



Procedure and Privileges Committee

Disclosure of the Identity of Journalists' Informants in the Course of Parliamentary Proceedings

**Report No. 4
May 2014**

**Legislative Assembly
Parliament of Western Australia**

Committee Members

Chairman	Hon Michael Sutherland, MLA Speaker of the Legislative Assembly Member for Mount Lawley
Deputy Chairman	Hon Michelle Roberts, MLA Member for Midland
Members	Mr Frank Alban, MLA Member for Swan Hills Ms Wendy Duncan, MLA Member for Kalgoorlie Mr John Quigley, MLA Member for Butler

Committee Staff

Principal Research Officer	Ms Isla Macphail, BA (Hons), MPhil
Advisers	Mr Peter McHugh Clerk of the Legislative Assembly Ms Kirsten Robinson, BA (Hons), MA Deputy Clerk of the Legislative Assembly
Legislative Assembly Parliament House Harvest Terrace PERTH WA 6000	Tel: (08) 9222 7219 Email: lappc@parliament.wa.gov.au Website: www.parliament.wa.gov.au

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Procedure and Privileges Committee

Disclosure of the Identity of Journalists' Informants in the Course of Parliamentary Proceedings

Report No. 4

Presented by

Ms Wendy Duncan, MLA
Deputy Speaker of the Legislative Assembly

Laid on the Table of the Legislative Assembly on 15 May 2014

Recommendation

That the Legislative Assembly amend the Standing Orders by inserting the following new Standing Order:

Disclosure of the Identity of Journalists' Informants

314. If the Assembly is considering whether to require a journalist to disclose an informant's identity it shall have regard to the public interest of having a free press when it does so.

Disclosure of the Identity of Journalists' Informants in the Course of Parliamentary Proceedings

Reference from the House

On 17 October 2013 the Legislative Assembly agreed to the following motion proposed by the Leader of the House:

That the Procedure and Privileges Committee consider whether, in light of the provisions of the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* —

- (a) journalists are appropriately protected from being compelled to disclose their sources in the course of parliamentary proceedings; and
- (b) any amendments to the Standing Orders are necessary or desirable.

The Committee is to report to the House on the above matters by 15 May 2014.

Background to the Reference

On 20 October 2011 the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (the Bill) was introduced into the Legislative Council by the Hon Michael Mischin MLC, the then Parliamentary Secretary to the Attorney General.

The Bill's purpose was to introduce responsible and accountable protections for professional persons and journalists which, in appropriate circumstances, would preclude them from being compelled to give evidence.¹

The Bill introduced a further protection for journalists' sources that recognised the fact that a source may often wish to remain anonymous in return for providing information to a journalist.² This protection would prevent a journalist from being compelled to give evidence disclosing the identity of their source unless it was determined that the protection should not apply in the circumstances of the proceedings in question.³ The journalist shield protections proposed by the Bill were not absolute. Rather, they provided a qualified protection:

¹ Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 2011, p. 8433.

² Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 2011, p. 8435.

³ Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 2011, p. 8434.

The public interest in the free flow of information and news must always be balanced against the public interest in courts and tribunals being properly informed of all matters that could legitimately affect their decisions. The Bill achieves this balance by outlining the circumstances in which a person acting judicially may direct that identifying evidence be given, notwithstanding the general presumption of non-compellability on the part of a journalist. The Bill relevantly provides that a person acting judicially may give a direction when the public interest in the disclosure of the identity of the informant outweighs, firstly, any likely adverse effect on the informant or any other person and, secondly, the public interest in the communication of facts and opinion to the public by the news media and the public interest in the ability of the news media to access sources of fact. In determining whether the relevant standard has been met, a person acting judicially must have regard to a series of factors set out in the Bill, including the probative value of the evidence, the importance of the evidence, the availability of other evidence and the risk to national security.⁴

In the course of his second reading speech, the Parliamentary Secretary outlined that the protection, and the qualification to the protection, afforded to journalists in the Bill:

applies not only in courts and tribunals, but also to inquiries, such as hearings before the Legislative Assembly or Legislative Council, or committee hearings of both Houses of Parliament.⁵

Following the Bill's introduction into the House, the Clerk of the Legislative Council expressed the view that the current wording of the Bill's provisions did not satisfy the requirement for 'unmistakeable language' by which the privileges of the Parliament can be qualified or abrogated, and as a consequence:

In the absence of any express statutory provision in the Bill the House and its committees will continue to have the ability to ask questions under parliamentary privilege, without reference to the *Evidence Act 1906*.⁶

State Counsel disputed this interpretation in an opinion provided to the Attorney General, but recommended that:

in order to place this important issue beyond any doubt or controversy, it may be advisable that s. 3 of the *Evidence Act* be amended to have the definition of "legal proceeding or proceedings" expressly include "proceedings in Parliament".⁷

The Government acted on the State Counsel's advice, and on 8 November 2011 a Supplementary Notice Paper was issued notifying that the Parliamentary Secretary to the Attorney General would move to insert the following terms into the Bill:

⁴ Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 2011, p. 8435.

⁵ Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 2011, p. 8436.

⁶ Mr Malcolm Peacock, Clerk of the Legislative Council, Letter to Hon Sue Ellery MLC, Leader of the Opposition in the Legislative Council, 26 October 2011, p. 8.

⁷ Mr George Tannin SC, State Counsel, Letter to the Hon Attorney General, 31 October 2011. p. 3.

person acting judicially includes a member of either House of Parliament or a Committee of either House, or both Houses, of Parliament who, by law, has authority to hear, receive, and examine evidence;

proceeding includes a proceeding before either House of Parliament or a Committee of either House, or both Houses, of Parliament, in which evidence is or may be given;⁸

On the same day the second reading of the Bill was resumed, and as both sides of the House clearly supported the policy of the Bill, the second reading was resolved in the affirmative on 10 November. In light, however, of concerns and differing views about the impact of the Bill on the operation of parliamentary privilege—in particular on the principle of the exclusive cognisance of Parliament over its own affairs—and suggestions that the policy of the Bill could be effected without infringing parliamentary privilege if its provisions were to apply to parliamentary proceedings via Standing Orders rather than statute, the House further resolved that the Bill be referred to the Procedure and Privileges Committee ‘for consideration of clause 5, proposed sections 20G to 20M, and their effect, if any, on parliamentary privilege’.⁹

During the course of its inquiry the Legislative Council Procedure and Privileges Committee sought the advice of independent senior counsel and came to the view that, as currently worded, the Bill’s provisions ‘may qualify the privileges of the Legislative Council’, but that the Government’s proposed amendments would ‘unquestionably’ qualify the principle of the exclusive cognisance of the House and potentially subject parliamentary proceedings to judicial review.¹⁰

The Committee examined options with respect to the issue and a majority recommended in its report, which was tabled on 29 November 2011:

That, if the House considers that parliamentary privilege should be preserved and the relevant provision relating to the protection of the identity of journalists’ sources be adopted in Standing Orders, the House should –

- (a) not adopt the Government’s proposed amendments to the Bill;
- (b) adopt a prohibitive clause, providing that the Bill (Act) does not apply to the proceedings of both Houses of Parliament;
- (c) adopt a Standing Order(s) to provide for the protection of the identity of journalists’ sources in relation to the proceedings of the Legislative Council as part of the forthcoming consideration of the House’s Standing Orders; and

⁸ Supplementary Notice Paper No. 232, Issue No. 1, 8 November 2011.

⁹ *Parliamentary Debates* (Hansard), 10 November 2011, pp. 9302–9303.

¹⁰ Standing Committee on Procedure and Privileges, *Reference from the House – Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*, Report 23, 2011, Legislative Council, Western Australia, pp. 5 and 6.

- (d) upon the adoption of such a Standing Order(s) under (c), acquaint the Legislative Assembly accordingly and invite it to adopt the same Standing Order(s).¹¹

On 23 August 2012 two Government amendments, in the form of the recommended prohibitive clauses, appeared on a Supplementary Notice paper:

person acting judicially does not include a member of a House of Parliament or a Committee of a House, or both Houses, of Parliament who, by law, has authority to hear, receive, and examine evidence;

proceeding does not include a proceeding before either House of Parliament or a Committee of either House, or both Houses, of Parliament, in which evidence is or may be given,¹²

On the same day the Council commenced the committee stage of the Bill, and Hon Michael Mischin MLC, now Attorney General, moved the amendments while reiterating that as it was 'explicitly the Government's intent' that the journalist shield provisions should apply to parliamentary proceedings, the Committee's recommendations had been accepted: 'in the expectation that this House will address the issue of amendment to Standing Orders with expedition to provide the fullest possible protection consistent with the policy of the Bill'.¹³

The amendments were agreed to; the amended Bill was reported; and the House immediately resolved that the Procedure and Privileges Committee be instructed to draft a Standing Order which would adopt:

the principles contained in the Bill, and apply the procedures related to the disclosure of a journalist's confidential source contained in the Bill to the proceedings of the Legislative Council.¹⁴

Pursuant to this resolution, on 12 September 2012 two alternative draft Standing Orders, which applied the Bill's shield provisions to parliamentary proceedings, were provided to Members of the Legislative Council for review and comment. On the same day the Bill was read a third time and transmitted to the Legislative Assembly, where it was declared an urgent Bill and passed without amendment on 18 September 2012.

On 27 September 2012 the Legislative Council Procedure and Privileges Committee tabled a report which recommended the two alternative draft Standing Orders which had previously been circulated.¹⁵ In summary, the first option linked the Standing Order

¹¹ Standing Committee on Procedure and Privileges, *Reference from the House – Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*, Report 23, 2011, Legislative Council, Western Australia, p. 10.

¹² Supplementary Notice Paper No. 232, Issue No. 3, 23 August 2012.

¹³ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 23 August 2012, pp. 5318 and 5319.

¹⁴ Standing Committee on Procedure and Privileges, *Further Review of the Standing Orders*, Report 24, 2012, Legislative Council, Western Australia, p. 1.

¹⁵ Standing Committee on Procedure and Privileges, *Further Review of the Standing Orders*, Report 24, 2012, Legislative Council, Western Australia.

to the *Evidence Act 1906* as amended by the Bill, while the second option essentially incorporated the specific provisions of the amendments to the *Evidence Act 1906* into the Standing Order, although making minor adjustments to some of the Bill's provisions to align with parliamentary procedure. The Committee supported the second option as it made 'clear the considerations required by the House in these circumstances, without reference to an Act of Parliament'.¹⁶

Following the prorogation of the Parliament on 14 December 2012 all business listed on the Notice Paper lapsed. The Committee's report was re-tabled on 15 August 2013 for the purpose of reinstating the Committee's recommendations.¹⁷

The Government accepted the Committee's preferred option regarding the Standing Order and on 12 September 2013 the Leader of the House in the Legislative Council moved that the following new Standing Order be adopted:

201. Protection of the Identity of Journalists' Informants

- (1) Where a journalist is examined before a Committee or the Council and, in the course of such examination, is asked to disclose the identity of the journalist's informant and refuses, the Council shall consider whether to excuse the answering of the question pursuant to section 7 of the *Parliamentary Privileges Act 1891*.
- (2) In considering a matter under (1), the Council shall only order the disclosure of the identity of a journalist's informant if the Council is satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs —
 - (a) any likely adverse effect of the disclosure of the identity on the informant or any other person; and
 - (b) the public interest in the communication of facts and opinions to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
- (3) Without limiting the matters that the Council may have regard to for the purposes of this Standing Order, the Council must have regard to the following matters —
 - (a) the probative value of the identifying evidence in the proceeding;
 - (b) the importance of the identifying evidence in the proceeding;
 - (c) the nature and gravity of the subject matter of the proceeding;

¹⁶ Standing Committee on Procedure and Privileges, *Further Review of the Standing Orders*, Report 24, 2012, Legislative Council, Western Australia, p. 18.

¹⁷ Standing Committee on Procedure and Privileges, *Further Review of the Standing Orders (No. 2)*, Report 28, 2013, Legislative Council, Western Australia, p. 1.

- (d) the availability of any other evidence concerning the matters to which the identifying evidence relates;
- (e) the likely effect of the identifying evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the informant or any other person;
- (f) the means available to the Council to limit the harm or extent of the harm that is likely to be caused if the identifying evidence is given;
- (g) the likely effect of the identifying evidence in relation to —
 - (i) a prosecution that has commenced but has not been finalised; or
 - (ii) an investigation, of which the Council is aware, into whether or not an offence has been committed;
- (h) whether the substance of the identifying evidence has already been disclosed by the informant or any other person;
- (i) the risk to national security or to the security of the State;
- (j) whether or not there was misconduct on the part of the informant or the journalist in relation to obtaining, using, giving or receiving information.

The new Standing Order essentially replicated the ten factors, or criteria, which the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* mandated that a person acting judicially ‘must have regard to’ when considering compelling evidence from a journalist.¹⁸ The new Standing Order was adopted without amendment on 18 September 2013.

During the debate on the new Standing Order, several members thought there was a need for a corresponding Standing Order to be adopted by the Legislative Assembly to ensure that the ‘protections are provided in both Houses’.¹⁹ The Attorney General indicated that while it was the Government’s intention that the Legislative Assembly incorporate the journalist shield provisions for parliamentary proceedings via Standing Order, ‘What finally happens in that place is a matter for that House’ and ‘They may have their own particular views on how the Standing Orders ought to be amended for them’.²⁰

¹⁸ Section 20J(3), *Evidence Act 1906*.

¹⁹ Hon Ken Travers MLC, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 18 September 2013, p. 4306.

²⁰ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 18 September 2013, pp. 4306 and 4305.

Approach by the Procedure and Privileges Committee of the Legislative Assembly

In approaching the reference from the Legislative Assembly, this Committee notes the Parliament's agreement that journalist shield provisions with respect to parliamentary proceedings be excluded from the *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* because of concerns these provisions would infringe parliamentary privilege and potentially subject parliamentary proceedings to judicial review. There was a view that both Houses could make appropriate provision in the Standing Orders to reflect the policy of the Act.

Your Committee's view is that the circumstances in which a journalist refused to disclose an informant's identity already could—and undoubtedly would—be taken into account by an Assembly committee and by the House itself in the absence of journalist shield provisions. Indeed, although cases where a journalist has been requested to disclose the identity of a confidential source to a parliamentary committee are extremely rare, as Members noted during the course of debate on the Bill, this Committee observes that parliaments in Australia—including the Legislative Council of Western Australia in 2009 with respect to journalist Paul Lampathakis—do not have a history of compelling journalists to violate the journalists' Code of Ethics and disclose their sources. In the Lampathakis case, the Legislative Council Procedure and Privileges Committee respected the journalist's refusal to disclose his confidential sources and paid 'regard to the maxim that "*parliamentary privilege should be used as a shield rather than a sword*".²¹ The Committee duly recommended that the House excuse the answering of the question—to which the Legislative Council agreed.²² This Committee believes that, in the absence of extraordinary circumstances, the views expressed by the Legislative Council in the Lampathakis case would be the likely course taken in future parliaments.

However, accepting that there is an expectation by the House that the Standing Orders make specific reference to the matter, your Committee concurs that amending the Standing Orders to recognise the journalist protection provision is an appropriate course for the Legislative Assembly to take.

This Committee does not consider that it is necessary or desirable to amend the Standing Orders to replicate the ten criteria the now-amended *Evidence Act 1906* enjoins a person acting judicially to have regard to in determining whether to direct a journalist to disclose a source's identity—especially given the Attorney General's

²¹ Select Committee into the Police Raid on the Sunday Times, *Report 1*, 2009, Legislative Council, Western Australia, p. 165.

²² Select Committee into the Police Raid on the Sunday Times, *Report 1*, 2009, Legislative Council, Western Australia, p. 166.

observation that the list of mandatory factors to be considered, although extensive, is 'non-exhaustive' anyway.²³

This Committee believes that the committees and the House will take appropriate matters into account in making any such determination. In passing, it is noted that attempting to evaluate 'the risk to national security or to the security of the State' criterion may involve committees in attempting to determine issues which they may not be well equipped to determine.

This Committee also considers that amending the Standing Orders in line with the Legislative Council's new Standing Order may give undue weight to the protection of journalists' interests *vis-à-vis* other competing interests such as the decision-making capacity of the Parliament.

Accordingly, this Committee believes that the preferable approach is to direct Members to take cognisance of the public interest of having a free press when considering whether a witness should be compelled to disclose a source. This approach is consonant with section 7 of the *Parliamentary Privileges Act 1891*, which instructs the Houses to 'excuse' or 'order' the answering of questions or production of documents by unwilling witnesses 'as the circumstances of the case may require'.

Recommendation

That the Legislative Assembly amend the Standing Orders by inserting the following new Standing Order:

Disclosure of the Identity of Journalists' Informants

314. If the Assembly is considering whether to require a journalist to disclose an informant's identity it shall have regard to the public interest of having a free press when it does so.



Hon Michael Sutherland MLA
Chairman of the Committee
15 May 2014

²³ Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 20 October 2011, p. 8434.

Committee's Functions and Powers

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.