

## **Parliamentary Papers and Parliamentary Privilege: A case for continued vigilance**

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In November 2000, the then Speaker of the Legislative Assembly of Western Australia, the Hon. George Strickland MLA, made a statement to the House regarding his concerns related to the conferring of absolute privilege on papers tabled in the House.<sup>1</sup> This statement was made following a motion passed at a sitting of the House several weeks prior, which authorised the publication of a report of an inquiry into matters related to a local government organisation in Western Australia.

This motion was not unique — indeed, there have been other instances where the House has conferred absolute privilege on the reports of similar inquiries, both before and after this statement. However, the ‘reminder’ to members of the effect of conferring absolute privilege on a document produced outside the Parliament that it has only just received (and therefore is incapable of making any considered judgement regarding its contents), and the potential for an abuse of privilege as a consequence of this action, is a message that still resonates today.

This paper examines the issue of tabled papers and the privilege that attaches (or should be attached) to these documents. From the perspective of the Legislative Assembly of Western Australia, it examines the reasons why this matter remains an important consideration, the Standing Orders and legislation dealing with parliamentary papers (and a concerning recent legislative trend), and the considerations and actions undertaken in other jurisdictions. It concludes that the potential for abuse of parliamentary privilege remains in this aspect of the operations of the House, and continued vigilance against this abuse is warranted.

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<sup>1</sup> *Votes and Proceedings of the Legislative Assembly of Western Australia*, Parliament of Western Australia, No. 27 of the 4<sup>th</sup> session of the 35<sup>th</sup> Parliament, 23 November 2000, p. 255

### ***Standing Orders and Legislation relating to Parliamentary Papers***

At the outset, it is useful to detail the Standing Orders (SOs) of the House and legislation that are relevant to parliamentary papers. There are two SOs of the Legislative Assembly of Western Australia in this category. These are SOs 151 and 159.

#### ***Tabled papers***

**151.** (1) Papers, including records in any form, may be laid upon the Table of the House by the Speaker, or a Minister, and in the case of reports from committees, by the Chairman or a member authorised by the committee.

(2) Papers may be presented in the Assembly or may instead be delivered to the Clerk who will read each sitting day, a list of papers so delivered.

#### ***Printing of papers***

**159.** Immediately following tabling of a paper, a motion may be moved that it be printed or that consideration of the paper be made an order of the day for a future day.

Parliamentary privilege in Western Australia is derived from the W.A. *Parliamentary Privileges Act 1891*, which is dealt with in the next section of this paper. The W.A. *Parliamentary Papers Act 1891* is the Western Australian equivalent of the U.K. *Parliamentary Papers Act 1840*, which was passed as a consequence of the 1839 *Stockdale v. Hansard* case.

Until recently several sections of the W.A. *Criminal Code* also dealt with publication of parliamentary information. However part of the implementation of uniform defamation laws in Australia effectively transferred these sections into the *Defamation Act 2005* and sections of this Act are relevant to these matters (see Appendix One).

### ***The Source of Parliamentary Privilege in Western Australia***

Section 1 of the Western Australian *Parliamentary Privileges Act 1891* provides as follows —

The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise —

- (a) the privileges, immunities and powers set out in this Act; and
- (b) to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.

The *Parliamentary Privileges Act 1891* then defines a number of privileges, immunities and powers specific to the Parliament of Western Australia. The privileges, immunities and powers by custom, statute or otherwise of the House of Commons of the United Kingdom and its members and committees as at 1 January 1989 are articulated in Erskine May 21<sup>st</sup> edition (1989).

In relation to Parliamentary privilege, Erskine May provides the following definition —

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.<sup>2</sup>

One of these ‘peculiar rights’ is the freedom of speech afforded by Article 9 of the Bill of Rights 1689. This Article provides 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’. By virtue of the *Parliamentary Privileges Act 1891*, this ‘freedom’ applies to the Parliament of Western Australia.

A critical aspect of the definition provided by Erskine May is contained in the words ‘without which they could not discharge their functions’. In short, these ‘rights’, including the freedom of speech and debates or proceedings derived from Article 9, exist for the purpose of allowing the Parliament to undertake its work. Just as importantly, these rights do not exist simply to protect members from any redress against their actions. These points are re-visited later in this paper.

### ***Parliamentary Privilege and Tabled Papers***

Standing Order 151(1) provides that a member<sup>3</sup> may table a document in the Legislative Assembly of Western Australia for the information and examination of other members. In accordance with the Article 9 provisions applying via the *Parliamentary Privileges Act 1891*, this action is a proceeding of Parliament, is accordingly subject to absolute privilege, and may therefore be undertaken without fear of any recourse outside the Parliament. This position is reinforced by the *Defamation Act 2005*.

However, absolute privilege attaches to that publication only — any further publication by the member or others outside of the Parliament would attract at best qualified privilege, as specified in the *Defamation Act 2005*, where tests such as public interest and intent become relevant (as discussed later in this paper). In order

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<sup>2</sup> Erskine May (1989) *The Law, Privileges, Proceedings and Usage of Parliament*, 21<sup>st</sup> edition, Boulton C.J. (ed.), Butterworth & Co. (Publishers) Ltd, London, p. 69.

<sup>3</sup> Standing Order 151(1) limits this capacity to the Speaker, a Minister, or in the case of committee reports, the committee Chairman or a member authorised by the committee.

to extend the absolute privilege beyond the domain of the House, the House must agree to a motion to authorise the publication of the paper.

As outlined by Speaker Strickland in 2000, this paper argues that consideration should be given prior to passing such a resolution and effectively extending the protection of parliamentary privilege beyond its 'normal' reach, and this extension should not occur as a matter of course. In a submission to a committee of the Queensland Parliament examining this issue in 1991, a former Clerk of the Legislative Council in Western Australia made the following observation:

... the starting point in any decision of parliamentary immunity is the end intended to be achieved by the cloak of immunity.

Is it for the public interest or benefit, or is it designed simply to exempt Parliament and its officers from avoiding legal liability that would otherwise attach to publication? It is difficult to support the view that members of Parliament should avoid liability because they are members of Parliament. Close examination of the immunities possessed by the House of Commons demonstrates that each has the object of protecting the unimpeded functioning of the institution rather than assisting irresponsibility on the part of its members.<sup>4</sup>

In the same committee inquiry, the Clerk of the House of Representatives in New Zealand made the following point in his submission:

What carries no special protection is a report of the contents of a document which is simply tabled in the House. And why should it be? If it contained highly defamatory and prejudicial material this could be repeated with impunity by the simple expedient of its tabling. The House should not allow itself to be used in this way to give protection to defamatory material. Simply tabling a document (which no one has had the chance to examine in advance) does not make it the House's document and it is difficult to see why this should give it any special status. The position is different if the House makes an order in respect of the document for in that case the House makes the document its own document and lends it the House's prestige and authority. I believe that the House should be discriminating in doing this, taking care to do so only where this is warranted by the importance of the document. It should not indiscriminately confer protection on documents that come before it. They should stand or fall on their own merits.<sup>5</sup>

This issue was also examined by the United Kingdom Parliament's Joint Committee on Parliamentary Privilege in 1999. That Committee argued that absolute privilege should not be extended automatically to all reports presented to the Parliament, noting '... the importance of confining the absolute legal immunity afforded by

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<sup>4</sup> Select Committee of Privileges (1991), *Report on Privilege Attaching to Parliamentary Papers*, Legislative Assembly of Queensland, p. 5

<sup>5</sup> *ibid.*, pp 13 and 14

parliamentary privilege to those areas which need this immunity if Parliament is to be effective.<sup>6</sup>

Later in that Committee's report, it concluded that '... the presumption should be that, unless there are strong reasons in the public interest, no paper other than one emanating from the House or its Committees should be absolutely privileged.'<sup>7</sup>

The Australian Federal Parliament has also considered these matters. Its 1984 Joint Select Committee on Parliamentary Privilege recognised the potential for damage to individual's reputations as a consequence of conferring absolute privilege on tabled papers.

There is some concern that documents containing accusations of or reflections on individuals can be tabled and a motion authorising their printing or publication pursuant to the Parliamentary Papers Act can be agreed to with widespread dissemination of damaging statements then taking place. This can — and does — happen without any real assessment being made by the House concerned before the motion is agreed to.<sup>8</sup>

However, whilst recognising the potential for harm, this Committee believed that the volume of papers tabled in their Parliament mitigated against any direct resolution of this problem by vetting papers prior to tabling or similar means. Instead the Committee recommended that persons aggrieved by material published in papers authorised for printing under the authority of the House should have access to a proposed 'right of reply' system, with a view to incorporating relevant responses from persons adversely impacted upon by these papers into Hansard.<sup>9</sup> Indeed, it should be noted that both the Parliament of the Commonwealth of Australia's House of Representatives and Senate currently have Standing Orders that provide that all tabled papers are authorised for publication.<sup>10</sup>

### ***What Privilege should apply to Tabled Papers?***

It is clear that the House, in order to discharge its functions, needs to provide absolute privilege to its own documents. As previously described, this is covered by the Article 9 principles captured by the *Parliamentary Privileges Act 1891*, and is further complemented by the *Parliamentary Papers Act 1891* and section 27 of the *Defamation Act 2003*. Similarly, reports required by statute to be presented to

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<sup>6</sup> Joint Committee on Parliamentary Privilege (1999): *Volume 1 — Report and Proceedings of the Committee*, House of Commons and House of Lords, United Kingdom Parliament, p. 89.

<sup>7</sup> *ibid.*, p. 90

<sup>8</sup> Joint Select Committee on Parliamentary Privilege (1984): *Final Report — October 1984*, Parliament of the Commonwealth of Australia, Canberra, Parliamentary Paper No. 219/84, p. 60

<sup>9</sup> *ibid.*, p. 62

<sup>10</sup> House of Representatives Standing Order No. 203 and Senate Standing Order No. 167

Parliament are covered by section 28 of the *Defamation Act 2003*. This Act further provides a defence of qualified privilege, that is determined on such matters as public interest and the intent of the further publication (a defence of qualified privilege is defeated if the further publication is actuated by malice).

The questions remain — why should the House confer its privilege on a particular tabled paper that it has neither authored nor ordered be produced? If the material contained is fair and accurate, and if further publication is undertaken without malice and in the public interest, why would the House have any need to confer its authority on such a document? If further publication of the material is not in the public interest or is undertaken by persons motivated to harm other individuals, why would the House seek to protect this action or behaviour? In particular, should the House extend its privilege to a document that the members of the House have not had a chance to review?

Clearly this action should be taken with some caution, in order to avoid any breach of privilege. In the case of inquiry reports presented to the Legislative Assembly, there should be some mechanism by which the House can review the report or at the very least receive a précis of the report prior to resolving to confer its privileges on the document. Given the infrequency with which these motions are moved in the W.A. Legislative Assembly, this could hardly be seen as an onerous impost. The last motion authorising publication of a report was passed on 11 October 2005<sup>11</sup> — the most recent occasion prior to that was 17 August 2004.<sup>12</sup>

### ***Abuse of Parliamentary Privilege***

It must be acknowledged that the great majority of tabled papers contain inoffensive material pertaining to matters of public administration. There are a great number of reports tabled every sitting day — many are annual reports of government departments and agencies. However, the fact that the number of potentially problematic tabled papers is small is no reason for complacency. Indeed, the instances of genuine abuse of parliamentary privilege are rare, but the repercussions these instances can have for the institution in general and certain individuals is very real.

As noted by a Federal Parliamentary committee some two decades ago,

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<sup>11</sup> Report of the Inquiry into the City of Joondalup, October 2005: presented to the Legislative Assembly on Tuesday, 11 October 2005 (*Votes and Proceedings* No. 43 of 2005, p. 351). Motion authorising publication of report passed immediately following presentation.

<sup>12</sup> Report of the Inquiry into the Escape of Prisoners from the Supreme Court, July 2004: presented to the Legislative Assembly on Tuesday, 17 August 2004 (*Votes and Proceedings* No. 138 of 2004, p. 1376). Motion authorising publication of report passed immediately following presentation.

[o]ne of the most difficult and contentious areas, and one that has caused a great deal of public criticism and has caused us a great deal of concern, is misuse of parliamentary privilege. Here is to be found a clear conflict of public policy: between on the one hand Parliament's rights to, and its need of, the fearless, open and direct expression of opinions by its Members, and on the other the citizen's right to his good reputation.<sup>13</sup>

As with other jurisdictions, Western Australia has a number of historical instances of abuse of parliamentary privilege. In the Legislative Assembly, there have been three previous Select Committees established to inquire into and report to the House regarding members' alleged abuse of parliamentary privilege.<sup>14</sup> However, probably the most notable Western Australian example of an abuse of parliamentary privilege in recent years was associated with the presentation of a particular petition to the Legislative Council.

In November 1992, a petition was presented in the Legislative Council of Western Australia by the Hon. John Halden. The petition was signed by one petitioner, Mr Brian Easton, and became known as the 'Easton Petition'. In this petition, Mr Easton alleged that the Official Corruption Commission had referred to police an investigation of allegations that the then Leader of the Opposition, the Hon. Richard Court, had provided confidential documents relating to Exim Corporation (a State-owned enterprise of which Mr Easton was Managing Director) to Mr Easton's estranged wife, Ms Penny Easton. The petition alleged that the documents were used as evidence in divorce proceedings against Mr Easton by his former wife, leading the Family Court to believe that Mr Easton was due to receive \$200,000 more than he obtained upon his retirement. The petition alleged that not only Ms Easton but also her sister had given false testimony in the divorce proceedings before the Family Court.

Four days after the tabling of the petition in the Legislative Council, Ms Easton committed suicide. The Legislative Council established a select committee of privilege, which found the petition both misleading and unfair, and Mr Easton and Mr Halden guilty of a breach of the privileges of the House.<sup>15</sup>

The Easton petition is a strong Western Australian example of the potential consequences that may arise from an abuse of parliamentary privilege associated with the presentation of a document to a House of Parliament. Whilst the petition was not authorised to be printed by the Legislative Council, the consequences that

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<sup>13</sup> Joint Select Committee on Parliamentary Privilege (1984): *Final Report — October 1984*, Parliament of the Commonwealth of Australia, Canberra, Parliamentary Paper No. 219/84, p. 53

<sup>14</sup> for details of these committees, see the Parliament of Western Australia, *Procedure and Privileges Committee of the Legislative Assembly*, Report No. 3 in the 37<sup>th</sup> Parliament, 2005, p. 21

<sup>15</sup> Mr Easton refused to comply with a direction that he apologise in writing to the House, and was subsequently imprisoned for contempt of the Legislative Council.

flowed from its presentation to the Parliament serve as a salutary reminder of the need for continued vigilance against abuse of privilege.

### ***Recent Drafting Practices***

The drafting of some recent legislation enacted by the Western Australian parliament is also a cause for concern in regards to this matter. Like other jurisdictions, many W.A. Acts provide for reports to government of certain activities prescribed under the legislation, and that these reports be tabled in both Houses of the Parliament. Further to this, it is usual that these provisions include a capacity for a Minister or other person to submit these reports direct to the Clerk of the House if the House is not sitting,<sup>16</sup> and the reports are deemed as tabled in the House as a consequence of that action.

However, some recent Acts have included a further dimension to this capacity to table reports with the Clerk, whereby this process also includes the deeming of absolute privilege upon these reports. An example of this can be found with the *Legal Practice Act 2003*.

This Act, amongst other things, establishes the Legal Practice Board and the Legal Practitioners Complaints Committee in Western Australia. The Board and Committee, under sections 17 and 166 of the Act respectively, are required to present an annual report to the Attorney General. These sections further provide that the Attorney General must table these reports in both Houses of the Parliament within 14 days of receipt. However, if either House is not sitting, the Attorney General can present the report to the Clerk of the House and it is deemed tabled in accordance with section 251 of the Act.

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<sup>16</sup> These provisions can include a period for which the House is expected not to be sitting before this method of tabling a report can be used.



## 251. Laying documents before House of Parliament that is not sitting

- (1) If section 17(2) or 166(2) requires the Attorney General to cause the text of a document to be laid before each House of Parliament, or dealt with under this section, within a period and —
  - (a) at the commencement of the period, a House of Parliament is not sitting; and
  - (b) the Attorney General is of the opinion that the House will not sit during that period, the Attorney General is to transmit a copy of the text of the document to the Clerk of that House.
- (2) A copy of the text of a document transmitted to the Clerk of a House is to be regarded —
  - (a) as having been laid before that House; and
  - (b) as being a document published by order or under the authority of that House.
- (3) The laying of a copy of the text of a document that is regarded as having occurred under subsection (2)(a) is to be recorded in the Minute, or Votes and Proceedings, of the House on the first sitting day of the House after the Clerk received the copy.

As mentioned, the tabling of documents with the Clerk of the House during non-sitting periods is commonplace. However, the automatic extension of absolute privilege that is contained in section 251(2)(b) of the *Legal Practice Act 2003* is by no means routine.

There are two aspects to this practice that are somewhat disturbing. Firstly (and obviously), section 251(2)(b) of the *Legal Practice Act 2003* extends absolute privilege to these reports despite the fact that no member of the House, other than the Attorney General (and he/she may be a member of the other House), has seen the report. Further, given that section 251 applies when the House is not sitting, members may not even become aware that the report has been tabled until some time after the event, let alone be familiar with its contents. Secondly, section 251(2)(b) establishes a curious discrepancy between reports tabled by this means and a report tabled under the Act by the 'usual' means (ie. presented to the House when it is sitting). Under the provisions of this Act, a report presented directly to the House during a sitting would attract only the extent of privilege that attaches to other tabled papers, whereas a report tabled via section 251(2)(b) when the House is not sitting would be absolutely privileged. This anomaly only further underscores the problematic nature of this section.

From either aspect, this would seem an undesirable situation. It is one matter to question whether a House should pass a motion effectively conferring absolute privilege on a report that has just been presented to the House. It is entirely another matter to enact legislation that provides the same protection to reports which are tabled indirectly through the Clerk when the House is not sitting and members are engaged with parliamentary business in their electorates. Given the absence of debate on this clause during the passage of the bill through the Parliament, one

might wonder whether members were aware of the full implications of this section when it was being considered by the House.

### ***Conclusion***

The Parliament requires absolute privilege to pursue issues in the public interest without fear or favour. However, this great power comes with great responsibility. If the Parliament allows its privileges to be abused by its own members and others, the institution's reputation is damaged in the eyes of the public, and the genuine cynicism with which many people view the Parliament today is reinforced.

In the case of conferring absolute privilege on tabled papers, the Parliament's interests and the legitimate performance of the institution must always be considered. The Parliament's protection should only be extended when this is necessary in order to discharge the proper functions of the House. Parliamentary privilege should not be used to protect Executive Government from its actions, nor promote the private interests of any person or body. It should not be automatically applied to documents by virtue of a tabling procedure.

From a Western Australian perspective, there is no good reason why the House should not inspect a tabled paper prior to deciding whether to confer absolute privilege upon it, particularly given the infrequency with which the Legislative Assembly resolves to authorise publication of reports. This action would delay the tabling of a few reports, but more importantly would safeguard against any abuse of privilege that may occur. Furthermore, the House should cease passing legislation that confers absolute privilege automatically on documents that are not produced by the House.

As with all privileges of the Parliament, the House must guard itself against the unnecessary and irresponsible extension of absolute privilege to documents it has neither authored nor requested. For the sake of the credibility of the institution, and the maintenance of public support in its role in the governing of our society, the House must remain vigilant against this and other potential abuses of parliamentary privilege. ▲

**APPENDIX ONE****Extracts from Western Australian *Defamation Act 2005***

Section 4 of the *Defamation Act 2005* includes the following definition —

**‘parliamentary body’** means —

- (a) a parliament or legislature of any country;
- (b) a house of a parliament or legislature of any country;
- (c) a committee of a parliament or legislature of any country;
- (d) a committee of a house or houses of a parliament or legislature of any country;

Sections 27, 28 and 30 of the *Defamation Act 2005* are, in part, as follows —

**27. Defence of absolute privilege**

- (1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.
- (2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if —
  - (a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to) —
    - (i) the publication of a document by order, or under the authority, of the body;
    - (ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law;
    - (iii) the publication of matter while giving evidence before the body; and
    - (iv) the publication of matter while presenting or submitting a document to the body;

.....

**28. Defence for publication of public documents**

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in —
  - (a) a public document or a fair copy of a public document; or
  - (b) a fair summary of, or a fair extract from, a public document.

....

- (3) A defence established under subsection (1) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.
- (4) In this section —
  - ‘**public document**’ means —
    - (a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law;
    - ....
    - (c) any report or other document that under the law of any country —
      - (i) is authorised to be published; or
      - (ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body;
    - (d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public;
    - ....

### 30. **Defence of qualified privilege for provision of certain information**

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the ‘**recipient**’) if the defendant proves that —
  - (a) the recipient has an interest or apparent interest in having information on some subject;
  - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
  - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account —
  - (a) the extent to which the matter published is of public interest;
  - (b) the extent to which the matter published relates to the performance of the public functions or activities of the person;

- (c) the seriousness of any defamatory imputation carried by the matter published;
  - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts;
  - (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously;
  - (f) the nature of the business environment in which the defendant operates;
  - (g) the sources of the information in the matter published and the integrity of those sources;
  - (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person;
  - (i) any other steps taken to verify the information in the matter published; and
  - (j) any other circumstances that the court considers relevant.
- (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
- (5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.