paragraph (b):

(8) *The documents were at all times held to be, and treated, as strictly confidential;*

(9) *The Exim Board at no time authorized release of those documents to Mr Richard Court MLA or to anyone acting under his authority;*

(10) *It was admitted during the court proceedings that the documents, and others, had no bearing on the issues;*

(11) *The Official Corruption Commission referred the matter of how Mr Court came to be in possession of the documents and whether, in passing them to the petitioner's then wife, Mr Court had acted contrary to s 7 (1) (a) of the Official Corruption Commission Act 1988, to the Police for inquiry.*

Your petitioner respectfully requests that the Legislative Council will inquire into the circumstances relating to paragraphs 2 (a) and (b) and, on being satisfied that what the petitioner alleges is true, recommend or require (as the case may be) such declarations or other relief as it thinks fit.

And your petitioner, as in duty bound, will ever pray.

Brian Easton

Mrs Easton, a lawyer, who was mentioned in the petition became the object of press scrutiny and she was also pictured by them although apparently trying to avoid press attention. On Monday, November 9, 1992 after attending a case in Midland, Mrs Easton did not return to work but instead took her own life.

2. ESTABLISHMENT AND TERMS OF REFERENCE OF COMMITTEE OF PRIVILEGE ON PETITION PRESENTED BY HON JOHN HALDEN

A Select Committee of Privilege was established by the Legislative Council on Tuesday, November 10, 1992 by order in the following terms:

That -

(1) *A Committee of Privilege of 5 Members, any 3 of whom constitute a quorum, be established to inquire whether there has been any breach of the privilege of the House in the preparation, presentation, use and promotion of the petition presented to this House by the Hon John Halden on behalf of Brian Easton on Thursday, November 5, 1992.*

(2) The Committee have -

(a) access to documents in the care of the Standing Committee on Constitutional Affairs;

(b) have power to move from place to place; and

(c) have power to send for persons, papers and records.

(3) The Committee report no later than December 3, 1992 and if the House do then stand adjourned the Committee deliver its report to the President who shall cause the same to be printed by authority of this Order.

The Committee consisted of Hons Peter Foss, Kim Chance, Reg Davies, P G Pendal and Tom Stephens, and the Hon Peter Foss was chairman thereof.

On Thursday, December 3, 1992, Hon Peter Foss MLC, Chairman of the Committee of Privilege, the House then being adjourned, presented the report of the Committee to the President of the Legislative Council on December 14, 1992 pursuant to the conditions of paragraph (3) of the terms of reference.

2.1 Formal Tabling of Report in the Legislative Council

The President subsequently Tabled the Report in the Legislative Council on Tuesday, June 22, 1993.

The Report contained many recommendations and conclusions relevant to the contents and method of presentation of the petition. Of utmost importance amongst those recommendations were the following —

The Committee recommends that the House do order:

The petitioner Brian Mahon Easton be adjudged guilty of a breach of the privilege of the House.

The petition should be struck out.

The petitioner be prohibited from further petitioning the House on this matter without the consent of the House.

The petitioner do unreservedly apologise in writing to the House for having petitioned the House in a misleading manner.

In making this recommendation as to the proposed penalty the Committee said:

In view of Mr Easton's age, the wish to preserve the child of the Easton marriage from further distress and recognising that he did suffer an injustice in the Family Court, the effects of a bitter dispute in the Family Court and that one of his motives was a desire to clear his name, the Committee has not

recommended any more severe penalty. Were it not for these factors, in any like case it would not be so lenient.

On the motion of Hon Peter Foss, consideration of the Report was made an Order of the Day for the next sitting.

No further action or debate occurred during the balance of the 1993 Parliamentary Session with respect to this Report.

3. SUBSEQUENT EVENTS

On June 22, 1994 the Minister for Health, the Hon Peter Foss, moved the following motion —

1. *That Brian Mahon Easton be adjudged guilty of a breach of privilege for the reasons stated in the report of the Select Committee of Privilege appointed to inquire into aspects of a petition presented by Brian Mahon Easton;*

2. *That:*

   (a) *the petition be struck out and all references to the petition in the Minutes be expunged;*

   (b) *Brian Mahon Easton be prohibited from further petitioning this House in relation to any matter within the prayer of the petition without the prior consent of the House;*

   (c) *Brian Mahon Easton unreservedly apologize in writing to the House within 14 days of the day on which this order is made for having petitioned the House in a misleading manner;*

3. *That the House expresses the opinion and strongly recommends, that the Hon John Halden should formally apologize in the House to Mrs McAuley, the sister of the late Mrs Easton, and Mr and Mrs Campbell, the parents of the late Mrs Easton;*

4. *That the House refer to the Standing Orders Committee whether Standing Orders should be amended in the following terms:*

   (1) *Standing order 132 be amended by adding the words:*

"The Clerk shall not be concerned to inquire into the factual correctness of any statement or allegation contained in a petition but shall, nonetheless, decline to certify a petition that is submitted contrary to the provisions of SO 134."

(2) Standing order 133 be amended by:

(a) adding to subparagraph (a) (i) before the word "addressed" the words "drafted by, or at the direction of, the person promoting it, couched in reasonable terms, and";

(b) deleting subparagraph (a) (v);

(c) inserting as subparagraphs (c) (v), (vi) and (vii) the following:

"(v) contain statements adverse to, or make allegations of improper, corrupt or illegal conduct against, a person whether by name or office;

(vi) contain or disclose matter in breach of a secrecy provision of, or order imposed or made under the authority of, a written law;

(vii) seek relief or a declaration in circumstances where the matter is justiciable and legal remedies available to the petitioner have not been exhausted".

(3) Standing order 134 be deleted and the following substituted:

Additional requirements for certain petitions

134. *(a) Where a petition would, but for the provisions of this Chapter:*

(i) contain statements or allegations of the type described in SO 133 (c) (v);

(ii) disclose matter in breach of SO 133 (c) (vi),

the petition shall be confined to a request for relief and be accompanied by a statement of the facts supporting the request.

(b) The statement required under paragraph (a) shall disclose all relevant facts including those adverse to the petitioner and have affixed an affidavit in the form set out in the Schedule to this order.

(c) A petition subject to SO 133 (c) (vii) shall be accompanied by a copy of the judgment of the court of first instance and on appeal.

(d) The statement required by paragraph (a), the affidavit made under paragraph (b), and the copy of judgment required by paragraph (c) are not to be tabled or presented with a petition but shall be retained by the Clerk pending their transmission to the Committee to which the petition is, or stands referred after presentation.

SCHEDULE

AFFIDAVIT FOR PURPOSES OF SO 134

Re the Petition of A B

I, X Y, solicitor/counsel for the petitioner A B, make oath and say as follows:

The statements of fact made by the petitioner in paragraphs . . . of the petition are true to the best of my knowledge, information and belief, and the allegations made are, in my professional opinion, sustainable.

Sworn etc

5. That:

(a) all documents presented to, or produced by, the Committee; and

(b) a bundle of documents identified by the Mover as documents relating to the petition and received subsequently by him,

be tabled and thereafter, together with the evidence taken by the Committee be transmitted to the Director of Public Prosecutions with the intent that he advise this House whether an offence has been committed under the Parliamentary Privileges Act 1891.

After debate the motion was agreed to by the House.

3.1 Response Date to Comply with the Order of the House

Under the terms of the Order of the House Mr Easton was required to respond by Tuesday, July 5, 1994.

3.2 Correspondence with Mr Easton by Clerk of the House

A letter, addressed to Mr Easton, from the Clerk of the Council was hand delivered to Mr Easton by a Sheriff's officer on Monday, June 27, 1994 advising Mr Easton of the Order of the House.

3.3 Correspondence with Clerk of the House by Mr Easton

On July 4, 1994 Mr Easton responded to the Clerk's letter and indicated he was not prepared to apologise to the House by saying inter alia —

"All the matters canvassed by the Chairman of the Privileges Committee as minor breaches of privilege were identified in the specific information which I was asked to provide to the Clerk before the Petition was drafted. It is therefore impossible to understand that I can be adjudged guilty of a breach of privilege having followed the advice I was given in every respect.

With the greatest respect to the President and Members of the Legislative Council I believe it would be both cowardly and dishonest for me unreservedly or otherwise to apologise to the House for having petitioned the House in a misleading manner when, in fact, I did so with the advice and direction of the Clerk of the Legislative Council. Certainly no breach of privilege was intended and in light of the available documentation it probably did not occur."

3.4 President Informed the House of Non-compliance with Order

On Tuesday, August 9, 1994 the President informed the House that Mr Brian Mahon Easton had not provided a written apology as required by a resolution of the House passed on Wednesday, June 22, 1994.

The President also tabled the certificate of service of the House's Order on Mr Easton and the correspondence received by him from Mr Easton in response to that Order [see Table paper 229].

4. ESTABLISHMENT AND TERMS OF REFERENCE OF SELECT COMMITTEE OF PRIVILEGE — NON-COMPLIANCE BY MR BRIAN EASTON WITH ORDER OF THE HOUSE

On Tuesday, August 9, 1994 the Minister for Health moved for the appointment of a Select Committee of Privilege which was agreed to by the House in the following terms:

(1) A Committee of Privilege be established to recommend to the House as to what action if any the House should now take by reason of the non-compliance by Brian Easton with the Order of this House of June 22, 1994.

(2) The Committee consist of Hons George Cash, Peter Foss, Mark Nevill, Kim Chance and Reg Davies, and the Hon Peter Foss be chairman thereof.

(3) The Committee have:

(a) access to all documents and evidence which was available to the Committee of Privilege on the petition by Brian Easton;

(b) power to move from place to place; and

(c) power to send for persons, papers and records.

(4) The Committee report no later than Tuesday, August 23, 1994, and if the House then stand adjourned, the Committee deliver its report to the President who shall cause the report to be printed by authority of this Order.

5. EASTON SUMMONED TO ATTEND COMMITTEE

5.1 On Wednesday, August 10, 1994 Mr Brian Mahon Easton was summoned to appear before and give evidence to the Select Committee of Privilege on Wednesday, August 17, 1994.

5.2 On Friday, August 12, 1994 a Sheriff's Officer formally served Mr Easton with a summons to appear before the Committee as a witness together with a copy of —

(a) notes for witnesses appearing before Committees;

(b) an extract of Standing Order 358 — witnesses entitlement of the Legislative Council; and

(c) an extract of Minutes No 18 of the Legislative Council, dated August 9, 1994 setting out the terms of reference of the Select Committee.

6.0 MEETINGS

6.1 Mr Easton, accompanied by his legal adviser, Mr Mark McAuliffe, appeared before the Committee on Wednesday, August 17, 1994 and gave evidence.

6.2 The Committee has met to deliberate on Wednesday, August 10, 1994, Wednesday, August 17, 1994, Wednesday, September 28, 1994, Tuesday, November 1, 1994, Tuesday, November 29, 1994, Thursday, December 8, 1994 and Wednesday, December 14, 1994.

7. ENTITLEMENTS OF WITNESSES

7.1 At its first meeting the Committee adopted, to the extent appropriate, the provisions of SO 358 concerning the entitlements of witnesses appearing before a Standing Committee of the House.

8. ASSISTANCE

8.1 Memorandum to Committee by Clerk of the Legislative Council

The following memorandum was provided to the Committee by the Clerk of the Legislative Council for consideration at its first meeting held on Wednesday, August 10, 1994.

Memorandum to the Committee of Privilege

The House has requested this Committee to recommend what further action (if any) might be taken against Brian M Easton for his failure to comply with the order of the House of June 22 requiring Mr Easton to provide a written apology within 14 days of the order consequent upon his being adjudged guilty of a breach of privilege.

The first question is whether Mr Easton's non-compliance is, itself, a contempt. This matter can be disposed of summarily. The circumstances under which the order to apologize was made do not admit of the type of submissions made in the letter addressed to the Clerk as a response to the order in lieu of an apology. Those submissions ought to have been made when Mr Easton appeared before the Committee of Privilege on the petition.

Non-compliance with the order to apologize is a contempt, but, as the resolution appointing this Committee contemplates, the House is not bound to take action against Mr Easton; it could decide to let the matter rest. This is a matter that the Committee will need to consider in framing its recommendations.

However, the House is faced with a situation of what might be termed "double contempt", viz, the contempt relating to the presentation of the petition, and the contempt arising from non-compliance with the order of June 22. Assuming for the sake of discussion that the Committee will recommend further action against Mr Easton, this memorandum traverses the options that are available to the House. In each case the discussion proceeds on the basis that the House declares Mr Easton guilty of contempt by reason of non-compliance with the June 22 order.

Option 1

The first option is to provide Mr Easton with an opportunity to purge both contempts by making an apology (whether written or personally at the Bar). The disadvantage is that, given the stance adopted by Mr Easton evidenced in his letter to the Clerk, this course of action will merely compound the contempt in the very likely event that Mr Easton fails to make the apology.

Option 2

Reprimand or censure at the Bar. This procedure was last used by the House in 1986 in relation to Peter Ellett for failure to answer questions put to him by a select committee.

These are the mildest forms of punishment open to the House.

Option 3

Committal. This involves the House ordering Mr Easton to be jailed by warrant issued by the President. Committal is the customary punishment available to the House although it has never been used by the Legislative Council.

Should Mr Easton be committed, I anticipate that he would seek a writ of habeas corpus. I have no doubt, based on the authorities, that he would be unsuccessful in securing his release by this means.

I should point out that the imposition of a fine provided for in s 8 of the Parliamentary Privileges Act 1891 is not a punishment open to the House in this case. The power to fine is restricted to the contempts described in the section and it will be noted that a failure to comply with the order actually made against Mr Easton is not provided for.

United Kingdom parliamentary authorities, including Commons' select committees, agree that it is very doubtful that the Commons possess a power to fine absent statutory authority. The English High Court certainly took that view in 1704, 38 years after the Commons last imposed a fine of £1 000 in White's case (1666). In any event, the construction of s 1 of the 1891 Act effectively precludes the Legislative Council from claiming such a power. That section requires that any power possessed by the House must be one:

> *" . . . at the time of the passing of this Act, or shall hereafter for the time being be, held, enjoyed, and exercised by the Commons . . . ".*

Clearly, the power to fine was not one exercised by the Commons in 1891 or at any time thereafter. This view is supported by the express power conferred by s 8.

When the Committee has decided what recommendations it desires to make, I am available to assist the Committee in whatever way it may request.

L B Marquet
Clerk of the Legislative Council

8.2 Medical Advice

In view of the concern expressed by the previous Committee of Privilege as to Mr Easton's age as precluding a more harsh penalty the Committee asked Mr Easton to submit voluntarily to a medical and psychiatric examination. Mr Easton agreed to a medical examination and declined a psychiatric examination.

The Committee was subsequently advised by the physician who examined Mr Easton that his state of health would not preclude him from spending some time in prison.

8.3 Chief Justice and Crown Solicitor's Advice

8.3.1 The Committee resolved to seek the advice of the Chief Justice, or another Justice nominated by him, in relation to the following questions:

1. Would the Legislative Council be acting within its powers, more particularly those conferred by s 1 of the *Parliamentary Privileges Act 1891*, were it to order on failure of Mr Easton to provide the required apology within a time certain, that Mr Easton be imprisoned?

2. Is it lawful for the Legislative Council, by resolution, to authorise the President to order, after a date certain, Mr Easton's release whether or not the required apology has been given at that time?

3. What is an appropriate period of incarceration for such an offence should the Council be minded to order release even though the contempt has not been purged?

Advice received by the Committee from the Chief Justice on October 25, 1994 suggested that it would be beyond the constitutional function of the Chief Justice or any Judge of the Supreme Court to provide legal advice to a committee of the Parliament. It was his view that such advice should be sought and obtained from the law officers of the Crown.

8.3.2 The Committee notes that the House can resolve to state a case for opinion of the justices but rather than follow that path which would lead to public speculation prior to the Committee presenting its full report, the Committee resolved to seek approval from the Attorney General to forward the same set of questions to the Solicitor General for advice.

8.3.3 Approval having been granted the Committee wrote to the Solicitor General on November 21, 1994 enclosing the questions previously asked of the Chief Justice as set out in paragraph 8.3.1 above.

The Solicitor General, in view of his pending appointment to the Supreme Court and time constraints believed that it would be preferable if he did not consider the matter, and requested that the Crown Solicitor provide the response which the Crown Solicitor did on 6th December, 1994.

9 MATTERS TO BE CONSIDERED IN RECOMMENDING TO HOUSE

9.1 The Demeanour of Mr Easton

The letter written by Mr Easton in response to the receipt of the order was not apologetic. In fact, it maintained his position which position had been determined by the previous committee and the House to be a contempt. Mr Easton also took the opportunity to attack the previous committee and its Chairman for their manner in conducting the inquiry.

This attitude was maintained in his appearance before the current Committee. Admittedly, his attitude fluctuated between statements which were conciliatory and respectful and others which were outright defiant and themselves verging on the contemptuous. The Committee was compelled to call Mr Easton to order for reflecting on a member of the Committee during the course of his evidence.

9.2 The Proceedings Before the Committee

9.2.1 Evidence of Mr Easton

The Committee informed Mr Easton of his rights, the penalties for false evidence, the role of the Committee and the range of penalties as advised to the Committee by the Clerk.

The Committee also pointed out that it was customary in the House for a person who had misled the House, whether it was that person's fault or not, to apologise to the House.

It pointed out to Mr Easton that the Hon John Halden who had presented the petition and who was found **not** guilty of misleading the House had been recommended to apologise and had done so.

Mr Easton, on the other hand, who had been found guilty and ordered to apologise, had refused.

The Committee gave Mr Easton the opportunity to give any evidence in mitigation that he wished.

In the same way that the previous committee had made it clear that it was not concerned to ascertain who had told the truth before the Family Court this Committee made it clear that it also was not concerned with that fact nor was it concerned with the matters that the previous committee had considered – it was only concerned to decide whether and if so what action should be taken over his refusal to comply with an order of the House and whether there was any excuse.

Mr Easton tried to raise both these issues. Mr Easton also alleged that if he apologised, the general public would misunderstand what he was doing and would see it as an admission of the truth of the allegations against him. Mr Easton also challenged the correctness of the decision of the House. Mr Easton also challenged the procedure of the House.

On his behalf, Mr Easton's solicitor was allowed to give evidence to the Committee and in the course of this the Chairman explained the procedure —

> *CHAIRMAN: Mr McAuliffe, our procedure is an inquisitorial one; your client has chosen to come to Parliament and can only come to Parliament because he says that all other areas are exhausted to him. He cannot come into Parliament on the matters that he raised unless he is able to says that he has exhausted his legal remedies before the other courts. Having come to Parliament, you deal with Parliament in the way that it handles matters. Parliament has its own way of handling matters, it is an inquisitorial one and is quite different from the way in which courts operate. However, once you have chosen the venue then you go by the rules of that venue. I understand Mr Easton's concern, but Parliament operates in its own way and will continue to do so.*

The Committee immediately struck the problem that the previous committee had struck, where Mr Easton appeared to have a difference in what he could intellectually understand and what he could emotionally accept. Mr Easton also sought to canvas issues such as the relative responsibility for the contents of the petition of himself and Mr Marquet.

Not only was this issue decided before the previous committee, but Mr Easton's argument is also at odds with his evidence to the previous committee.

The Committee draws attention to pages 10, 12, 39 and 40 of the previous committee's report where Mr Easton firmly takes credit for what was stated in the petition.

The Committee made several efforts to bring Mr Easton back to the central position of his failure to apologise pursuant to the order for misleading the House but without success. Mr Easton continued to insist upon canvassing the issues in dispute between himself and his late wife's family.

9.2.2 Evidence of Mr McAuliffe

The Committee also took evidence from Mr McAuliffe who is Mr Easton's solicitor, both in the presence of Mr Easton and, with his consent, in his absence.

Under the law and customs of the House a witness before a committee is not allowed to be represented by Counsel. There is a right to the benefit of Counsel ie. the right to take advice on questions before answering them. This is a right that witnesses before Courts do not usually have.

It is not possible to appear before a committee except as a witness. The penalties that lie for misleading a committee follow as a matter of law whether the witness is sworn or not. Furthermore, the privileges that apply in Courts against self incrimination and legal professional privilege do not apply.

The Committee asserts these rights. However, in the circumstances the Committee advised Mr Easton as follows —

> *The Committee has discussed the matter and we would be prepared to allow Mr McAuliffe to give evidence and give him an undertaking that although, under the law, there is no privilege when a person appears before a Parliamentary committee, the Committee would not insist on an answer to a question which did breach legal professional privilege or did cause self incrimination or incrimination of another. We propose that if Mr McAuliffe were to become a witness we proceed in two parts - the first part in the presence of his client and the second part in his absence.*

The Committee advises the House that it has not allowed these rights of committees to lapse and the Chairman wishes to note that he is personally aware of an occasion where the right has been asserted with no such undertaking being given.

Mr McAuliffe made a submission to the Committee which the Committee found useful in understanding the position taken by Mr Easton. In particular, he confirmed that Mr Easton had a particular difficulty in making an apology because he would see it as admitting that his late wife's family were correct in their allegations. Mr McAuliffe also raised concerns with the procedure of the Committee to which the Chairman replied in the terms mentioned in paragraph 9.2.1.

Mr McAuliffe also accepted that the Committee had made it quite clear what was now required of Mr Easton and that Mr Easton understood this.

9.2.3 The Advice of the Crown Solicitor

What follows is only an extract from a nine page opinion and certainly does not do justice to the arguments supporting the recommendations made. It is not intended to be a summary of the arguments but only an extract from the conclusions. The full written advice of the Crown Solicitor is attached as Annexure 1.

The Crown Solicitor confirmed that the appropriate contempt to be considered was the second contempt and that the failure to apologise in response to an order of the House was itself a contempt. He referred to Denman CJ in *Case of Sheriff of Middlesex* cited in Erskine May, 20th Ed p.125.

> *"Representative bodies must necessarily vindicate their authority by means of their own, and those means lie in the process of committal for contempt"*

The Committee also notes that Denman CJ then said —

> *"This applies not to the Houses of Parliament only, but . . . as was observed in Burdett v Abbott (14 East 138) to the courts of justice, which, as well as the Houses, must be liable to continual obstruction and insult, if they were not entrusted with such powers' in case of Sherriff of Middlesex, 3 St Tr (ns) 1253."*

The Crown Solicitor went on to say —

> *"It would be incongruous if the House, could require a contemnor to apologise, rather than impose some other penalty, and then be powerless to see that lesser sanction was complied with. For this reason, I would support the view in Browning that a failure to apologise amounts to a contempt liable to its own punishment."*

The Crown Solicitor after a lengthy examination of the authorities and the *Parliamentary Privileges Act* said —

> *"As stated above, the House of Commons clearly having power to commit for contempt, the Legislative Council would also have power under s.1 of the Parliamentary Privileges Act.*

The Crown Solicitor recognises that the House only has power to commit until the end of the session of Parliament and the Committee has always recognised this. There have been examples of imprisonment for a fixed period of time such as that of Fitzpatrick and Brown by the House of Representatives in 1955 where both the High Court and Privy Council considered that that warrant would have been sufficient were it issued by the House of Commons.

Although it appears possible to imprison for a time certain the Crown Solicitor recommended that we follow the House of Commons practice as closely as possible. That is described in Erskine May (21st Ed at 109) as follows —

> *The more recent practice of the Commons has been not to commit offenders for any specified time, but generally or during pleasure, and to keep them in custody until they present petitions expressing proper contrition.*

In the light of the foregoing advice, it is apparent that the House may order the imprisonment of Mr Easton and that if it does so it should be at the House's pleasure. This would not extend beyond the term of the Parliamentary session.

9.2.4 Relevant Matters

It is clear that Mr Easton has committed another contempt of the House. In terms of the basis of contempt it is a more serious contempt because it is an open defiance of the House. The earlier contempt may have the excuse of ignorance although the previous committee certainly did not accept that the misleading was inadvertent.

The previous contempt, in the opinion of the previous committee, deserved a more serious penalty than that which was imposed. Out of consideration of other factors a more severe penalty was not imposed.

At page 54 of its report, the previous committee stated that it took into account Mr Easton's age and that it wished to preserve the child of the marriage from further distress and certain other factors which this Committee considers not relevant to the present contempt.

The measures open to the House are limited. It is not an option to ignore the contempt. It is a flagrant defiance made after the House had already been extremely lenient and had exacted from Mr Easton only that which common decency would have required of him anyway.

Requiring a further apology is futile because it invites him to repeat his offence. In any event the Committee believes that both these remedies are inadequate for the offence.

If the House were not to impose some substantial penalty then it would indicate that orders of the House may be ignored with virtual impunity provided that you were prepared to be openly defiant.

The remaining questions are whether the factors that motivated the House last time not to impose a more severe penalty should operate to mitigate this and if not, what the degree of penalty should be.

The Committee has satisfied itself by medical evidence that there is no reason why Mr Easton should not be incarcerated. Whilst the Committee is loathe to add any further burden to the family it does appear now that it is entirely in Mr Easton's hands whether he consigns himself to jail. In any case where there is imprisonment there will always be pain to families involved. If there is a special position here it is that Mr Easton has the option - he can apologise and avoid being jailed or he can remain obdurate and take the responsibility for his actions.

The Committee considers that if there is to be incarceration it should take place during the school holidays so as to minimise the impact on Mr Easton's son *vis a vis* his school companions.

The Committee believes that it is appropriate that Mr Easton consider the consequences of his actions because he seems to have totally failed to do so when he first filed his petition.

A majority of the Committee, the Hons Peter Foss, George Cash and Reg Davies, consider that censure is inadequate and that imprisonment is the only appropriate remedy.

Hons Mark Nevill and Kim Chance believe that imprisonment is not the appropriate penalty.

View of Hon Mark Nevill

Hon Mark Nevill believes that, having regard for the circumstances of this case, imprisonment would be a harsh penalty and that a censure by the House for failure to comply with an order of the House is the most appropriate available remedy.

View of Hon Kim Chance

Hon Kim Chance believes that, regardless of the circumstances, imprisonment should not be an option available to this, or any, House of Parliament, and that as the only remaining options are to either not act, or to impose a censure on Mr Easton, that a censure should be imposed.

Hon Kim Chance considers that the necessity for Parliament to vindicate its authority by means of its own has ceased to exist in modern society in which Parliament has less need to impose that authority.

Similarly in a more tolerant society than that which existed at the time of the precedent offered by the Crown Solicitor (in 9.2.3), it could be expected that the community in general would not demand the exercise of the penalty of imprisonment for a contempt of Parliament.

Indeed it is possible that the exercise of Committal powers for this offence would generally be regarded as anachronistic and petty.

10. RECOMMENDATIONS

Accordingly, the Committee recommends —

1. That the House adjudge Brian Mahon Easton guilty of a further serious breach of privilege of this House by reason of his failure and refusal to comply with the order of the House

2. That the House order that the only sufficient apology by Mr Easton would be for him to petition the House only in the form of petition attached hereto and that he be granted leave to petition the House in that form and that form only.

3. In the event that the House is not sitting he be ordered to present his petition to the President.

A majority of your Committee the Hons Peter Foss, George Cash and Reg Davies further recommends —

4. The President be ordered to issue his warrant for the committal of Mr Easton if Mr Easton has not by December 28, 1994 petitioned the House in the form attached and that the warrant cite "a serious breach of privilege" as the grounds for committal and require Mr Easton to be held at the House's pleasure.

5. The President be authorised to issue a warrant for the release of Mr Easton in the event that Mr Easton petition the House in the form attached or at any time after Mr Easton has spent 7 days in custody.

6. The House note that at the prorogation of the Parliament, this order shall lapse and Mr Easton will be entitled to be released.

A minority of your Committee, Hons Mark Nevill and Kim Chance in lieu of majority recommendations 4 to 6 recommends —

4. The House censure Mr Easton for his failure to comply with the order of the House.

11. FORM OF ORDER

That —

(1) *Brian Mahon EASTON*, having been adjudged guilty of a serious contempt of this House and having failed to make the apology required of him by order made on June 22, 1994 ["The Order"] the President is authorized and required to issue a warrant under his hand, in the form prescribed in Schedule 1 to this order, for the arrest and imprisonment of *Brian Mahon EASTON* —

Provided that the President shall not issue his warrant before Wednesday December 28, 1994 and if, before that day, *Brian Mahon EASTON* makes an apology in the form prescribed in Schedule 2, this order lapses.

(2) For the purpose of The Order this order shall constitute consent of the House for the purpose of presenting a petition of apology and the President is authorized to received that apology.

(3) Where the House is not sitting, or is adjourned, on a day that is not less than 7 days after the day on which *Brian Mahon EASTON* is imprisoned, the President is authorized, but subject to his discretion, to direct that *Brian Mahon EASTON* be released from imprisonment whether or not he has apologised.

(4) Notwithstanding paragraph (3), the President shall order the immediate release of *Brian Mahon EASTON* on receipt of an apology in the form prescribed in Schedule 2 at any time between his imprisonment and the time from which the President may exercize the discretion conferred by paragraph (3).

(5) The President is authorized to make any return required to be made by the President to any court in answer to a writ of *Habeas Corpus* or other proceedings commenced affecting or relating to this order and, for the avoidance of doubt, the President is authorized to exercise any function or power held, exercisable or enjoyed by this House necessary or incidental to giving effect to this order.

Schedule 1

Whereas **Brian Mahon Easton** was adjudged guilty of a serious contempt of the Legislative Council by its resolution made on June 22, 1994 and has failed to apologize for that contempt, now I, **Clive Edward Griffiths**, President of the Legislative Council, acting in conformity with an order of the Legislative Council made on [date] require you, **Ian Lea Allnutt**, Usher of the Black Rod in the Parliament of Western Australia, with the assistance of such members of the Police Service or other persons as you deem necessary, to arrest **Brian Mahon Easton** and deliver him into the custody of the Principal Officer having control of the Casuarina Prison and there to keep him in custody until released by my further order.

....

President *Date*

Schedule 2

To the President and Members of the Legislative Council in Parliament assembled.

I, *Brian Mahon EASTON* in answer to an order of the Legislative Council made on [date] hereby make my apology to the Legislative Council and respectfully request that I be released from any further penalty that I may otherwise incur.

And your petitioner, as in duty bound, will ever pray.

....
Signature of Petitioner *Date*

Hon Peter Foss MLC (Chairman) .....

Hon Kim Chance MLC .....

Hon George Cash MLC .....

Hon Mark Nevill MLC .....

Hon Reg Davies MLC .....

ANNEXURE 1

CROWN SOLICITOR'S OFFICE

Westralia Square
141 St. George's Tce
Perth, Western Australia 6000

Box F317, G.P.O. Perth 6001
Telephone (09) 264 1711
FAX (09) 264 1440, 264 1442
DX 175.

Your Ref:
Our Ref: CSO 94/12553
Enquiries: PANEGYRES:RBS

Mr Peter Foss MLC,
Chairman,
Select Committee of Privilege,
Legislative Council,
Parliament House,
PERTH WA 6000

Dear Mr Foss,

LEGISLATIVE COUNCIL - POWERS IN RELATION TO CONTEMPT

I refer to your letter of the 21st November to the Solicitor General.

Given his pending appointment as a Judge of the Supreme Court, and time constraints, he believed it would be preferable if he did not consider the matter, and requested that I provide the response. I have since sought and obtained additional information from Messrs Allnutt and Wahl.

I was somewhat concerned to learn upon return from a meeting with counsel on the evening of Tuesday 29th November, that your Committee was then meeting, and had expected the Solicitor General's written advice to be available for consideration at that meeting. I hope the lack of written advice at that time did not seriously inconvenience your Committee.

Your inquiry raises very interesting matters which I have dealt with in the following manner .

1. What is the relevant Contempt?

If there is to be any punishment for contempt, it is first necessary to identify the relevant conduct said to amount to a contempt. The course which has ensued gives rise to two possible breaches of privilege:

(a) Misleading Parliament by a Petition tabled 5 November 1992 - Abuse of the Right of Petition; and

(b) Refusing to Apologise for the Original Contempt - Disobeying an Order of the Legislative Council.

The inquiry by the Select Committee identifies the second of these matters as the relevant conduct. In my view, that view is correct. The first matter, although capable of constituting a contempt, has already been dealt with by the House. In a sense a "sentence" has already been passed on that conduct and, on the basis of the Order made by the Legislative Council on 22 June 1994, it did not warrant imprisonment but merely required an apology.

Furthermore, the crucial issue seems to be the need for the House to vindicate its own authority and be able to enforce the Order it has already made. If imprisonment were sought to be imposed for the first contempt it could amount to a new "sentence" for that contempt without having followed the original Order through to its conclusion.

In any event, it would appear that both matters amount to conduct able to be adjudged by the Legislative Council as in contempt of the House. That is:

(a) The original Petition amounted to an Abuse of the Right of Petition, the most common instance of which in the past has been:

> "frivolously, vexatiously or maliciously submitting a petition containing false, scandalous or groundless allegations against any person (whether a Member of either House or not)" (Erskine May, *Parliamentary Practice*, 21st ed., p.118)

The orginal Select Committee clearly found this to the case in its Report of December 1992:

> "44.8 Even if [Mr. Easton] was not actuated by malice, he was certainly not actuated by goodwill or solely by the wish to save his personal reputation. His actions appear to fall within the behaviour referred to by the Clerk...That is, it was an irritant."

(b) Refusing to apologise for the original contempt amounts to Disobedience of an Order of the House. Examples of conduct amounting to such a contempt are where a person fails to obey particular orders made by the House, such as failing to attend when summoned, failure to make returns and refusing to withdraw (Erskine May, 21st ed., p.117). Erskine May makes no specific reference to the

failure to make an apology when required as amounting to a contempt. However, Browning's *House of Representatives Practice* (1989) provides that where the House orders that an apology be made:

> "Any disregard of, or non-compliance with, a resolution or order of the House of this kind could, itself, be regarded as a contempt and attract alternative means of punishment." (Browning, p.720.)

Walker , in *Contempt of Parliament and the Media* (1984), also refers, in the context of apologies required of the media, to the failure to apologise as amounting to a contempt. Both Walker and Browning cite Erskine May as supporting their conclusion.

This conclusion, in my view, accords with the rationale which supports Parliament's power to commit for contempt:

> "Representative bodies must necessarily vindicate their authority by means of their own, and those means lie in the process of committal for contempt" (Denman CJ, *Case of Sheriff of Middlesex*, cited in Erskine May, 20th ed., p.125).

It would be incongruous if the House, could require a contemnor to apologise, rather than impose some other penalty, and then be powerless to see that the lesser sanction was complied with. For this reason, I would support the view in Browning that a failure to apologise amounts to a contempt liable to its own punishment.

2. Does the Legislative Council Have Power to Imprison for this Contempt?

It is clear that the House of Commons has power to commit a Member or non-Member for contempt of Parliament. While the Commons can no longer claim to be a court of record (as in the case of the House of Lords), its power to commit for contempt has long been recognised by the courts and exercised by the House - See Erskine May, 21st ed., p.103-104. There is no doubt that, had these contempts been committed against the House of Commons, imprisonment would have been an available punishment.

Whether the same power of committal may be exercised by the Houses of the Western Australian Parliament depends upon the scope of the *Parliamentary Privileges Act* 1891 (W.A.). Section 1 of that Act relevantly provides:

> "The Legislative Council...of Western Australia...and the Committees and members thereof...shall hold, enjoy, and exercise such and the like privileges, immunities and powers as, and the privileges, immunities, and powers of the said Council...and of the Committees and members

> thereof...are hereby defined to be 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, so far as the same are not inconsistent with the [*Constitution Act* 1889] or this Act, whether such privileges, immunities, or powers are or shall be, held, possessed, or enjoyed by custom, statute or otherwise. Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail."

Section 8 of the Act provides that each House may punish certain contempts in a summary manner by way of fine. Those listed contempts do not include those of the kind committed by Mr. Easton.

It has been suggested by some commentators that s.8, by providing for the punishment of specific contempts, limits the power of the Parliament to punish for other, non-specified, contempts. Both Walker (at pp. 31 & 72) and Campbell, in *Parliamentary Privilege in Australia* (1966) (at 26), rely on the proviso in the last sentence of s.1 as support for this narrow view.

If this view were correct, the Legislative Council would only ever have power to imprison pending the payment of a fine imposed under s.8 and would have no power to punish for contempts such as those in the present case. In my view, however, the view is not correct for the following reasons:

1. It does not give adequate weight to the amplitude of the grant of power in s.1 of the *Parliamentary Privileges Act*. The powers in s.8, particularly the power to fine, were not held and exercised by the Commons at the time of their enactment and therefore should be seen as adding to, rather than detracting from, the powers of the Western Australian Parliament to punish for contempt.

2. The view does not recognise the fundamental constitutional importance of the power to punish for contempt and the fact that, were it to be eroded in the way contended, explicit language would need to be used. For example, in rejecting a submission that a narrow construction of the Commonwealth Parliament's powers under s.49 of the Commonwealth *Constitution* should be adopted, the High Court in *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157 at 165, stated:

> "The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them...Added to that simple reason are the facts of the history of this particular branch of the law. Students of English constitutional history are well aware of the controversy which attended the establishment of the powers, privileges and

> immunities of the House of Commons. Students of English constitutional law are made aware at a very early stage of their tuition of the judicial declarations terminating that controversy, and it may be said that there is no more conspicuous chapter in the constitutional law of Great Britain than the particular matter with which we are dealing. It is quite incredible that the framers of s.49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s.49, were not quite conscious of the consequences which followed from it."

If Parliament were to be taken to have limited its power to punish in the manner suggested, one would expect express mention of it in the legislation or at least detailed consideration in the Parliamentary Debates. There is none and the second reading speech rather suggests that s.8 was included out of convenience for later reference. See the Attorney General's speech:

> "[If] the House desires to exercise the summary power of committing for contempt, it shall not go back to ascertain what the powers of the House of Commons would be, if we find that that particular matter is dealt with in the sections of this Bill following the 8th section." (*Hansard*, Assembly, 1891, p.96)

3. Finally, the view that s.8 adds to, rather than limits, the powers of Parliament is supported by the decision of the Full Court of the Supreme Court in *Aboriginal Legal Service of Western Australia Inc v Western Australia* (1993) 9 WAR 297.

In that case the Court had to consider the scope of s.4 of the *Parliamentary Privileges Act* which empowers each House to send for persons and papers. There is thus an analogy with s.8 as the question arose in that case whether s.4 exhaustively defined the House's power to compel attendance or whether there was residual power in the broad grant in s.1 which would enable the House to compel attendance in circumstances not covered by s.4. A majority of the Court (at least), held that it did not. Nicholson J. (with whom Walsh J. agreed) considered that s.4 did not require personal attendance before the bar of the House but went on, at 314:

> "[I]f this is not the correct view of s 4 of the Privileges Act, I still consider the Legislative Council has the requisite power as a power exercised by the House of Commons. If s 4 of the Privileges Act deals only with personal attendance before the bar of the House or a Committee for production of documents, the proviso to s 1 operates for it to prevail only to that extent. Section 1 is left free to operate independently as the requisite source of power. ...[T]he House of Commons has always had the requisite power."

Similarly, in relation to whether "persons" in s.4 included bodies corporate:

> "If...s 4 were confined to natural persons I consider s 1 of the Privileges Act would operate as the relevant source of power to order corporate persons to produce documents because the proviso to s 1 would operate to make s 4 exclusive only to that more limited extent." (at 315)

Clearly then Nicholson J. (& Walsh J.) took the view that the proviso to s.1 did not mean that the Legislative Council's powers to compel attendance were confined to the powers detailed in later sections. Rowland J. did not expressly consider the point, although his Honour did generally agree with Nicholson J (at 308).

Identical reasoning would, in my view, apply to s.8. The powers of contempt would only be confined to the limited extent identified in the s.8, such that any contempts not mentioned in s.8 (such as those in the present circumstances), would be able to be punished according to the broader power conferred by s.1. As stated above, the House of Commons clearly having power to commit for contempt, the Legislative Council would also have power under s.1 of the *Parliamentary Privileges Act.*

3. Nature of the House's Power to Imprison

The main points which arise are whether the House can imprison for a time certain and whether the period may extend beyond the session of Parliament. The latter of these can answered with certainty: the House has no power to imprison a person for contempt beyond the session of Parliament. See Denman C.J. in *Stockdale v Hansard* (1839) 9 AD & E 1 at 114; 112 ER 1112 at 1156:

> "[H]owever flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall and every Judge of all the Courts would be bound to discharge him by habeas corpus."

This principle is recognised in Erskine May, 21st ed. at pp.104, 108-109 and in Browning at p.717.

The question of a fixed period is more difficult. There is certainly precedent for imprisoning a contemnor for a fixed term which does not exceed the session.

The imprisonment of Fitzpatrick and Brown by the House of Representatives in 1955 was specified in the warrant to be for a period of three months, or until earlier prorogation. The High Court clearly held that that warrant would have been sufficient were it issued by the House of Commons (at 164) and the Privy Council considered the High Court's judgment "unimpeachable".

The difficulty which arises is that the current authorities seem to suggest that there is no such power. For example Odgers, *Australian Senate Practice*, 6th ed., categorically states at 1030: "There is no power to imprison for a fixed period". Erskine May, 21st ed., at 104, on the other hand, is more ambiguous:

> "[T]hough the Commons formerly imprisoned offenders for a time certain, it has subsequently been considered as wanting the power to commit for a period beyond the end of the session." (see also p.109)

This, in my view, suggests that the want of power to imprison for a time certain is really just a reflection of the other limitation and emphasises the fact that Parliament cannot imprison beyond the session. The statement of principle does not seem to be addressing a fixed period of imprisonment which will expire *before* prorogation of Parliament.

I would therefore be inclined to the view that, strictly speaking, the House of Commons would still be able to commit for a specified time were it not to exceed the session. Nevertheless, it is certainly arguable that a warrant which specified a fixed period of imprisonment would be beyond the power of Parliament and it could be expected that any such warrant would be challenged on that basis. In the circumstances therefore the most prudent course would be to follow the practice of the House of Commons as closely as possible. That practice is described by Erskine May (21st ed., at 109) as follows:

> "The more recent practice of the Commons has been not to commit offenders for any specified time, but generally or during pleasure; and to keep them in custody until they present petitions expressing proper contrition for their offences and praying for their release, or until, upon motion made in the House, it is resolved that they shall be discharged."

4. Form of Warrants

Traditionally the scope for judicial review of a committal by Parliament has been limited, the general rule being that the causes of a committal cannot be inquired into by courts of law (Erskine May, 21st ed., at 107). There may be some scope for review of whether the specified offence is, as a matter of law, in fact a contempt of Parliament, although the scope for review will depend upon the particularity of the warrant. The law was concisely stated by Dixon

C.J. in *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157 at 162:

> "[I]t is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms."

Accordingly, if a warrant specified that Mr Easton had refused to obey an order of the House, the only question for a court would be whether such a refusal, in law, amounts to a contempt of the House and it could not inquire into the nature or circumstances of the refusal. It should not be necessary to state the nature of the contempt with any greater specificity (for example, the warrant in *R v Richards; Ex parte Fitzpatrick & Browne* merely stated that the contemnor was "guilty of a serious breach of privilege").

The facts which establish the contempt need not, and should not, appear in the Warrant as there is some authority for the proposition that if they are set out, the courts will inquire into whether they are sufficient (Erskine May, 21st ed., at 108).

5. Conclusions

To return to the specific questions posed by the Select Committee, I would advise:

1 Whilst it would be within the powers of the Legislative Council to order that, if Mr. Easton failed to apologise within a time certain, he be imprisoned, as indicated above, it may be considered more appropriate for the House to now deal with Mr. Easton without specific reference to time or apology, in respect of his failure to apologise pursuant to the order of the House made on 22 June 1994.

2. I take this question to be directed to the issue whether a warrant of the House to imprison may be expressed for a fixed period. In my view, the House would have such power, so long as the period expressed did not extend beyond the term of the parliamentary session.

Nevertheless, in my view, if a committal were made, the more appropriate course would be to imprison Mr. Easton during the

pleasure of the House. This has the advantage of leaving all the House's options as to the duration of the incarceration open. Furthermore, a warrant imprisoning during pleasure would more closely follow the practice adopted by the House of Commons.

3. The House of Commons has not exercised its power to commit for contempt since 1880 and the only occasion this century when an Australian Parliament has exercised such powers was in the case of Fitzpatrick and Browne in 1955. The period of imprisonment in that case was 3 months. As the contempt in that case, attempting to influence the vote of a particular member, was of a more serious kind than that presently in issue, it can safely be said that a period of that duration is not warranted. Beyond that, the paucity of recent examples does not enable me to offer any more useful guidance.

Yours faithfully,

CROWN SOLICITOR

6 December, 1994

(PAP1.DOC)