Criminal Law - False Evidence Before Parliament Submission 006

Queensland Parliamentary Service

THE CLERK OF THE PARLIAMENT
Parliament House
George Street
Brisbane Qld 4000
Ph: 61 7 3406 7250
Fax: 61 7 3221 7475
email: ClerksOffice@parliament.qld.gov.au
www.parliament.qld.gov.au

Your Ref: Our Ref:

27 June 2012

Mr Ray Hopper MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Hopper

Criminal Law (False Evidence Before Parliament) Amendment Bill 2012

Thank you for your letter of 20 June 2012 regarding the above Bill. I apologise for my letter being dispatched after the closing date of 25 June 2012, which was occasioned by other duties and research requirements for this submission. I hope that the committee will excuse the possible odd error in the submission which may have occurred due to the hurried way in which it has been put together. However, I trust that the committee will still find this late, short submission useful in its consideration of the Bill.

A history of the provision

Why s.57 was originally included in the Criminal Code?

I believe it is worthwhile relating some history regarding s.57 of the *Criminal Code* and similar related provisions in the *Criminal Code*.

Until 1978 the Legislative Assembly did not have the same powers, rights and privileges as the House of Commons, although it was undoubtedly within its competence to legislate accordingly.[1]

The *Parliamentary Privilege Act 1861* (Qld) conferred upon the Queensland Legislative Assembly a restricted power to punish summarily for certain enumerated contempts.[2] Later, these provisions were transferred to the "consolidated" *Constitution Act of 1867* (Qld). The provisions that had been contained in the *Parliamentary Privilege Act 1861* I-XIV were identical to ss.41-52 of the 1867 Act.

The reasons for the Queensland legislature opting not to confer upon itself all of the powers of the House of Commons are unclear. The *Constitution Bill 1867 (Qld)* was not the subject of much scrutiny in the Legislative Assembly. Indeed, the Bill was one of thirty which passed their second-reading stage *in globo* in the Legislative Assembly.[3] The Bill received more attention in the Legislative Council. On the second reading of the Bill in the Council the President, the Honourable M C O'Connell, expressed concern that not enough care had been taken by the Legislative Assembly.[4]

---

1 See for example comments by Philp J in *Barnes v. Purcell (1946) St.R. Qd 87.*

2 The Act was passed by both Houseson 1 August 1861.

3 Bernays, *Queensland Politics During Sixty Years,* at 207.

4 Queensland Parliamentary Debates, 13 November 1867, 619.

On 11 December 1867 when the third reading of the Bill was called, the President, who had since studied the Bill, expressed his concern that the Bill did not contain all the *various privileges which are necessary for the due carrying out of our duties as a part of the Legislature of this Colony.*[5] On the motion of the President, the Bill was referred to a select committee. The committee reported on 19 December 1867.[6] The committee recommended that clauses 41 to 56 of the Bill be omitted and be replaced by two new clauses.[7] One of the new clauses attempted to confer upon the Queensland Parliament the same powers, privileges and immunities as the House of Commons. However, the committee's report was ignored and the Bill passed its third reading in the Council without amendment or debate on 20 December 1867. (It appears from the records of the Council that it was much more concerned on that day about the *Disease in Sheep Bill.* [8])

In 1978 the *Constitution Act of 1867* (Qld) was amended, by the insertion into the act of s.40A, to finally give the Queensland Legislative Assembly the same powers, privileges and immunities of the House of Commons.

The *Criminal Code* was first adopted in 1899. It was at the time a "benchmark" piece of legislation that was ultimately replicated by many jurisdictions in the Commonwealth. The *Criminal Code* provided offences for a number of actions which would also have constituted a contempt of Parliament in the United Kingdom. (But not necessarily in Queensland given the failure to adopt the privileges and powers of the House of Commons until 1978.)

Part II, Chapter VII of the *Criminal Code* provided for a number of offences against Executive and Legislative Power. In his accompanying letter to the Attorney-General, Sir Samuel Griffith stated that he had:

> *... included in this Part various provisions as to misconduct which in the United Kingdom is treated as a breach of the privileges of Parliament and punished accordingly. The reasons which there exist for not regarding it as a breach of Criminal Law are, however, not applicable to Queensland. I have no doubt that much of this misconduct is a misdemeanour at Common Law, although never in practice punished as an indictable offence.*[9]

The "reasons" which existed in the United Kingdom which were not applicable to Queensland to which Sir Samuel refers are obviously the fact that at the time of developing the Code the Queensland legislature did not have all the powers, immunities and privileges of the House of Commons. As a result, Sir Samuel included a number of offences which would have otherwise been a contempt.

Section 57 of the *Criminal Code Act 1899* provided:

> ***57 False evidence before Parliament***
> *(1) Any person who in the course of an examination before the Legislative Assembly, or before a committee of the Legislative Assembly, knowingly gives a false answer to any lawful and relevant question put to the person in the course of the examination is guilty of a crime, and is liable to imprisonment for 7 years.*
> *(2) The offender cannot be arrested without warrant.*
> *(3) A person cannot be convicted of the offence defined in this section upon the uncorroborated testimony of 1 witness.*

---

5 Queensland Parliamentary Debates, 11 December 1867, 701-702.

6 *Report from the Select Committee on the Constitution Bill with the proceedings of the Committee,* contained in Legislative Council Journals, Vol XI, 1867-8.

7 Ibid.

8 *Minutes of the Proceedings of the Legislative Council*, contained in Legislative Council Journals, Vol XI, 1867-8.

9 *Carters' Criminal Code,* Butterworths

The provision lay in the *Criminal Code*, unused to the best of my knowledge, despite the wider privilege powers being conferred upon the Legislative Assembly in 1978, until events in 2005 and 2006.

The events of 2005 and 2006

On 11 May 2005, the Legislative Assembly adopted an order of appointment to establish estimates committees to consider the 2005 annual appropriation bills. The proposed expenditures stated in the *Appropriation Bill 2005* and the *Appropriation (Parliament) Bill 2005* were referred to the estimates committees immediately after both Bills were read a second time. Estimates Committee D was allocated organisational units within the portfolios of the Minister for Health and the Attorney–General and Minister for Justice. On 8 July 2005 Estimates Committee D held a public hearing in accordance with Standing and Sessional Orders.

It was alleged that at the hearing held that day the Hon Gordon Nuttall MP, in answers to questions put by a member of the committee, Mr Stuart Copeland MP, deliberately misled the estimates committee.[10] Following the hearing on 9 August 2005 Mr Copeland wrote to the Speaker requesting the matter be referred to the Members' Ethics and Privileges Committee (MEPPC). On 23 August 2005 the Speaker advised the Legislative Assembly that he had referred the matter to the committee. On 25 August 2005 the Chairman of the Crime and Misconduct Commission (CMC) wrote to the Speaker advising that the Commission, with the Queensland Police Service, was investigating the matter.

On 29 September 2005 the MEPPC advised the Speaker that it would take no action in relation to this reference until it was established that other authorities were not taking action in respect of the matter.

On 7 December 2005 the CMC reported to the Attorney-General on its investigation into this matter. On the basis of the evidence identified in its investigation, the CMC decided that prosecution proceedings within the meaning of section 49(1) of the *Crime and Misconduct Act 2001* should be considered.[11] The Attorney-General caused the report to be tabled in the Assembly on the same day.

Where a matter is both a contempt and a criminal offence, in accordance with Section 47(2) of the *Parliament of Queensland Act*, the Parliament may, by resolution, direct the Attorney-General to prosecute the person for the offence against the other Act (in this instance, an alleged offence against Section 57 of the *Criminal Code*).

On 9 December 2005 a special sitting of the Legislative Assembly was called by the Governor. (The House had adjourned on its own resolution until February.) At the sitting, the Attorney-General made a ministerial statement in which she effectively sought direction from the Legislative Assembly as to whether to deal with the matter sent to her by the CMC regarding Hon Nuttall as a criminal matter or as a contempt of Parliament.

Hon Nuttall had already resigned as a Minister and, after the Attorney-General's ministerial statement, was given leave to make a personal explanation.

The Premier then moved, by leave, the following motion:

> *That, notwithstanding anything contained in Standing and Sessional Orders—*

---

10 Ironically, these questions arguably did not relate to matters contained in the estimates, but to the Ministers knowledge of the registration of overseas trained doctors.

11 Crime and Misconduct Commission, *Allegations concerning the Honourable Gordon Nuttall MP: Report of a CMC investigation*, Crime and Misconduct Commission, Brisbane, 2005, at 45.

1. *the House notes the Crime and Misconduct Commission's report (the report) on its investigation into allegations against the Honourable Gordon Nuttall MP tabled by the Attorney-General and Minister for Justice on 7 December 2005;*
2 *the House notes the report by the Commissioner of the Queensland Police Service on these matters;*
3. *the House notes the resignation of the Member for Sandgate as a Minister and a Member of the Executive Council on 7 December 2005;*
4. *the House notes the Ministerial Statements made today by the Honourable the Premier and Treasurer and the Honourable the Attorney-General and Minister for Justice about the matters the subject of the report;*
5. *the House notes the Member's statement and apology to the House today about the matters the subject of the report;*
6. *the House determines under section 38 (Decisions on contempt) of the Parliament of Queensland Act 2001 that the Member's conduct be now dealt with by this Parliament as a contempt; and*
7. *the House accepts the Member's resignation as a Minister and a member of the Executive Council and the apology made today to the Parliament as the appropriate penalty in accordance with section 39 (Assembly's power to deal with contempt) of the Parliament of Queensland Act 2001.*

The motion was passed after considerable, often vitriolic, debate. The resolution effectively ended all proceedings. Much of the debate centred upon whether s.57 of the Code ever intended to apply in such circumstances (against a member as opposed to a "stranger" appearing before a committee).

On 9 May 2006 the Attorney-General introduced the *Criminal Code Amendment Bill 2006*, the objective of which was to repeal sections 56, 57 and 58 of the *Criminal Code*. The Attorney-General argued that repeal of section 57 of the *Criminal Code* would ensure that the principle inherent in Article 9 of the *Bill of Rights (1688)* is preserved and reinforced. For members, this would bring Queensland into line with the position in the House of Commons, the Commonwealth Houses of Parliament and the Parliaments of other States and Territories. For non-members, the position would be the same as for the Commonwealth Houses of Parliament. The Attorney-General emphasised that members and non-members would remain liable to be dealt with for contempt of Parliament under the *Parliament of Queensland Act 2001*.

I am not certain that the adage that 'hard cases make bad law' can be applied to the *Criminal Code Amendment Bill 2006*. But it was extremely disappointing to see the recall of Parliament on 9 December 2005 to pass a motion effectively quashing all pending action. The recall of Parliament on 9 December 2005 to deal with a matter arising from a CMC investigation and report is an example of how dealing with an ethical issue can easily become hopelessly partisan if normal procedure is not followed. The matter was already before the MEPPC. That committee had established a long history of dealing with difficult matters in an appropriate and bipartisan fashion. In its history to that time, there had only ever been one dissenting report. Even if the committee had not been able to come to a bipartisan conclusion and agreed action, proper process would have been followed if the committee had been allowed to proceed in the normal way.

This unfortunate departure from process was then followed up by a Bill which was bound to be the subject of opposition and further vitriolic debate. What was particularly disappointing was that this Bill broke a long uninterrupted period of bipartisanship on legislative and regulatory matters pertaining to the Parliament, its powers and privileges and its ethical framework. In this regard I refer specifically to the work of the previous Legal, Constitutional and Administrative Review Committee and the MEPPC and bipartisan legislation such as the *Constitution of Queensland Act 2001* and the *Parliament of Queensland Act 2001* and bipartisan rules contained in documents such as the *Code of Ethical Standards* and the rules for the *Registers of Members' and Related Persons Registers*.

My plea to the committee is do all within its power to restore a sensible, considered bipartisan approach to the legislative and regulatory matters pertaining to the Parliament, its powers and privileges and its ethical framework.

Contempts and Criminal Proceedings

The issue at the heart of this matter is the relationship between the courts and Parliament. More specifically, the issue is whether contempts of Parliament should be dealt with by the courts by way of criminal proceedings or by the Parliament by way of contempt proceedings. In one way the matter goes directly to issues of separation of powers.

I must admit to the committee that my personal views on this issue have waxed and waned over the years. With the benefit of almost 20 years experience in the Parliamentary Service, I believe that:

1. Parliament should always retain the powers, rights and privileges traditionally held by the House of Commons, including the power to deal with both members and non-members.
2. There should be a range of criminal and regulatory offences enforceable in the courts that include many matters that could also be a contempt of Parliament, but which are more appropriately and expeditiously dealt with in court proceedings.
3. That a double jeopardy provision allowing a matter to be dealt with by way of an offence or contempt but providing it cannot be proceeded with in both ways is appropriate (as per s.47 of the *Parliament of Queensland Act 2001*).
4. Generally, non-members are best dealt with by criminal and regulatory offences enforceable in the courts. We need to accept that:
    a. contempt proceedings are relatively cumbersome and onerous on committees, members and offenders
    b. there is a real risk that public perceptions will end up (perversely) favouring the offender, given that contempt of Parliament proceedings can easily be portrayed as being oppressive
    c. there is a risk of odium to the Parliament, being seen to be a judge in its own matter.
5. Generally, Members are best dealt with by contempt proceedings, except for the most serious offences (such as bribery). It cannot be forgotten that most contempts *vis a vis* members are essentially breaches of the Assembly's code of standards for members.

Definitional issues

The proposed section 57(1), like its predecessor, provides that 'A person who, during an examination before the Legislative Assembly or a committee, knowingly gives a false answer to a lawful and relevant question put to the person during the examination commits a crime.'

The question that arises is: what is an ***examination*** before the Legislative Assembly or a committee? It is noted that the term 'examination' is not defined in the provision, the Code or the *Acts Interpretation Act 1954*.

The issue at the heart of the question came into focus recently with Mr Gordon Nuttall's appearance at the Bar of the House. May's Parliamentary Practice[12] sets out the current procedure whereby a witness is examined at the Bar of the House of Commons:

> *When a witness is examined by the House of Commons, or by a Committee of the whole House, he attends at the bar, which is then in position. If the witness be not in custody, the mace remains upon the Table, when, according to the strict rule of the House, the Speaker should put all the questions to the witness, and Members should only suggest to him the questions which they desire to be put. ... When a witness is in the custody of the Serjeant at Arms, or is brought from any*

---

12 Twentieth Edition, p 745.

> *prison in custody, it is the usual, but not the constant, practice for the Serjeant to stand with the mace at the bar. When the mace is on the Serjeant's shoulder, the Speaker has the sole management; and no Member may speak, or even suggest questions to the Chair. ...*

Hatsell's historical accounts of prisoners being brought before the Bar of the House of Commons (17th and 18th centuries) provide further background.[13] Hatsell cites numerous cases that:

> *... all seem to prove, that whenever any person, already a prisoner, whether in custody of the Serjeant, or in any other prison, is brought to the Bar as a witness, or to attend the hearing of any cause, he must be brought in by the Serjeant, and the Serjeant must stand by him at the Bar, with the Mace, during the time he continues there.*

Hatsell continues:

> *... On the other hand, ... [other cases] seem to contradict this practice; and shew that a prisoner may be brought to the Bar to be examined, ... without the necessity of the Serjeant's standing by him with the Mace...*

In this regard, Hatsell distinguishes between delinquents and witnesses, and persons to be censured or examined, etc. Hatsell states that in the case of a *culprit*, having disobeyed the orders of the House, 'the Serjeant must stand by him with the Mace; and during that time no person can speak but the Speaker.'[14] In other cases, where a person is brought as a witness, or to be *examined*, 'though they are at the time prisoners, if the Mace is left upon the Table, the Members, though they cannot debate, may suggest to the Speaker such questions as arise out of the examination, and appear to them necessary to be put.'[15]

In other words, there are doubts as to whether a person in Mr Nuttall's position or former Justice Vasta (1989), or Vivian Rogers Creighton (1956), when they appear at the bar to give explanation of a matter and are not cross-examined or questioned in any way, are actually the subject of an 'examination' or not. Indeed, Speaker Mickel MP, correctly in my view, ruled that a person, such as Mr Nuttall, appearing at the Bar of the House on a charge of contempt is not a witness *per* se, but rather a person being heard in their defence. A person being heard in their defence is not able to be cross-examined by members.[16]

In my submission, a definition of 'examination' is desirable in the proposed section 57. Consideration should be given to whether the definition should extend to persons appearing at the bar of the House in their defence and whether it is necessary for a person to have taken an oath or affirmation for it to amount to an 'examination'.

Collateral damage - Section 56 and 58

Section 56 of the *Criminal Code* provided that it is was misdemeanour to disturb the Assembly and section 58 of the *Criminal Code* related to witnesses refusing to attend and give evidence before the Assembly:

> ***56. Disturbing the legislature.*** *Any person who advisedly—*
> *(1) Disturbs either House of Parliament while in session; or*
> *(2) Commits any disorderly conduct in the immediate view and presence of either House of Parliament while in session, tending to interrupt its proceedings or to impair the respect due to its authority;*

---

13 Hatsell, Precedents of Proceedings in the House of Commons, Volume II, 1818.
14 Hatsell, Precedents of Proceedings in the House of Commons, volume II, 1818, pp 143-144.
15 Hatsell, Precedents of Proceedings in the House of Commons, volume II, 1818, pp 143-144.
16 Speaker's Ruling 12 May 2011 (See Tabled Paper 5311T4445.)

is guilty of a misdemeanour, and is liable to imprisonment for three years. [The offender may be, and it is hereby declared that he always was liable to be, arrested without warrant.]

58. Witness refusing to attend or give evidence before Parliament or Parliamentary Committee.
Any person who—
(1) Being duly summoned to attend as a witness or to produce any book, document, or other thing, in his possession, before either House of Parliament, or before a committee of either House, or before a joint Committee of both Houses, authorized to summon witnesses or to call for the production of such thing, refuses or neglects without lawful excuse to attend pursuant to the summons or to produce anything which he is summoned to produce, and which is relevant and proper to be produced; or
(2) Being present before either House of Parliament, or before a Committee of either House [or before a Joint Committee of both Houses] authorized to summon witnesses, refuses to answer any lawful and relevant question;
is guilty of a misdemeanour, and is liable to imprisonment for two years.

When introducing the Criminal Code Amendment Bill 2006 the then Attorney-General said that having regard to the level of criminality and the fact that the conduct is able to be dealt with as contempt under the *Parliament of Queensland Act 2001*, these sections should also be repealed:

> *Two other sections of the Criminal Code, sections 56 and 58, are also being repealed for the same reason as section 57 is being repealed. This is because offences against both sections are more properly dealt with as a contempt under the Parliament of Queensland Act 2001.*

The Explanatory Notes to the Bill provided:

> *Section 56 of the Criminal Code provides that it is a misdemeanour to disturb the Assembly and section 58 of the Criminal Code relates to witnesses refusing to attend and give evidence before the Assembly.*
>
> *Having regard to the level of criminality and the fact that the conduct is able to be dealt with as contempt under the Parliament of Queensland Act 2001, these sections are also repealed.*

I would submit that ss.56 and 58 of the *Criminal Code* were effectively removed as "collateral damage" in the efforts to remove s.57 of the Code. For the reasons I have advanced above, that generally non-members should be dealt with by the criminal offences before the courts, I believe that their removal should be reconsidered.

Currently, there is a less than satisfactory situation whereby it is an offence to create a disturbance when Parliament is not sitting pursuant to section 56A of the *Criminal Code* but not an offence to create a disturbance when the Parliament is sitting. It is usually the case, and recent disturbances would seem to confirm, that persons will seek to promote a grievance or issue when Parliament is sitting, particularly when a Bill is being debated.

Since the repeal of s.56 there have been two instances where criminal action pursuant to that provision would have, in my view, been warranted. The first occurred on 25 November 2010 where a disturbance was created by two individuals. One disrupted the session of Parliament by standing in the gallery, moving toward the railing and yelling loudly at the Speaker and threw what appeared to be paper into the chamber. Another rose to their feet with security officers testifying that he also was making loud, audible noise. Resisting removal from the gallery led to the injury of a Parliamentary Security Officer (twisted ankle).

Both were subsequently charged with a summary offence pursuant to section 51 of the *Parliamentary Service Act 1988* and under the *Justices Act 1886*. One pleaded guilty and the other was acquitted by a magistrate. I asked police prosecutions to consider appealing the decision, which they declined. (I am more than happy to elaborate on this particular matter in private session should the committee so desire.)

A more recent incident occurred in the gallery on 21 June 2012 where loud and persistently unruly behaviour by those in the gallery caused debate of a Bill to be interrupted on several occasions, finally resulting in the clearing of the public gallery.

In my submission, sections 56 and 58 of the Criminal Code should be reinserted into the Code to again make it an offence to create a disturbance when Parliament is sitting and for a witnesses to refuse to attend and give evidence before the Assembly or produce material as required by summons.

Yours sincerely

Neil Laurie
The Clerk of the Parliament