SUBMISSION BY THE MEMBERS' ETHICS AND PARLIAMENTARY PRIVILEGES COMMITTEE TO THE LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE ON ITS REVIEW OF THE QUEENSLAND CONSTITUTION

RE CONTEMPT OF PARLIAMENT IN QUEENSLAND

1. THE HISTORY

Colonial legislatures, including Queensland, did not by virtue of their ancestry automatically inherit the all the rights and privileges of the Imperial Parliament.

Although the Privy Council had previously held that it was inherent in every assembly that possesses a supreme legislative authority a power to punish contempts,[1] in *Kielly v. Carson* [2] it was held that a colonial legislature did not have the power to order the arrest of a stranger. The Privy Council drew a distinction between immediate impediments to the "due course of its proceedings" and the power to punish strangers for "past misconduct". The former was seen as necessary to the existence of a legislative body, whilst the latter was a matter reserved for courts of record. The House of Commons and the House of Lords both had the power to punish strangers for past misconduct because those bodies had formerly constituted the "High Court of Parliament".

The response by Colonial legislatures varied. Some passed legislation conferring on themselves all of the privileges, powers and immunities of the House of Commons, whilst others passed legislation detailing their privilege.[3] At first the Queensland legislature opted to take the latter course of action. The *Parliamentary Privilege Act 1861* (Qld) conferred upon the Queensland Legislative Assembly a restricted power to punish summarily for certain enumerated contempts.[4] 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 are 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.[5] 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

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1 *Beaumont v. Barrett* (1836) 1 Moo PC 59 at 76.

2 (1842) 1 Moo PC 63.

3 Ibid.

4 The Act was passed by both House on 1 August 1861.

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

taken by the Legislative Assembly.[6] On December 11 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.*[7] On the motion of the President, the Bill was referred to a select committee. The committee reported on 19 December 1867. [8] The committee recommended that clauses 41 to 56 of the Bill be omitted and be replaced by two new clauses.[9] 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.

In 1946 in the Queensland case of *Barnes v. Purcell*,[10] Philp J. stated:

> *When the Legislative Assembly of Queensland was erected, it acquired, not the powers, privileges and immunities of the Commons, but only such powers as are necessary to the existence of such a body and the proper exercise of the functions it is intended to execute ... Unlike the Victorian Constitution Act (18 & 19 Vic. c. 35, s. 55), no express power was given to the Queensland Legislature to make laws defining "privileges, immunities and powers" of the Assembly... but the powers of the legislature so to do is not in question.*[11]

It was not until 1978 that the *Constitution Act of 1867* (Qld) was amended, by the insertion into the act of s.40A, to give the Queensland Legislative Assembly the same powers, privileges and immunities of the House of Commons. The 1978 amendment was the result, amongst other things, of submissions made to the then Attorney-General by the Parliamentary Privileges Committee.[12]

Prior to 1978 the Legislative Assembly would not have been able to deal with any contempt which was not a contempt committed in the face of its proceedings, unless it was one of those set forth in s.45. This much was made clear by *Barnes v. Purcell.*[13]

Since the insertion of s.40A into the *Constitution Act 1867* in 1978 the position is not so clear.

Mr John Logan of Counsel in advice to the Parliamentary Criminal Justice Committee has stated:

> *It is plain from both the language of s.40A itself and the speeches made at both committee and second reading stage in the Assembly in relation to the Bill which introduced the amendment to the Constitution Act in 1978 that the section was*

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6 Queensland Parliamentary Debates, 13 November 1867, 619.

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

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

9 Ibid.

10 (1946) St.R.Qd 87.

11 Ibid at 108-109.

12 *Report of the Parliamentary Privileges Committee* dated 8 September 1976.

13 [1946] St. R. Qd. 87.

> *introduced to overcome the restrictions on the power of the Assembly to punish for contempts highlighted by Philp J. in Barnes case. The insertion of s.40A into the Constitution Act enjoyed bi-partisan support.*[14]

Therefore, at least on one view the purpose of the insertion s.40A into the *Constitution Act 1867* was to give the Assembly a greater power to punish for contempts – the same power as the House of Commons. Unfortunately, whether it in fact achieved that purpose is another matter entirely.

2. THE PROBLEM

Of serious concern to the Members' Ethics and Parliamentary Privileges Committee (MEPPC) is the ability of the Legislative Assembly to effectively protect its processes when necessary.

In part 4.4 of the MEPPC's report no. 26 *First report on the powers, rights and immunities of the Legislative Assembly, its committees and members* tabled on 8 January 1999 the issue of contempt of Parliament was addressed by our committee.

In our report we noted the uncertainty that surrounds the power of the Legislative Assembly to punish for contempt. At page 13 the report stated:

> *A contempt of Parliament is any act or omission which disregards or attacks an established privilege of the House, or which otherwise obstructs or impedes, or is likely to obstruct or impede, the functions of the House.*
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> *As noted earlier, it was only in 1978 that s.40A was inserted into the* Constitution Act 1867 *(Qld). That provision gives the Queensland Legislative Assembly the same powers, privileges and immunities as the House of Commons. Therefore, it also probably includes a general power to punish for contempt. Sections 45-52 of the* Constitution Act 1867 *(Qld) are specific provisions regarding contempt of Parliament.*[15] *Section 45 of the* Constitution Act 1867 *(Qld) empowers Parliament to deal with a number of specified contempts summarily by way of fine and in default by imprisonment. Sections 46-50 give the Speaker power to issue a warrant for the arrest of a person adjudged guilty of contempt, and provide other incidental search and arrest powers. Section 52 provides that the Legislative Assembly can direct the Attorney-General to prosecute in the Supreme Court of Queensland any other contempt punishable by law.*
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> *The* Criminal Code *also provides offences for a number of actions which may also constitute a contempt of Parliament.*[16]

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14 Parliamentary Criminal Justice Committee, Report No. 24 16 February 1994, *Report of the unauthorised release and publication of a Committee document,* (advice by J A Logan esq. Attached to the report).

15 Members' Ethics and Parliamentary Privileges Committee, *Parliamentary Privilege in Queensland*, Issues Paper No. 3, July 1997, pp.2-3.

16 See Pt II, Chapter VII of the *Criminal Code* which provides for a number of offences against executive and legislative power; Members' Ethics and Parliamentary Privileges, op cit, p.3.

> *However, because of the uncoordinated legislative approach to the Assembly's powers, rights and immunities in the past, the full extent of the power of the Assembly regarding contempt is unclear. Since the insertion of s.40A into the* Constitution Act 1867 *(Qld), it is not absolutely certain whether the Legislative Assembly may only punish summarily those contempts enumerated in s.45 of the* Constitution Act 1867 *(Qld), or whether it also has the same power as the House of Commons to punish other acts or omissions not specified in s.45 which it determines has interfered with its powers, rights and immunities.*
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> *As to the power of the Assembly to direct a prosecution under s.52, there are also two possibilities as to what this section means. First, that s.52 only permits the Legislative Assembly to direct the prosecution of contempts before the Supreme Court where those contempts are also criminal offences. Secondly, and alternatively, that s.52 permits the prosecution of any act or omission which is recognised as, or is arguably, a contempt of Parliament. It is presumed that prosecution of the contempt would be dealt with in the same or similar manner as a contempt of court.*

There are currently at least four possible interpretations of the combined effect of ss.40A and 46-52 of the *Constitution of Queensland Act 1867* . These are:

- Firstly, that the Legislative Assembly may punish summarily those contempts enumerated in s.45 and also has the same power of the House of Commons to punish other acts or omissions not included in s.45 which it finds has interfered with its privileges or its functions. (This would certainly be the effect if cl.37(1) & (2) of the draft Parliament of Queensland Bill contained in LCARC's report No. 10 is adopted. It is also consistent with Mr Logan's view explained above.)
- Secondly, that s.45 exhaustively defines the power of the Assembly to punish for contempt and that its power to deal with all other contempts may only be dealt with pursuant to s.52. (This appears to be Mr Pyke's view expressed in a submission to LCARC – see below.)
- Thirdly, that s.45 intends to define exhaustively the circumstances in which the Legislative Assembly may fine and imprison persons held in contempt. But the Assembly, at least since the enactment in 1987 of s.40A, possesses the power to respond in non-punitive ways to any conduct adjudged by it as contempt. (This is Carney's view expressed in advice to the previous MEPPC provided to LCARC last week.)
- Finally, that the Legislative Assembly may punish summarily those contempts enumerated in s.45 by fine and also has the same power of the House of Commons to punish other acts or omissions not included in s.45 which it finds has interfered with its privileges or its functions. However, because the House of Commons has not exercised a power to fine in over 200 years, and it is thought that it has abandoned that claim, it is doubtful that the Legislative Assembly has a power to fine in respect of any contempt not enumerated in s.45. In respect of the power of the House of Commons to fine, Erskine May (22nd edn at 138) states:

The last occasion on which the Commons imposed a fine was in 1666[17] *no fine has been levied in modern times.*[18]

The Commons Select Committee on Parliamentary Privilege in 1967 recommended that legislation should be introduced to enable the House to impose fines with statutory authority[19] *and this recommendation was repeated by the Committee of Privileges in 1977, together with a proposal for the abolition of the power to imprison.*[20] *No action to implement these recommendations has been taken.*

3. RELEVANT RECOMMENDATION IN MEPPC REPORT NO. 26

Our report no. 26 was not only an interim report on our review of privilege in Queensland, it was also in effect a submission to your committee concerning your review on the consolidation of the Queensland Constitution. Indeed, the committee was anxious to report prior to your committee's finalisation of its review in order that the views of this committee could be taken into account. In that report we recommended that the Parliament of Queensland bill include a definition of contempt along the lines of that contained in the Commonwealth Parliament Privileges Act. We also recommended that the *contempts currently enumerated in the Constitution Act 1867 (Qld) should be presented in the current form as they appear in the LCARC's draft Parliament of Queensland Bill.*

We wish to explain in more detail what we meant by that recommendation. The LCARC's draft Parliament of Queensland Bill overcame the primary difficulty that we currently believe exists in respect of the enumerated contempts in the *Constitution Act 1867*. Clause 37(2) of the draft Parliament of Queensland Bill made it absolutely clear that the power of the Assembly to punish a person in respect of the enumerated contempts did not detract from the committee's general power to protect its process under the equivalent of the current s.40A of the *Constitution Act.* Therefore, in addition to the powers provided in cl.37(1) it makes it clear that the Assembly would have the same power to protect its process as the House of Commons and the Commonwealth Parliament.

In other words, the LCARC's draft Parliament of Queensland Bill adequately addresses the issues to which we alluded in our letter dated 3 March 1999 and our meeting on 4 March 1999.

Should your committee not recommend the drafting in the exposure draft, and keep the existing drafting, then we believe that your committee should be aware of the problems that the current drafting causes both this committee and the Assembly generally.

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17 CJ (1660-67) 690; cf ibid (1547-1628) 609, and 1 Parl Hist 1250.

18 The possession by the Commons of the power of imposing fines was denied by Lord Mansfield in *R v Pitt* (1762) 97 ER 861.

19 HC 34 (1866-67) para 197.

20 HC 417 (1976-77) para 15.

4. OTHER SUBMISSIONS TO THE LCARC

We note that your committee received at least one submission that was critical of the drafting of cl.37 in the draft Parliament of Queensland Bill.

Mr John Pyke, Lecturer in Constitutional Law, Queensland University of Technology, takes the view that s.45 is a "self-denying ordinance which limits the power of the House to punish for contempt to the imposition of fines only". Mr Pyke believes that cl.37(2) is extending the Assembly's power and going far beyond a consolidation and urges its deletion from the draft. We respect Mr Pyke's view and interpretation. However, Mr Pyke himself concedes that there are different views on the interpretation of the relevant sections. It cannot be said with absolute certainty that cl.37(1) & (2) of the LCARC's draft does not in fact represent the correct interpretation of the effect of s.40A and s.45. Logan's view, for example, is that the Assembly intended in 1978 to give itself the same power to deal with contempt as the House of Commons.

In any event, and with all respect to Mr Pyke, we doubt that he understands the situation that members of the MEPPC find themselves in when confronted with matters such as that outlined in our letter dated 3 March 1999.

5. SUGGESTIONS

At the meeting on 4 March 1999 you requested some details as to how the current problems could be resolved. We see the best way to resolve the problems, in their most desirable order, as follows. (It is noted that each of the following alternatives is predicated on a general definition of contempt being provided in the Bill in accordance with our recommendations in report no. 26.)

1. Make it clear that the Legislative Assembly has the same powers as the House of Commons to deal with contempts (without enumerating those contempts), including, to remove any doubt, the power to levy a fine in accordance with the Standing Orders and in default of the fine being paid – imprisonment.

2. Maintain the drafting of cl.37(1) & (2) in the draft Parliament of Queensland Bill in the form that it was presented in the interim report. This approach has the benefit of making it absolutely clear that the Assembly may deal with the enumerated matters by fine and still be able to protect its proceedings in a more general sense as does the House of Commons. Indeed, it is an attractive proposition because it also makes it clear that the House does have a power to fine in respect of some contempts, whereas there is some doubt that the House of Commons still retains its ability to fine. (See above.)

3. If the LCARC is not minded to keep the drafting of cl.37, including cl.37(2), we would prefer that the enumerated contempts and the method for dealing with those enumerated contempts be removed altogether. This would leave the Assembly with the same power to protect its proceedings as the House of Commons and the Commonwealth Parliament.

4. If the LCARC is minded to adopt none of the above approaches, then further work is required to ensure that the list of enumerated contempts is actually expanded to include other contempts likely to arise. The extra matters that need to be added include contempts such as deliberately misleading the House, interfering with a witness of a committee or the House, etc. It may well be that the list will have to be significantly expanded in order to ensure that the rights and privileges of the House can be adequately protected. The difficulty, as we see it, is that it is impossible to cater for every eventuality and some matters will as a result be overlooked. We live in a world that is rapidly changing and cannot foresee today what will be a problem in ten years time.

Matters canvassed in Erskine May that would need to be considered include:

(i) Misconduct in the presence of the House or its committees.

- Interrupting or disturbing the proceedings of the House or a committee.
- A witness persistently misleading a committee.
- Acting in a riotous, tumultuous or disorderly manner in order to hinder or promote legislation.

(ii) Disobedience to rules or orders of the House or committees.

- Refusal to attend as a witness.
- Refusal to be sworn or to answer questions.
- Refusal to produce evidence.
- Destruction of evidence.
- Refusing an order to withdraw from the House.

(iii) Presenting a forged or falsified document to the House or a committee.

- Forging signatures to petitions.
- Abusing the right to petition by submitting a petition which contains false, scandalous or groundless allegations or inducing by fraud persons to sign a petition.

(iv) Misconduct by Members or officers as such.

- Deliberately misleading the House.
- Corruption by the offering or acceptance of bribes.
- Advocacy by members of matters in which they have been concerned in a professional manner for a fee.
- The acceptance of a fee for services connected with their parliamentary duties.

(v) Constructive contempts.

- Speeches or writing reflecting on the dignity of the House.

- Wilful misrepresentation of debates.
- Premature disclosure of committee proceedings or evidence.
- Other indignities such as: fighting in the lobby; using the badge of the House on an unofficial publication; serving a writ on a Member in the precincts without the leave of the Speaker.

(vi) Obstructing Members in the discharge of their duties.

- Molesting or insulting Members attending, coming to, or going from the House.
- Attempted or actual intimidation of Members, including publishing threatening posters regarding Members voting in a forthcoming debate.
- Molesting Members on account of their conduct in Parliament, for example by inciting newspaper readers to telephone a Member to complain of question he had tabled.

(vii) Obstructing officers of the House while in the execution of their duty.

(viii) Obstructing witnesses or punishing witnesses for evidence given by them.

6. The worst possible scenario is if the LCARC simply recommends the transfer of the existing provisions in the *Constitution Act* to the Parliament of Queensland Bill. This would mean that a confusing and uncoordinated approach taken to the whole issue of contempt is simply continued. We urge your committee not to follow this course of action and take the opportunity to clarify this important matter.

We trust the above is of assistance to you. If you require further information, please do not hesitate to contact the chairman or the committee's secretariat.