# Imprisonment for Contempt of the Western Australian Parliament

★

HEATHER GOODWIN, ARRAN STEWART AND MELVILLE THOMAS†

*On two occasions the Western Australian Parliament has utilised its powers to imprison a person for contempt. This article explains the background to the two cases and explores some of the legal issues to which they give rise.*

In 1904 John Drayton, editor of the Kalgoorlie *Sun*, was committed to gaol for three weeks by the Western Australian Legislative Assembly, following his failure to pay a fine of £50 for holding Parliament in contempt. Until January 1995, the imprisonment of Drayton was the only instance of the Western Australian Parliament utilising its power to gaol a person for contempt. Ninety years after the Drayton incident, the imprisonment of Brian Easton for disobeying an order of the Legislative Council once again highlights this seldom used but very real power.

This article will examine the circumstances which led to the imprisonment of Drayton by the Legislative Assembly in 1904. This will be followed by a comparative analysis of the recent imprisonment of Brian Easton by the Legislative Council. The final part of the article will consider the historic purpose of the right of a 'commoner' to petition Parliament for the redress of a grievance and some of the legal issues arising from the imprisonment of Drayton and Easton.

---

† Student editors, The University of Western Australia Law Review. We are grateful to Mr Laurie Marquet, Clerk of the Legislative Council, for his help with research and to Mr George Syrota for commenting on an earlier draft of this article. The cartoon on p 191 was first published in *The Western Mail* (19 Nov 1904) and is reproduced with kind permission of *The West Australian*.

## THE DRAYTON CASE

Prior to the recent imprisonment of Brian Easton, the power of Parliament to imprison a person for breach of parliamentary privilege had been exercised only once in Western Australia, in the case of John Drayton, a newspaper editor, in 1904 (although imprisonments had occurred in other States).[1] Other instances involving the issue of breach of privilege had also arisen in Western Australia, but these were dealt with either without resorting to Parliament's power to imprison (eg, by having the offender apologise to Parliament or by reprimanding him) or no action was ultimately taken following debate on the matter in the House.[2] Drayton failed to answer questions put to him by a Select Committee of the Legislative Assembly, and was consequently fined by the Assembly under section 8 of the Parliamentary Privileges Act 1891 (WA) ('the Privileges Act'). When Drayton failed to pay the fine, the Assembly resolved to imprison him for his default, under the same section of the Privileges Act.

### 1. Background: the forfeiture of the 'Empress of Coolgardie' gold lease

In October 1904 the Legislative Assembly established a Select Committee to inquire into the circumstances surrounding the forfeiture of a gold-mining lease known as the 'Empress of Coolgardie'.[3] The lease was held by an English company named Phoenix Gold Mines Ltd ('Phoenix'), which went into liquidation in England in 1902. As a result, the lease property was not worked for over 12 months and a gold prospector, Daniel Browne, applied to the Warden's Court at Coolgardie for an order to forfeit the lease on the grounds that Phoenix had breached the covenants in the lease requiring it to work the land. At the hearing, held on 3 June 1903, Phoenix raised as a defence the provisions of the Companies Act 1893 (WA), which related to bankrupt companies, arguing that section 114 of the Act prevented forfeiture of the lease without leave of the Supreme Court.[4]

Warden Finnerty rejected this defence and recommended that the Minister for Mines order the forfeiture if it was within his power to do so.[5]

---

1. E Campbell *Parliamentary Privilege in Australia* (Melbourne: Melb UP, 1966) 121, 201.
2. For an excellent overview of this topic, see B Okely & D Black 'Parliamentary Privilege in Western Australia' in D Black (ed) *The House on the Hill* (Perth: WA Parliament, 1991).
3. *Hansard* (LA) 5 Oct 1904, 626.
4. WA Legislative Assembly *Report into the Application for Forfeiture and Subsequent Reinstatement of the Empress of Coolgardie Mining Lease* (Perth, 1904) ¶¶ 6-12. The Committee held 13 meetings and examined 24 witnesses.
5. Id, ¶¶ 10-11.

The Minister sought the advice of the Crown Law Department and was informed that the Governor in Council had the power to order forfeiture of the lease. However, the Department also advised the Minister that the proceedings in the Warden's Court were invalid as the applicant, Browne, had not obtained leave of the Supreme Court (as required by section 114 of the Companies Act) before commencing them. Thus, any order for forfeiture purporting to be based on the recommendation of the Warden would be invalid. Instead, the Governor in Council ordered that the lease be forfeited under 'the right of the Crown to forfeit without notice for non-fulfilment of labour covenants' — and this forfeiture was subsequently published in the Government Gazette.[6]

Unfortunately, the notice of the forfeiture which appeared in the Gazette erroneously purported to base the forfeiture on the irregular hearing in the Warden's Court. Thus, when the Minister sought the advice of the Crown Law Department on whether the lease should be granted to Browne, the Attorney-General and the Crown Solicitor advised him that Phoenix would have to be reinstated as holder of the lease. The Minister 'very reluctantly acquiesced' and the cancellation of the forfeiture was gazetted on 19 February 1904.[7]

## 2. The Kalgoorlie *Sun*

In the public mind there was a great deal of uncertainty about the forfeiture and subsequent reinstatement of the lease, and this was fuelled by several articles which were published in the Goldfields Press.[8] In particular, in a number of articles published in the Kalgoorlie *Sun* it was alleged that the Minister had acted wrongfully: he was accused of having 'robbed the prospector to fatten the capitalist' and of having 'returned [the lease] to the Bull syndicate from which it was rightly taken'.[9]

In consequence, on 5 October 1904, the Hon A A Horan (MLA) moved that a Select Committee be established 'to inquire into and report upon the application for forfeiture and reinstatement of the Empress of Coolgardie Gold Mining Lease'. The debate on the motion to appoint the Committee reveals that its purpose was to investigate the allegations made by the Press about the former Minister for Mines' handling of the affair; to 'take immediate steps to prove his innocence or guilt'; and to 'find out if possible the reason for the malicious libels'.[10]

---

6. Id, ¶¶ 12-13.
7. Id, ¶ 17.
8. Id, ¶¶ 23-24
9. *Hansard* (LA) 1 Nov 1904, 947-948; Okely & Black supra n 2, 393.
10. *Hansard* (LA) 5 Oct 1904, 623-625. The Select Committee concluded that the Minister had acted quite properly in following the advice of the Crown Law Department: *Report* supra n 4, ¶ 23.

The Committee proceeded to take evidence from witnesses and issued a summons to Drayton to appear before it on 31 October 1904 to give evidence. It was later explained by the Premier that the *Sun* had published 'a large number of articles ... dealing with this particular case that the Select Committee is investigating, and it was but natural therefore that the editor should be called upon to afford them a chance of knowing what information the articles were based on and what knowledge the editor of the paper possessed'.[11]

On 29 October at 9.20 am Drayton was served with the summons by a corporal of police. Drayton declared his intention not to attend the Committee hearing and duly failed to appear. In his absence, the Committee heard the evidence of other witnesses, and the Clerk of the House, at the insistence of the Committee, then telephoned Drayton to request his attendance. 'In conversation per telephone with the Clerk, Mr Drayton stated that he was not sure whether he would attend or not, but thought he would. On the reassembling ... Mr Drayton appeared before your Committee'.[12]

However, Drayton refused to give evidence. He stated that any information that he was privy to regarding the Empress of Coolgardie affair could be hearsay only, and not admissible evidence. The Chairman of the Committee reported Drayton's non-compliance in a letter to the Legislative Assembly and the House, on 1 November 1904, resolved that Drayton be found guilty of contempt under section 8 of the Privileges Act and fined £100.[13]

The resolution was moved by the Premier, Mr Daglish, and carried almost unanimously. The few dissentients suggested that 'perhaps some members are influenced by the fact that Mr Drayton is the editor of a paper which has attacked certain members of the House' and further suggested that the matter be deferred for a day so that it could be considered without 'undue haste'; or alternatively that Drayton be given the chance to explain himself before the House.[14]

Drayton did not pay the fine; instead he wrote to the Legislative Assembly expressing his regret 'to be obliged to inform your Honourable House that, being without means, owing to circumstances over which I have no control, I am not able to comply with your demand for immediate payment'.[15]

On 10 November 1904 the Assembly moved that Drayton be imprisoned until he paid the fine or until the end of the Parliamentary session, whichever

---

11. *Hansard* (LA) 1 Nov 1904, 944.
12. Ibid.
13. Id, 945; the fine was later reduced to £50 when it was found that the Standing Orders did not provide for the imposition of a larger sum: *Hansard* (LA) 3 Nov 1905, 1063.
14. *Hansard* (LA) 1 Nov 1904, 947-948.
15. *Hansard* (LA) 8 Nov 1905, 1100; Okely & Black supra n 2, 394.


was the sooner. This motion was passed unopposed, although it was suggested by the Leader of the Opposition that further notice of the motion might reasonably have been given.[16]

## 3. Arrest and imprisonment

The Sergeant-at-Arms, Mr Kidson, made a special trip from Perth to Kalgoorlie and effected the arrest of Drayton on Sunday, 13 November at the offices of the *Sun*. As it was a busy day, Drayton was allowed 'to attend to his newspaper duties until 11 o'clock' that night. At 11.15 pm, Drayton

16. *Hansard* (LA) 10 Nov 1905, 1170.

left Kalgoorlie by train for Fremantle Gaol, in the custody of one Detective Fraser. The two 'were provided with a well-stocked hamper' and travelled 'in a first-class reserved compartment'. The *Sun* declared that Drayton had been 'dragged to gaol for refusing to do what there is no law to make him do' and that he had refused to pay the fine on the principle that 'no person or committee or inquisition has the right to demand the violation of the secrecy of the confessional of the Press'.[17]

At Fremantle Gaol, Drayton was confined separately from the other prisoners and was 'allowed to receive visitors on a relatively unrestricted basis at reasonable hours'.[18]

On 8 December, the Hon C J Moran (MLA) moved that Drayton be released. Moran noted that the Governor in Council had enacted new prison regulations to deal with the new class of prisoner — a 'first class misdemeanant' — and that 'such regulations having come into force after John Drayton had been in prison for a fortnight or so, the passing of the regulations will look to the outside world as if Parliament wished to increase the punishment inflicted on Drayton'.[19] A majority of members agreed that Drayton had been sufficiently punished and resolved that he be pardoned and released.[20]

## 4. Press reaction to Drayton's imprisonment

The imprisonment of Drayton provoked much criticism of Parliament in the Press. *The West Australian* noted that a 'certain amount of hostility towards the action of Parliament in the matter has been voiced in many quarters'. In particular, the fine and imprisonment were thought by many to be a serious threat to the freedom of the Press. *The West Australian* suggested that the 'step taken yesterday will be criticised, no doubt, as unnecessarily severe, and as dictated not so much by a desire to uphold the dignity of Parliament as by a wish to get even with a hostile critic'.[21] Members were clearly worried about this view of their actions. The Hon H Ellis (MLA) said: 'I know at the present time many people do not understand what the offence was. They still think we were trying to infringe the privileges of the Press'. Other members tried to make it clear that if Drayton had merely refused to disclose his sources (rather than refusing point-blank to testify or be sworn at all) then the fine and imprisonment would not have been justified.[22]

---

17. 'The Drayton Contempt of Parliament' *The West Australian* 14 Nov 1904, 5.
18 Okely & Black supra n 2, 395.
19 *Hansard* (LA) 8 Dec 1904, 1714-1715.
20. Ibid
21 Editorial *The West Australian* 11 Nov 1904, 4.
22 *Hansard* (LA) 8 Dec 1904, 1719-1720.

The release of Drayton was greeted with great relief by many members. The Hon C J Moran was undoubtedly not alone in his view when he said:

> I wish simply to congratulate the leaders of the House and Mr Speaker upon the careful and generous interpretation they have given to the evident wish of the House in connection with this matter; also to express a hope that the incident will be forgotten, and that we shall never again have occasion in the history of Western Australia to go through the same proceeding.[23]

## THE EASTON PETITION

In January 1995, 90 years after the release of Drayton from Fremantle goal, Brian Mahon Easton[24] was arrested by the Deputy Clerk of the Legislative Council, Mr Ian Allnutt, acting under the ancient title of Gentleman Usher of the Block Rod, for contempt of the Western Australian Parliament. A warrant for Easton's arrest was issued by the Legislative Council on 28 December 1994 when Easton failed to comply with an Order of the Council made on 22 June 1994.[25] Under this Order, Easton was required to apologise to the House for drawing up a petition which was tabled in the Council on 5 November 1992[26] by the Hon John Halden. The petition contained misleading allegations against two members of the public and against the then Leader of the Opposition, Mr Richard Court.[27]

On 10 November 1992, five days after the tabling of the petition, the Honorable Member for East Metropolitan, Mr Peter Foss, moved a resolution, without notice, in the Council that a Committee of Privilege be established to inquire into whether there had been any breach of privilege in the tabling of the petition by the Hon John Halden on behalf of Easton. In support of the motion, the Hon Peter Foss pointed out that a petition is 'a very important right on behalf of citizens' of Western Australia. It affords the petitioner the privileges of the House and 'always when privileges are granted they come with an obligation — to behave responsibly and not to abuse those privileges'. He observed that, on the face of it, Easton's petition appeared to be 'merely

---

23. Id, 1725.
24. A former Public Service Commissioner and Managing Director of WA Exim Corporation Ltd.
25. Parliamentary Select Committee (LC) *Report of Privilege Concerning the Non-compliance by Brian Easton with the Order of the House of June 22, 1994* (Perth, 1994) A Royal Commission of Inquiry (Chair: Mr Kenneth Marks) was set up in Autumn 1995 to inquire into the circumstances surrounding the tabling of the Easton petition in 1992. At the time of writing, the Commission had not yet issued its report.
26. Parliamentary Select Committee (LC) *Report of Privilege Concerning the Petition of Brian Easton* (Perth, 1992).
27. Penny Easton, the petitioner's ex-wife, and Margaret McAuley, her sister; Richard Court MLA, then leader of the Liberal Party in Opposition, now Premier of WA.

a petition of grievance' by a single person complaining of some injustice to himself and asking Parliament to grant relief. However, the circumstances in which it was presented made it clear that this petition 'went beyond the normal range of petitions [in that it not only] accused a number of people of criminal misbehaviour ... perjury and ... corruption under the terms of the Official Corruption Commission Act', but the Press was also alerted to its presentation. The circumstances in which the petition was published and promoted indicated that Parliamentary processes may have been abused. This was not a petition aimed to secure just and reasonable relief for the petitioner but was 'part of an attempt to use the privileges of the Parliament to make allegations which it should have been known were false and needed to be treated with caution'.[28]

The Hon Peter Foss claimed that the petition was improperly brought before the Legislative Council and there were enough facts to justify an inquiry into a possible breach of Parliamentary privilege.

A Committee of Privilege was established by Order of the Council on the day of Mr Foss's motion and the following day five members of the House were appointed to the Committee.[29]

Four weeks later, on 14 December 1992, the Committee issued its report. This recommended, amongst other things, that:

> The House adjudge Easton guilty of a breach of privilege of the House; and Easton be required to apologise in writing to the House for having petitioned the House in a misleading manner.[30]

No action was taken on the report until 22 June 1994, 18 months later. The Hon Peter Foss moved a motion on that date which incorporated the recommendations in relation to Easton made by the Committee of Privilege in December 1992. After debate,[31] the House unanimously decided to make an Order under section 1 of the Privileges Act requiring Easton to sign the following letter of apology:

> To the President and Members of the Legislative Council in Parliament assembled:
> I, Brian Mahon Easton, in answer to an order of the Legislative Council made on 22 June 1994 hereby make my apology to the Legislative Council and respectfully request that I be released from any further penalty that I may otherwise incur.[32]

Under the terms of the Order, Easton was required to make this apology by 5 July 1994. On 9 August 1994 the President of the Legislative Council,

28. *Hansard* (LC) 10 Nov 1992, 6383-6385.
29. *Hansard* (LC) 11 Nov 1992, 6534; Chairman: Peter Foss (Liberal), Kim Chance (ALP), Reg Davies (Independent), Philip Pendal (Liberal) and Tom Stephens (ALP)'.
30. *Report of Privilege* supra n 26, 68. The Committee noted mitigating circumstances in Easton's favour: id, 69.
31. *Hansard* (LC) 22 Jun 1994, 2226-2253.
32. *Report of Privilege* supra n 25, sched 2, 19.

the Hon Clive Griffiths, informed the House that Easton had refused to apologise.[33]

On that day, the Hon Peter Foss moved to appoint a Select Committee of Privilege to recommend to the House what action it should take as a result of Easton's non-compliance with the House's Order. This motion was agreed to by the House.[34] In August 1994, Easton appeared before this Select Committee.

In December 1994 the Select Committee handed down its report. It unanimously recommended that Easton be adjudged guilty of a serious breach of privilege of the House (failure to apologise) and by a majority further recommended that he be imprisoned for contempt under powers given to Parliament by section 1 of the Privileges Act. The Hon Mark Nevill disagreed with this further recommendation stating: 'Imprisonment would be a harsh penalty and ... a censure by the House for failure to comply with an order of the House is the most appropriate available remedy'. The Hon Kim Chance (another member of the Select Committee) believed that:

> Regardless of the circumstances, imprisonment should not be an option available to this, or any, House of Parliament.... [I]t is possible that the exercise of committal powers for this offence would generally be regarded as anachronistic and petty.[35]

The 1992 Select Committee considered the Easton petition to be an abuse of the right to petition Parliament. Easton's subsequent refusal to apologise for this original breach of privilege amounted to a disobedience of an Order of the House. The advice from the Crown Solicitor's office to the Committee was that Easton's failure to apologise for his original contempt was itself a separate contempt punishable by the House. Thus, Easton was imprisoned not for the original contempt (ie, abusing the right of petition) but for his refusal to apologise and consequently to 'purge' his original contempt. The crucial issue before the 1994 Select Committee was 'the need for the House to vindicate its own authority and be able to enforce the Order it [had] already made'. The Crown Solicitor advised the Committee that it would be incongruous for the House to require Easton to apologise and then be powerless to enforce the lesser sanction.[36]

A warrant for Easton's arrest was issued on 28 December 1994 in the following terms:

> Whereas Brian Mahon Easton was adjudged guilty of a serious contempt of the

33. Id, 7.

34. *Hansard* (LC) 9 Aug 1994, 2835-2836. The following members were appointed to the Committee — Chairman: Peter Foss (Liberal), George Cash (Liberal), Kim Chance (ALP), Reg Davies (Independent) and Mark Nevill (ALP).

35. *Report of Privilege* supra n 25, 16; Foss, Cash and Davies in the majority, Chance and Nevill dissenting on the question of imprisonment.

36. *Report of Privilege* supra n 25: annex 1, 2-3.

> Legislative Council by its resolution made on 22 June 1994 and has failed to apologise for that contempt, now I, Clive Edward Griffiths, President of the Legislative Council, acting in conformity with an order of the Legislative Council made on [date] require you, Ian Lea Allnutt, Usher of the Black Rod in the Parliament of Western Australia, with the assistance of such members of the Police Service or other persons as you deem necessary, to arrest Brian Mahon Easton and deliver him into the custody of the Principal Officer having control of the Casuarina Prison and there to keep him in custody until released by my further order.[37]

The warrant did not cite the exact nature of the contempt, only that it was 'a serious' breach of privilege; nor did it state a definite time span for Easton's incarceration. This was on the advice of the Crown Solicitor. Past authority showed that it was not necessary to be specific about the nature of the contempt in order for the warrant to be valid[38] and furthermore there was some authority for the proposition that the warrant would be open to scrutiny by the courts if the facts which established the contempt were specifically set out.[39] With regard to the duration of incarceration, it was recommended by the Crown Solicitor that the Western Australian Parliament follow the practice adopted by the House of Commons of imprisoning a person 'during the pleasure of the House'. In practice this meant for the duration of the Parliamentary session. Easton could therefore, in theory, have been imprisoned for as long as Parliament was in session, but on the recommendation of the Select Committee he was to be released 'any time after Mr Easton has spent seven days in custody'.[40] He in fact spent seven days in Casuarina Prison.

## 1. Public reaction to Easton's imprisonment

Easton's petition and its aftermath have come to be known in the Press as 'The Easton Affair'.[41] One journalist described Easton's imprisonment as 'simply a farce'.[42] In a similar vein, Federal Industry Minister, the Hon Peter Cook, said:

> No matter what views people might hold about the Easton case, it should never have been dealt with as it has. The very idea of a chamber of elected people threatening and then imposing imprisonment, if they are not given an apology, has the overtones of a Gilbert and Sullivan farce. The mindset that prompts this self-righteous pomposity is archaic and typical of those who think that dressing up in wigs, frilly shirts and knee breeches represents the symbols of modern democracy.[43]

---

37. Id, sched 1, 18.
38. *R v Richards, ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162.
39. CJ Boulton (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 21st edn (London: Butterworths, 1989) 108.
40. *Report of Privilege* supra n 25, 16.
41. Eg J Walker 'The Easton Affair' *The Australian* 18 Apr 1995, 13.
42. S Oxley 'Unjust Process Simply a Farce' *The West Australian* 26 Jan 1995, 4.
43. P Cook 'Move a Travesty' *The West Australian* 26 Jan 1995, 4.

The Federal Member for Canning, the Hon George Gear, said that Easton's imprisonment was an abuse of power and the sort of arrogance expected from an 'undemocratically elected Legislative Council'.[44] The Hon Jim McGinty, Opposition Labor Leader in Parliament, said he found the imprisonment by the Legislative Council of a citizen 'without any right to be heard ... to be quite horrific' and stated that the Labor Party was opposed to 'such a fundamental denial of human rights as imprisonment without trial'. He pledged that a Labor government would overturn this archaic and repressive power of Parliament and would give the courts the power to punish a person who was in contempt of Parliament.[45]

## DISCUSSION

One of the major problems that the 1992 Select Committee into the Easton petition had to overcome was the fact that no similar situation had ever arisen in Western Australian, or indeed Australian, parliamentary history. The purpose of the 1904 Select Committee (investigating the 'Drayton Affair') was not the same as that of the 1992 Select Committee formed to investigate an abuse of the right to petition. Whilst the two imprisonments — 90 years apart — both caused much debate in Parliament, controversy in the media and confusion in the public mind, the circumstances leading to the imprisonment of Drayton and Easton were markedly different.

### 1. The purpose of the right to petition Parliament and the abuse of that right

In England, the right to petition Parliament for the redress of grievances has its origins in the establishment of the House of Commons. In the 17th century, with the change in sovereignty from the King to Parliament, two important resolutions were passed by the House concerning the right to petition. The first resolution stated that: '[I]t is an inherent right of every Commoner of England to prepare and present Petitions to the House of Commons in the case of grievance, and of the House of Commons to receive them'. The second resolution, however, placed a substantial caveat on that right: '[I]t is the undoubted right and privilege of the House of Commons to adjudge and determine, touching the nature and matter of such Petitions, how far they are fit and unfit to be received'.[46]

---

44. D Reardon & T Salon 'Easton Not Meant to Languish in Jail: Clerk' *The West Australian* 2 Feb 1995, 10.
45. S O'Malley 'McGinty Pledge on Contempt Law' *The West Australian* 21 Dec 1994, 10.
46. *Report of Privilege* supra n 26, Minutes of Evidence, attachment 1.

From this point onwards the House of Commons had to be mindful of the balance between the two considerations: the commoner's right to petition and Parliament's right to control such petitions to prevent abuse.

During the 18th and 19th centuries the House of Commons was besieged with thousands of petitions. In 1843 one session alone received 33 898 petitions containing 6 135 000 signatures. By the mid-19th century the House had established strict rules about the form and content of public petitions. Today such petitions are scrutinised by the Clerk of Public Petitions before being tabled. Under Standing Orders[47] all petitions are to be expressed in 'reasonable terms' and must not be abusive or defamatory. If a petition is passed by the Clerk of Public Petitions it is further considered by the Public Petitions Committee which has the discretion to refuse a petition containing 'offensive imputations'.

In Western Australia, at the time the Easton petition was tabled, there was no such bulwark against the tabling of an unfair, misleading or intemperate petition. The Standing Orders at that time contained only rudimentary requirements in relation to petitions. Order No 133(a)(v) stated that a petition should be 'couched in reasonable terms and devoid of statements that would constitute a breach of the Council's standing orders or irrelevant material'. A petition was presented either 'by delivery to the Clerk' or 'tabling in the Council' together with the Clerk's Certificate that the petition complied with the substantive rules set out in the Standing Orders. It was not until 1994, upon the recommendation of the 1992 Select Committee, that the Standing Orders were amended to bring them into line with those in the House of Commons.

That Committee made the following recommendation in order to protect against petitions containing offensive allegations:

> The Clerk or a member should, in the case where a petition is really a legal procedure, with the House as a Court of last resort, be able to insist that the petitioner provide with the petition, and where applicable, the supplementary statement, a certificate from Counsel that it complies with Standing Orders with respect to such matters as the exhaustion of all remedies, the fairness of the petition and allegations and that Counsel in signing that Certificate should be under the same sort of obligation that he is [in] when signing a pleading alleging fraud [48]

In addition, Standing Order 133 was amended to prevent the laying of a petition which contained 'statements adverse to ... a person' or which alleged 'improper, corrupt or illegal conduct against a person, whether by name or office.' It is important to note that had this been in force at the time, the Easton petition might never have been brought before Parliament.

---

47. Rule 14.
48. *Report of Privilege* supra n 25, 69.

## 2. The legal basis of the Legislative Council's order to imprison for contempt

As noted above, the ultimate recommendation of the majority of the 1994 Select Committee was to imprison Easton for contempt. Committing for contempt has long been recognised as one of the most important powers of Parliament; effectively Parliament has the right to be the arbiter, not only of what amounts to contempt, but also of what punishment is appropriate for that contempt. This power was invoked to punish Easton for disobeying the Legislative Council's Order that he apologise for abuse of the right to petition Parliament.

Although, over the course of English constitutional history, it has been well established that the House of Commons — and consequently Australian Parliaments at both state and federal levels — has the right to imprison for contempt, it can be argued that the Western Australian Parliament does not have an absolute right to imprison for *any* contempt. In Western Australia, section 8 of the Privileges Act enumerates a list of contempts that the Council and Assembly are empowered to punish in a summary manner. The particular contempt committed by Easton is not expressly mentioned in this section. Under section 8 the Council and Assembly are empowered to punish the following contempts — initially by way of a fine and later, if the fine is not paid, by imprisonment: (i) disobeying an order of either House or committee thereof to produce papers and documents; (ii) refusing to be examined or to answer questions put by either House; (iii) assaulting, insulting or obstructing any member; (iv) compelling a member by coercion to declare his position relating to a matter before Parliament; (v) challenging a member to a fight; (vi) bribing or attempting to bribe a member; and (vii) disturbing or interrupting the proceedings of Parliament.[49]

In 1904, the Legislative Assembly relied on section 8 to punish Drayton for refusing to answer questions and give evidence. This contempt was clearly covered by section 8. On the other hand, with Easton, the Legislative Council had to rely on section 1 of the Privileges Act in order to punish him for failing to apologise to the House. Section 1 provides that the powers, privileges and immunities enjoyed by the House of Commons are also to be enjoyed by the Legislative Council (and Assembly) of the Western Australian Parliament. Since one of the most important and undisputed privileges belonging to the Commons is the right to imprison for contempt, the Legislative Council must equally be empowered to imprison for a contempt regardless of whether or not the contempt comes under section 8. However, Professor Enid Campbell has suggested that, whilst the Legislative Council

49. Privileges Act 1891 (WA) s 8

has inherited these powers from the Commons, the wording of section 1 restricts their application.[50] The final words of this section state that, 'with respect to the powers hereinafter more particularly defined by this Act, *the provisions of this Act shall prevail*' (emphasis added). This raises the question: does section 8, by specifically defining certain contempts to be punishable summarily, implicitly prevent the Western Australian Parliament from punishing all other contempts such as the contempt committed by Easton? This point has not been authoritatively settled. However, in his advice to the Select Committee, the Crown Solicitor referred to the High Court decision in *R v Richards*.[51] In this case, decided 40 years ago, the court unanimously held that Parliament's powers, privileges and immunities could only be eroded through the use of explicit and unequivocal language. Seen in this light, section 8 merely defines certain punishments for certain types of contempt; it does not have a restrictive effect. All other contempts, including that of Easton, can be dealt with by utilising the powers under section 1; such powers are the product of English constitutional experience and cannot easily be eroded or excluded.

50. Campbell supra n 1, 26.

51. *R v Richards* supra n 38, 165. The Crown Solicitor also cited the WA Supreme Court's decision in *Aboriginal Legal Service of WA Inc v WA* (1993) 9 WAR 297 which dealt with s 4 of the Privileges Act (power to compel attendance).