



PROCEDURE AND PRIVILEGES COMMITTEE

PARLIAMENTARY PRIVILEGE AND ITS LINKAGE TO THE UK HOUSE OF COMMONS

Report No. 5

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ITS LINKAGE TO THE UK HOUSE
OF COMMONS**

Report No. 5

Presented by:
Mrs Dianne Guise, MLA
Laid on the Table of the Legislative Assembly
on 13 May 2004

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COMMITTEE'S FUNCTIONS, POWERS AND TERMS OF REFERENCE

Legislative Assembly Standing Order No. 282 provides the following functions, powers and terms of reference to the Procedure and Privileges Committee -

Procedure and Privileges Committee

282. (1) A Procedure and Privileges Committee will be appointed at the beginning of each session 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) The Procedure and Privileges Committee will have the powers of a select committee.

(3) Membership of the committee will consist of the Speaker and four other members as the Assembly appoints.

(4) Standing Order 278 will apply except that where possible any report of the committee will be presented by the Deputy Speaker.

(5) When consideration of a report from the committee is set down in an order of the day it will be considered using the consideration in detail procedure.

RECOMMENDATION

Recommendation 1.

- (1) That Section 36 of the *Constitution Act 1889* be amended by deleting the proviso; and
- (2) That the *Parliamentary Privileges Act 1891* be amended to specify that the Western Australian Parliament's privileges are those of the Commons House of Parliament (UK) as at 1 January 1989, and to delete the proviso from the Preamble,

as set out in Appendix 1.

MINISTERIAL RESPONSE

In accordance with Standing Order 277, the Procedure and Privileges Committee directs the Attorney General to report to the Legislative Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendation of the Committee.

PROCEDURE AND PRIVILEGES COMMITTEE

CHAIRMAN'S FOREWORD

The basis for parliamentary privilege in Britain and Australia is Article 9 of the *Bill of Rights 1689* (UK), which states:

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

Interpretation of parliamentary privilege has evolved over time and in recent years the United Kingdom Parliament has made substantial and significant changes and is contemplating making more. Because of statutory provisions linking the Western Australian Parliament's parliamentary privilege to that of the House of Commons, these changes can change the law in Western Australia without the Western Australian Parliament having any say in those changes.

The Queensland Parliament, which had similar statutory provisions linking their privilege to the House of Commons' privileges, enacted legislation in 2001 to resolve the difficulty by specifying that the law in the UK at a particular date is that which applies. This report recommends a similar approach.

This report is primarily concerned with addressing the problem of the linkage between the privileges of the Parliament of Western Australia and the privileges of the House of Commons. It also raises certain key issues in recent developments in the House of Commons as an indication of why there is a need to alter that linkage.

PART 1

PART 2 BACKGROUND

Parliamentary privilege¹ for the Western Australian Parliament is derived from that of the United Kingdom's House of Commons. Section 36 of the Western Australian *Constitution Act 1889* states:

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.

Provided that no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof.

Both the preamble and section 1 of the Western Australian *Parliamentary Privileges Act 1891* repeat the limitation of the proviso in the Constitution, referring to those privileges “*for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof.*”

Under the law as it stands, if the House of Commons chooses to diminish or change its privileges in any way, then those of the Parliament of Western Australia will be similarly diminished or changed at exactly the same time.

1.1 United Kingdom

A House of Commons and House of Lords Joint Committee inquiry into parliamentary privilege (UK Joint Committee Report), established in July 1997, reported to the Parliament on 30 March 1999.² The committee was set up in response to a number of matters pertinent to the British experience and to a general feeling that, as there had not been a major review since 1966-67, such an appraisal was due.³ The UK Joint Committee Report made 39 separate recommendations that, if implemented, would

¹ **Parliamentary privilege** “... the sum of peculiar rights enjoyed by each House collectively... and by Members of each House individually without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. This privilege, though part of the law of the land, is to a certain extent an exemption from the general law.” Limon, Sir Donald and McKay, WR (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, Twenty-second Edition, Butterworths, London, 1997, p.65.

² House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, March 1999. (hereafter UK Joint Committee's Report)

³ See UK Joint Committee's Report, paragraphs 27-31.

make significant changes to parliamentary privilege in the UK. Some legislation has already been published in draft form.⁴

1.2 Queensland

In 2001 legislation⁵ was introduced in Queensland not only in response to the developments in the House of Commons, but also out of a desire to consolidate existing provisions and to modernise the language of Acts applying to the Parliament.⁶

While the UK Joint Committee Report on parliamentary privilege lent urgency to the passage of the legislation, the Queensland Parliament, through its Members' Ethics and Parliamentary Privileges Committee (MEPPC) and its Legal, Constitutional and Administrative Review Committee (LCARC), had been addressing issues of constitutional change over the lives of three Parliaments. The most relevant of the committee reports⁷ are the MEPPC Report No. 26 - First report on the powers, rights and immunities of the Legislative Assembly, its committees and members, January 1999; and the MEPPC Report No. 34 - Report on relevance of House of Commons/House of Lords Joint Committee's report on parliamentary privilege, August 1999.

In essence the Queensland Parliament opted for the date of federation, 1 January 1901, as the date at which to 'peg' the link to UK privilege law. While your Committee agrees privilege should be pegged to a certain date, it does not propose the date of Federation be used as explained later in this report.

⁴ Draft Corruption Bill (UK). On 17 July 2003 a UK Joint Committee reported [HL Paper 147; HL 705] that the draft Bill's clause on waiver of parliamentary privilege required re-working.

⁵ The *Constitution of Queensland 2001*, and the *Parliament of Queensland Act 2001*.

⁶ In the case of the Constitution, the aim was (as far as practicable) to bring under one Act existing provisions that were scattered over a number of acts and, at the same time, to modernize the drafting style to make it more accessible. In the case of the *Parliament of Queensland Act 2001*, the primary aim was to consolidate existing laws incidental to the operation of the Assembly.

⁷ LCARC Report No. 10 - Consolidation of the Queensland Constitution: interim report, May 1998; LCARC Report No. 13 - Consolidation of the Queensland Constitution: final report, April 1999; LCARC Report No. 24 - Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution, July 2000; LCARC Report No. 31 - Review of the oath or affirmation of allegiance, October 2001; MEPPC Report No. 26 - First report on the powers, rights and immunities of the Legislative Assembly, its committees and members, January 1999; MEPPC Report No. 34 - Report on relevance of House of Commons/House of Lords Joint Committee's report on parliamentary privilege, August 1999; and MEPPC Report No. 44 - Report on a code of ethical standards for members of the Queensland Legislative Assembly, September 2000.

PART 3 THE ISSUES

There is one key issue and a number of subsidiary issues. The key issue is the nexus that exists between the House of Commons and the Parliament of Western Australia, without which the subsidiary issues have no urgency. The subsidiary issues are a number of matters addressed by the UK Joint Committee Report that would flow on to the Parliament of Western Australia. Here the concern is not with arguing the merits of the subsidiary issues but with noting the nature of some of the changes that may be imposed on the Parliament of Western Australia without the Parliament having an opportunity to give the changes detailed, or indeed any, consideration.

2.1 Key Issue - The Linkage with the House of Commons

For the Western Australian Parliament, as for the Queensland Parliament, the issue of the linkage of its privileges to those of the House of Commons is as much about sovereignty as about parliamentary privilege. Without amendment to s.36 of the Western Australian *Constitution Act 1889* and the preamble and s.1 of the Western Australian *Parliamentary Privileges Act 1891*, any changes adopted by the House of Commons that modify its parliamentary privileges will equally apply to the Parliament of Western Australia. This not only creates uncertainty around the powers, rights and immunities of the Western Australian Parliament, but also leaves them dependent on decisions of a House of Commons that, in some instances, may in turn be subservient to the jurisdiction of the European Union.⁸ It is also contrary to the spirit of s.1 of the *Australia Act 1986* (UK), which states:

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

This further reinforces the argument for the removal of the linkage between the UK Parliament's parliamentary privilege and those of the Western Australian Parliament so that changes to parliamentary privilege made after 1986 or a later date in the UK do not apply in Western Australia.

⁸ The Human Rights Act 1998 (UK) brings the Westminster Parliament under the jurisdiction of the European Court of Human Rights in certain matters including aspects of parliamentary privilege. This is indicated by *Demicola v Malta* in which the European Court of Human Rights overturned a decision of another European Parliament (the Malta House of Representatives) in pursuit of a claim of breach of privilege against a journalist. The court's jurisprudence was held to cover legislatures of member states of the European Union and the court found that in this instance the particular proceedings of the Malta House of Representatives had violated the accused's right to a fair hearing. See HL/HC Joint Committee's Report, paragraphs 29 and 283.

The Parliament of Queensland chose to retain its linkage with the House of Commons but to specify that it referred to the privileges that applied to the UK House of Commons as at the date of Federation; that is, 1 January 1901. Other dates were considered but they were thought to have had the disadvantage of making it more difficult to draw on Commonwealth precedents to determine the extent of the privileges of the Queensland Legislative Assembly.

The option of linking parliamentary privilege to that enjoyed by the House of Representatives was also rejected on the basis that it was considered undesirable that the Commonwealth Parliament be in a position to determine the extent of the Queensland Parliament's privileges. That is reasoning with which your committee agrees.

A better option for the Western Australian Parliament is to 'peg' the linkage with the House of Commons to 1 January 1989, the publication year of the twenty-first edition of *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament (Parliamentary Practice)* which is also the next edition published after the *Australia Act 1986*. This edition predates the undesirable changes introduced by the *Defamation Act 1996* (UK) and also those recommended by the UK Joint Committee Inquiry into parliamentary privilege, yet still enabling the Western Australian Parliament to continue to refer to an authoritative procedural text of relatively recent publication date when determining parliamentary privilege. It will then be left to the Western Australian Parliament to determine which, if any, subsequent changes to the privilege it wants to adopt.

2.2 Subsidiary Issues

2.2.1 Waiver of freedom of speech

The UK Joint Committee Report recommended replacing Section 13 of the United Kingdom *Defamation Act 1996* with a new provision which would allow the House to make a general waiver of Article 9 of the *Bill of Rights 1689* in an appropriate case (not necessarily a defamation action). The *Defamation Act 1996* had permitted either individual members, or the Parliament collectively, to waive the immunity conferred by Article 9 of the *Bill of Rights 1689*. This was in response to a situation in which a member of the House of Commons found that his attempts to effectively pursue a defamation case were being frustrated by his inability to refer to proceedings in Parliament. The legislation attempted to balance a suggested denial of justice of an allegedly defamed member (who cannot bring parliamentary proceedings into evidence to defend his reputation) against a basic tenet of privilege that freedom of speech is the privilege of the Parliament as a whole and not of the individual member in his own right.

The Queensland MEPPC Report No. 26 argued against the change. It claimed that to allow an individual to waive this right, in order to protect his reputation in court, could

cast doubt on the veracity of any member who chose not to do so (perhaps to protect an informant or whistleblower). Further, to allow the Parliament collectively to waive this right could lead to loss of protection for individual members such as independents or members of minority parties and make them more susceptible to coercion from the Executive. The Report recommended that there should be no provision for either individual members, or the Parliament collectively, to waive the immunity conferred by Article 9 of the *Bill of Rights 1689* (UK). Again, your Committee concurs with that view.

This complex issue is an instance of the risks involved in the current nexus between the Parliament of Western Australia and the House of Commons in relation to parliamentary privilege. Your Committee takes the position that any provision that would seek to waive the immunity conferred by Article 9 of the *Bill of Rights 1689* (UK) should be carefully considered by the Western Australian Parliament.

2.2.2 Parliamentary Privilege in Cases of Corruption

The UK Joint Committee Report examined the issue of corruption and whether members of both UK Houses should be included within the scope of forthcoming legislation (at the time of its deliberations, members of neither House were subject by statute to the law of bribery in respect of proceedings in Parliament). Although a House could punish members for bribery as a contempt of Parliament, it was uncertain whether they were subject to existing legislation or even to common law in this regard. It was also debatable whether they should be, as they were already subject to the jurisdiction of Parliament.⁹ However, the UK Joint Committee took the view that corruption is insidious and particularly damaging if it takes hold in a democratic institution. Consequently, it recommended (Recommendation 13) that members of both Houses should be included within the scope of forthcoming legislation on corruption and that Article 9 of the *Bill of Rights 1689* should be set aside in criminal proceedings for bribery. It was proposed that because this could expose members to malicious allegations, prosecution of members under the new UK legislation should require the consent of the UK Attorney General or the Lord Advocate.¹⁰ Since the Report was tabled, a draft Corruption Bill has been cleared by the Home Office and was presented to the Parliament in March 2003. Section 12 of this Bill has the effect of making evidence admissible in proceedings for a corruption offence notwithstanding Article 9 of the *Bill of Rights 1689*.¹¹ Subsequently a Parliamentary Joint Committee has recommended changes, inter alia, to the privilege provisions.¹²

⁹ See UK Joint Committee Report, paragraphs 135-142.

¹⁰ *ibid.*, paragraphs 166-169 and Summary of Recommendations, recommendation 13; and QMEPPC Report 34, section 3, Recommendation 13 and footnote.

¹¹ Home Office, *Corruption: Draft Legislation*, CM 5777, para. 33.

¹² UK Joint Committee on the Draft Corruption Bill, Report and Evidences, 31 July 2003.

As mentioned earlier in this report, this provides potential for a substantial diminution of parliamentary privilege to occur without this Parliament having the right to deliberate on the matter. Again, your Committee takes the position that any provision that would seek to waive the immunity conferred by Article 9 of the *Bill of Rights 1689* (UK) should be carefully considered in Western Australia.

2.2.3 A statute covering parliamentary privilege

The UK Joint Committee Report made a series of direct and indirect recommendations that aspects of parliamentary privilege be codified. These were drawn together in recommendation 39 which stated that:

there should be a Parliamentary Privileges Act, bringing together all the changes in the law referred to [in the report] above, and codifying parliamentary privileges as a whole.

The Queensland MEPPC Report No. 26 strongly opposed adopting any separate statute or code that would comprehensively define parliamentary privilege or contempt of Parliament.

This question of codifying parliamentary privilege is a difficult area and requires careful consideration. In Western Australia, informed discussion with the Solicitor General in the past leads your Committee to conclude that codification is unwise in the short to medium term and we should await the benefits of the considered application of the Commonwealth's attempt at codifying privilege contained in the *Parliamentary Privilege Act 1989*.

Your Committee proposes that Section 36 of the Western Australian *Constitution Act 1889* and the preamble to Section 1 of the Western Australian *Parliamentary Privileges Act 1891* be amended to peg the Western Australian Parliament's privileges to those that applied in the UK House of Commons as at 1 January 1989. Your Committee notes that the 21st Edition of *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament* will be then used as a primary privilege reference, subject of course to legislative changes made from time to time by statute of the Houses of the Western Australian Parliament.

Your Committee considers that the necessary legislative changes to bring this proposal into effect are those contained in Appendix 1 which was formulated and then adjusted after consultation with Parliamentary Counsel.

Recommendation 1.

- (1) That Section 36 of the *Constitution Act 1889* be amended by deleting the proviso; and
- (2) That the *Parliamentary Privileges Act 1891* be amended to specify that the Western Australian Parliament's privileges are those of the Commons House of Parliament (UK) as at 1 January 1989, and to delete the proviso from the Preamble,

as set out in Appendix 1.

APPENDIX ONE

RECOMMENDED LEGISLATIVE CHANGES TO BRING PARLIAMENTARY PRIVILEGE LAW UNDER WESTERN AUSTRALIAN CONTROL

Constitution Act 1889

1. Section 36

Section 36 should be amended by deleting –

“Provided that no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof”.

Parliamentary Privileges Act 1891

1. Preamble

The Preamble should be amended by deleting –

“, provided no such privileges, immunities, or powers should exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof”.

2. Section 1

There are two options for change to Section 1: one which makes only the necessary deletions and the other which amends and restates the section in current usage. An amended and modernised version should be as follows –

“2. Privileges and sources of Assembly and Council

The Legislative Assembly and Legislative Council 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.”.

APPENDIX TWO

LEGISLATION

List of Legislation (or other relevant information) used in the inquiry.

Example:

Legislation	State (or Country)
Bill of Rights 1689	United Kingdom
Defamation Act 1996	United Kingdom
Australia Act 1986	United Kingdom
Constitution Act 1889	Western Australia
Parliamentary Privileges Act 1891	Western Australia
Constitution of Queensland 2001	Queensland
Parliament of Question Act 2001	Queensland