THIRTY-EIGHTH PARLIAMENT

REPORT 23

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

REFERENCE FROM THE HOUSE - EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Presented by Hon. Barry House MLC (Chairman)

November 2011

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Date first appointed: 24 May 2001

Terms of Reference:

6. Procedure and Privileges Committee

6.1 A *Procedure and Privileges Committee* is established.

6.2 The Committee consists of the President and the Chairman of Committees, the Deputy Chairmen of Committees (*all ex officio*), and any members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chairman, and the Chairman of Committees is the Deputy Chairman, of the Committee.

6.3 With any necessary modifications, SO 326A applies to a co-opted member.

6.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the House and its committees, and recommend to the House such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the House or its committees.

6.5 Unless otherwise ordered any rule or order under which a matter of privilege stands referred, or is referred, to a committee (however described) for inquiry and report is a reference to the Committee."

Members as at the time of this inquiry:

Hon. Barry House MLC (Chairman)	Hon. Colin Holt MLC
Hon. Matt Benson-Lidholm MLC (Deputy Chairman)	Hon. Michael Mischin MLC *
Hon. Brian Ellis MLC	Hon. Ken Travers MLC
Hon. Jon Ford MLC	Hon. Donna Faragher MLC (Substitute Member for Hon. Michael Mischin MLC *)
Hon. Wendy Duncan MLC (Co-opted Member)	Hon. Giz Watson MLC (Co-opted Member)

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CONTENTS

1 Reference 1
2 Background to the Reference 1
3 Approach by the Committee 2
4 Parliamentary Privilege 3
5 Further Advice received by the Committee 4
6 Does the Bill effect Parliamentary Privilege? 4
7 What is the effect upon Parliamentary Privilege? 6
8 Options for the House 6

APPENDIX 1: LETTER FROM THE CLERK OF THE LEGISLATIVE COUNCIL TO HON. SUE ELLERY MLC, LEADER OF THE OPPOSITION, DATED 26 OCTOBER 2011 15

APPENDIX 2: LETTER FROM MR GEORGE TANNIN SC, STATE COUNSEL FOR WESTERN AUSTRALIA, TO THE ATTORNEY GENERAL, DATED 31 OCTOBER 2011 27

APPENDIX 3: LETTER FROM THE CLERK OF THE LEGISLATIVE COUNCIL TO HON. SUE ELLERY MLC, LEADER OF THE OPPOSITION, DATED 7 NOVEMBER 2011 33

APPENDIX 4: LETTER FROM MR GEORGE TANNIN SC, STATE COUNSEL FOR WESTERN AUSTRALIA, TO HON. MICHAEL MISCHIN MLC, PARLIAMENTARY SECRETARY TO THE ATTORNEY GENERAL, DATED 8 NOVEMBER 2011 37

APPENDIX 5: LETTER FROM THE CLERK OF THE LEGISLATIVE COUNCIL TO THE PROCEDURE AND PRIVILEGES COMMITTEE, DATED 15 NOVEMBER 2011 41

APPENDIX 6: LETTER FROM MR GEORGE TANNIN SC, STATE COUNSEL FOR WESTERN AUSTRALIA, TO THE PROCEDURE AND PRIVILEGES COMMITTEE, DATED 17 NOVEMBER 2011 59

APPENDIX 7: LEGAL ADVICE RECEIVED BY THE PROCEDURE AND PRIVILEGES COMMITTEE FROM MR BRET WALKER SC, DATED 18 NOVEMBER 2011 73

APPENDIX 8: OUTLINE OF FURTHER ADVICE SOUGHT FROM MR BRET WALKER SC 85

APPENDIX 9: FURTHER LEGAL ADVICE RECEIVED BY THE PROCEDURE AND PRIVILEGES COMMITTEE FROM MR BRET WALKER SC, DATED 25 NOVEMBER 2011 89

REPORT OF THE
STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

IN RELATION TO THE

REFERENCE FROM THE HOUSE - EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

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1 REFERENCE

1.1 On 10 November 2011, the Legislative Council resolved the following motion:

> *That Order of the Day No. 7, the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011, be discharged and referred to the Standing Committee on Procedure and Privileges for consideration of Clause 5 sections 20G to 20M and their effect, if any, on parliamentary privilege, and report not later than 29 November 2011.*

2 BACKGROUND TO THE REFERENCE

2.1 On Thursday, 20 October 2011, the Parliamentary Secretary to the Attorney General introduced into the Legislative Council the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011* (the Bill). The Parliamentary Secretary's second reading speech on the Bill indicated that the Bill's purpose is to introduce responsible and accountable protections for professional persons and journalists which, in appropriate circumstances, preclude them from being compelled to give evidence.

2.2 The proposed protection will prevent a journalist from being compelled to give evidence disclosing the identity of their source unless it is determined that the protection should not apply in the circumstances of the proceedings in question.

2.3 The Parliamentary Secretary stated:

> *The purpose of permitting a person acting judicially to give a direction under the protection provisions is to ensure that the protection, and the qualification to the protection, afforded to journalists applies not only in courts and tribunals, but also to inquiries,* ***such as hearings before the Legislative Assembly or Legislative Council, or committee hearings of both houses of Parliament****.*

> *The protection will apply in this manner regardless of whether the empowering statute of the relevant tribunal or inquiry excludes the application of the Evidence Act 1906, which is the Act that the bill amends.*[1] [emphasis added]

2.4 Prior to the resumption of the debate on the Bill, the Clerk wrote to the Party Leaders, noting the expressed intent of the Government regarding the operation of the Bill including parliamentary proceedings and opining that the Bill did not, in its current form, satisfy the requirement for 'unmistakeable language' in relation to such provisions for the privileges of the Parliament to be qualified or abrogated.[2] The State Counsel provided an opinion on this matter, which disputed the Clerk's view, but proposed Government amendments to put beyond doubt the application of the Bill to parliamentary proceedings.[3] Further correspondence from the Clerk and the State Counsel addressed the substantive issue of whether such a qualification or abrogation of parliamentary privilege was justified, with the Clerk raising the potential impact of judicial intervention upon the operations of the Parliament.[4]

2.5 The second reading debate on the Bill resumed on 8 November 2011, and the second reading of the Bill was resolved in the affirmative on 10 November 2011. In the course of this debate, the House clearly expressed its collective view that the policy of the Bill be adopted - that is, that the protection afforded to journalists in relation to the (non)disclosure of their sources be effected. However, given the doubts raised regarding the impact upon parliamentary privilege, the House resolved that the Procedure and Privileges Committee inquire into this matter on behalf of the House. Accordingly, the reference cited at paragraph 1.1 was passed by the House.

3 APPROACH BY THE COMMITTEE

3.1 In its preliminary review of the reference from the House, the Committee noted that the policy of the Bill had been agreed to and that the sections of the Bill that had been referred by the House related to the protection of the identity of journalists' informants. Further, the Committee noted that the reference required the Members to inquire into the effect, if any, on parliamentary privilege in relation to these sections of the Bill. In doing so, the Committee considered that it was prudent to offer the

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1 Hon. Michael Mischin MLC, Parliamentary Secretary to the Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 20 October 2011, p8436.

2 Letter from Clerk of the Legislative Council to Hon. Sue Ellery MLC, Leader of the Opposition, 26 October 2011.

3 Letter from Mr George Tannin SC, State Counsel for Western Australia to the Attorney General, 31 October 2011.

4 Letter from Clerk of the Legislative Council to Hon. Sue Ellery MLC, Leader of the Opposition, 7 November 2011.

Letter from Mr George Tannin SC, State Counsel for Western Australia to Hon. Michael Mischin, Parliamentary Secretary to the Attorney General, 8 November 2011.

House some options to address any adverse impacts upon parliamentary privilege arising from the Bill.

4 DOCTRINE OF THE SEPARATION OF POWERS

4.1 In the Australian constitutional tradition, the "separation of powers" doctrine means that the Parliament, the Executive Government and the courts each have their own separate spheres of power or authority. According to the doctrine, each of the three branches of government should be confined to the exercise of its own functions and should not encroach upon the functions of the other branches.

4.2 The separation of powers doctrine is partially enshrined in the Australian Commonwealth Constitution (in Part III dealing with the separation of Executive and Judicial powers). There is, however, no express reference to the doctrine in Western Australia's constitutional legislation (i.e. the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899*).

5 PARLIAMENTARY PRIVILEGE

5.1 Erskine May provides the following definition of parliamentary privilege:

> *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.*[5]

5.2 These rights predominantly fall into two categories: freedom of speech in relation to parliamentary proceedings and the exclusive cognisance of the Parliament in relation to its proceedings, both of which are founded on Article 9 of the UK *Bill of Rights 1689*. Article 9 forms part of Western Australian law by virtue of section 1 of the *Parliamentary Privileges Act 1891*, which provides that:

> *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*

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5 Erskine May (1989) *The Law, Privileges, Proceedings and Usage of Parliament*, 21st edition, Boulton C.J. (ed.), Butterworth & Co. (Publishers) Ltd, London, p119.

> *(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.*

5.3 The question as to the effect, if any, on parliamentary privilege in relation to clause 5, sections 20G to 20M inclusive of the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011* directly pertains to the issue of the Parliament's exclusive cognisance over its affairs.

6 FURTHER ADVICE RECEIVED BY THE COMMITTEE

6.1 The Committee wrote to four persons, advising of the reference from the House and inviting (further) submissions to the Committee's inquiry:

a) the Parliamentary Secretary to the Attorney General;

b) the Clerk of the Legislative Council;

c) the State Counsel; and

d) the W.A. Branch Director of the Media, Entertainment and Arts Alliance.

6.2 The Clerk and the State Counsel provided submissions to the Committee arising from this invitation, which are appended to this report.[6]

6.3 The Committee also sought advice from independent senior counsel. The Committee was grateful to receive the assistance of Mr Bret Walker SC, whose advice to the Committee is appended to this report.[7]

7 DOES THE BILL EFFECT PARLIAMENTARY PRIVILEGE?

7.1 An initial matter requiring the Committee's attention arose from the correspondence of the Clerk and the State Counsel, and is also referred to in the independent senior counsel's advice. This matter related to the potential effect of the provisions of the Bill, and whether these provisions 'abrogate' or 'qualify' parliamentary privilege.

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6 Letter from Clerk of the Legislative Council to the Procedure and Privileges Committee, 15 November 2011.

Letter from Mr George Tannin SC, State Counsel for Western Australia to the Procedure and Privileges Committee, 17 November 2011.

7 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011 and 25 November 2011.

7.2 Whilst the use of these differing terms may create some confusion, the Committee considers that it is clear from the material it has received (and which is appended to this report) that the use of these terms is dependent upon the context in which they are used, and does not reflect a significant difference regarding the impact or otherwise of the Bill upon parliamentary privilege. When looking at the specific privilege of the House to require a witness to answer a lawful and relevant question (including a question to a journalist to disclose the identity of a source), any removal of this privilege would constitute an abrogation of that specific privilege. However, when viewing parliamentary privilege as a whole i.e. the sum of the peculiar rights, the proposed changes would represent a qualification of parliamentary privilege.

7.3 As already noted, the Clerk expressed concerns regarding the current provisions of the Bill, and in particular whether these provisions are sufficiently clear to qualify parliamentary privilege. The Committee has noted that the Government has proposed amendments to put beyond doubt the Bill's operation in regards to parliamentary proceedings.

7.4 As part of the advice sought from independent senior counsel, the Committee sought clarification on this matter pertaining to the Bill in its current form. To this end, the Committee notes Mr Walker's view that the provisions of the current Bill "may well … amount[..] to the requisite clarity of legislative intention to affect the Houses' privileges."[8].

7.5 Given this, the Committee considers that in relation to this question, the finding of the Committee must be similarly qualified.

Finding 1:

The Committee finds that clause 5 section 20G to 20M of the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*, as agreed to at the second reading stage by the House, may qualify the privileges of the Legislative Council.

8 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011, p2, paragraph 4.

7.6 The position in relation to the Bill and its impact upon parliamentary privilege is clear, however, when the Government's proposed amendments are inserted into the Bill. As noted by independent senior counsel, the provisions of the Bill as amended "will incontestably apply to parliamentary inquiries"[9]. As such, the adoption of the Government's amendments as promulgated in Supplementary Notice Paper No. 232 will put this issue beyond any doubt.

Finding 2:

The Committee finds that clause 5 section 20G to 20M of the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011, as agreed to at the second reading stage by the House <u>and as proposed to be amended by the Government</u>, qualifies the privileges of the Legislative Council.

8 WHAT IS THE EFFECT UPON PARLIAMENTARY PRIVILEGE?

8.1 The Committee notes the concerns outlined in Mr Walker's opinion regarding the effect of the Bill upon parliamentary privilege, and recommends that all Members carefully review his advice. In particular, the Committee notes his view regarding the judicial review prescribed by the Bill in relation to a parliamentary proceeding, and that "[t]his prospect is the antithesis of the non-interference by courts of law which is part of the defining character of Australian legislative chambers"[10].

8.2 In summary, the Bill unquestionably qualifies the principle of the exclusive cognisance of the House, which is fundamental to parliamentary privilege.

9 OPTIONS FOR THE HOUSE

9.1 The Committee again notes that the House has agreed to the policy of the Bill, and therefore the House's consideration should turn to the most appropriate means by which to implement that policy. In considering this matter, the Committee considers that the House needs to attempt to reconcile two objectives - implementing this policy and protecting parliamentary privilege.

9.2 Notwithstanding the opinions provided by the Clerk and Mr Walker, and the effect upon parliamentary privilege as outlined, the House may choose to proceed with the Bill and provide judicial review to this particular category of parliamentary proceedings. The House may find persuasive the arguments advanced by the

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9 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011, p1, paragraph 2.

10 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011, p5, paragraph 12.

Parliamentary Secretary and the State Counsel, regarding the 'certainty' provided by legislation, particularly in relation to the binding of both Houses to uniform arrangements in relation to the policy objective. Members may also take some comfort from the advice provided by independent senior counsel that the effect of the Bill would not extend beyond the circumstances prescribed in the Bill[11], and consider that the capacity for judicial review outweighs the consequent qualification to parliamentary privilege.

9.3 If the House is to proceed with this option, Members should vote in favour of the Government's proposed amendments to the Bill, in order that its application to parliamentary proceedings is put beyond doubt.

Option 1:

That, if the House considers that the adoption of legislation is the preferable option, then the House should agree to the Government's proposed amendments to the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*, and otherwise allow the Bill to proceed through the remaining stages in the House.

9.4 If the House determines, as outlined by the State Counsel, that "any form of judicial oversight or review in the case of parliamentary proceedings is an undesirable compromise of the separation of powers and … consider[s] the situation warrants an amendment to the Bill to preserve the powers and privileges of Parliament from any judicial interference"[12], the House should amend the Bill to specifically exclude its operation in relation to the proceedings of both Houses, and adopt Standing Orders that reflect the policy of the Bill.

9.5 The Committee notes that this action would, in the opinion of independent senior counsel, avoid the "difficulties or radical constitutional shift"[13] that arise from the relevant provisions (and proposed amendments) to the Bill.

9.6 In regards to any prohibitive clause (a clause specifically excluding the operation of the Bill in relation to, in this instance, the proceedings of both Houses), the Committee notes the previous debates in the House (for example, see the debate on the *Official*

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11 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011, p7, question/answer (b)(ii).

12 Letter from Mr George Tannin SC, State Counsel for Western Australia to the Procedure and Privileges Committee, 17 November 2011, p11

13 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011, p9, paragraph 17

Corruption Commission Bill 1996[14]) concerning the inclusion of such clauses and the potential argument arising in relation to similar legislation that does not contain these clauses (i.e. that the adoption of such clauses may give rise to uncertainty where other Acts do not include such specific exclusions in relation to parliamentary privilege). However, given the Committee's finding that this Bill may already qualify parliamentary privilege, the Committee considers it is sensible for the House, if it determines that parliamentary proceedings should be excluded from the operations of the Bill, to adopt a clause that specifies that exclusion.

9.7 The Committee did consider the prospect that a prohibitive clause could include a specific provision that the Houses adopt Standing Orders that align with the relevant sections of the Bill, in order that a direct link is established between the Bill/Act and the Standing Orders. However, the Committee was cognisant that such a suggestion would raise effectively the same issue for the Bill as already identified by the independent senior counsel - a capacity for judicial review, in this case in relation to the adequacy of such Standing Orders. This position was confirmed by independent senior counsel[15].

9.8 In regards to the proposal to adopt Standing Orders as an alternative means to deliver the agreed policy outcome, the Committee makes the following observations.

9.9 Firstly, the Committee observes that the circumstances under which a journalist would be asked to reveal the identity of a journalist's source relate, at least in the first instance, to the operations of the House's committees. If the journalist refuses to answer such a question, the committee is empowered to do nothing more than refer the matter to the House - the non-compliance by the witness (journalist) is a matter for the House to consider and deal with.

9.10 In considering whether to require an answer, the House must act in accordance with section 7 of the *Parliamentary Privileges Act 1891* (PPA), which provides (in part) that the House "may excuse the answering of such question … as the circumstance of the case may require". The advice received from independent senior counsel also noted the existence of this current statutory provision.[16]

9.11 The only occasion when these precise circumstances have arisen for the Legislative Council was during the proceedings of the *Select Committee into the Police Raid on The Sunday Times*. In this Committee's report to the House, it reported that a journalist had refused to answer a question regarding the source of information

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14 Hon. Peter Foss MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 9 July 1996, pps 3870 and 3871.

15 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 25 November 2011, p2

16 Legal advice provided to the Procedure and Privileges Committee by Mr Bret Walker SC, 18 November 2011, p3, paragraph 6

published by the journalist, and further that the Committee recommended that the journalist be excused from answering that question by the House (in accordance with s7 of the PPA). The House subsequently adopted this recommendation and excused the witness for his failure to answer the question.

9.12 Secondly, the Committee observes that current Legislative Council Standing Order 330 provides a number of important entitlements for all witnesses, beyond those contained in s7 of the PPA. These entitlements include access to relevant documents, the benefit of counsel, and a capacity for the witness to provide supplementary or new evidence. The Committee notes that the relevant sections of the Bill relate to one category of witness, in relation to one particular question that may be posed to that witness, and that the House has to date considered the Standing Orders as a sufficient vehicle to provide the great majority of entitlements for witnesses appearing before its committees.

9.13 Finally, in noting the comments made during the second reading debate on the Bill contrasting the options of applying these provisions via legislation or Standing Orders, the Committee advises the House that it cannot find a precedent for the Legislative Council suspending its Standing Orders in relation to witness entitlements. The Committee further notes that an absolute majority of Members would be required to support such a motion, and any diminishment of the entitlements for witnesses could only be effected by motion moved (and debate conducted) in the House.

9.14 If the House determines to proceed to exclude parliamentary proceedings from the Bill and implement the relevant sections of the Bill in Standing Orders, the House would need to agree to amend the Bill to include a clause to the effect that the Bill does not apply to the proceedings of both Houses of Parliament, and adopt relevant Standing Orders. The precise form and location in the Bill of such a prohibitive clause should be determined following advice from Parliamentary Counsel.

9.15 In regards to the Standing Orders, the Committee notes that the House is likely to consider a proposed, new set of Standing Orders in the near future. The adoption of new Standing Orders in relation to the protection of the identity of journalists' sources would not be dependent upon the passage of the Bill through Parliament, and could proceed as part of the adoption of these new Standing Orders. A draft, new Standing Order is provided below for the consideration of the House, though the precise form of such would be dependent upon the House's consideration of the other, proposed Standing Orders in relation to witness entitlements.

9.16 The Committee further considered the prospect of Joint Standing Orders related to the protection of the identity of journalists' sources. However, the Committee notes that agreement between the Houses on such Joint Standing Orders would not preclude either House from amending these arrangements in the future (and hence severing the joint arrangement). The Committee considers that, if the House adopts such Standing

Orders, that the Legislative Assembly be acquainted accordingly and invited to adopt the same Standing Orders.

Option 2:

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

(a) not adopt the Government's proposed amendments to the Bill;

(b) adopt a prohibitive clause, providing that the Bill (Act) does not apply to the proceedings of both Houses of Parliament;

(c) adopt a Standing Order(s) to provide for the protection of the identity of journalists' sources in relation to the proceedings of the Legislative Council as part of the forthcoming consideration of the House's Standing Orders; and

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

Possible New Standing Order:

In New Proposed Chapter XVI: Witnesses - To insert -

194. Protection of the Identity of Journalists' Informants

Where a journalist is examined before a Committee or the Council and, in the course of such examination, is asked to disclose the identity of the journalist's informant and refuses, the Council, in considering whether to excuse the answering of the question in accordance with section 7 of the *Parliamentary Privileges Act 1891*, shall take account of the provisions under sections 20I to 20M of the *Evidence and Public Interest Disclosure Legislation Amendment Act 2011*.

10 MAJORITY RECOMMENDATION

10.1 To assist the House with its deliberations in regards to the two options presented above, the Committee determined to include a recommendation to the House in this report. This recommendation represents the view of the majority of Committee Members, whilst Hon. Ken Travers supported Option 1 for the reasons outlined below -

> *Parliamentary privilege is an important principle to uphold and protect. This Bill creates a dilemma of how one can uphold this principle compared to the principles outlined in the policy of the Bill as referred to in Section 9.2 of the Report.*
>
> *The Parliament has traditionally had the power to punish people for a range of contempts against the Parliament. Over time, some Parliaments have transferred this power to the Court system.*
>
> *Issues surrounding the relevant provisions in this Bill are likely to arise when the Parliament requires a journalist to identify their source, does not excuse them for failing to do so, and seeks to punish them for their failure to comply with an order of the Parliament.*
>
> *In these circumstances I believe, on balance, it is appropriate to support Option 1.*[17]

Majority Recommendation 1:

The majority of the Committee recommends that the House proceed in accordance with Option 2 in this report in relation to the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*.

Hon. Barry House MLC
Chairman
29 November 2011

[17] Email from Hon. Ken Travers MLC to the Deputy Clerk, 29 November 2011.

APPENDICES

Appendix 1:	Letter from the Clerk of the Legislative Council to Hon. Sue Ellery MLC, Leader of the Opposition, dated 26 October 2011. *Letter tabled in the Legislative Council on 8 November 2011 - TP 4059* **[*Copies of the same letter were also sent to the Leaders of the other political parties and the Parliamentary Secretary to the Attorney General*]**
Appendix 2:	Letter from Mr George Tannin SC, State Counsel for Western Australia, to the Attorney General, dated 31 October 2011. *Letter tabled in the Legislative Council on 9 November 2011 - TP 4067*
Appendix 3:	Letter from the Clerk of the Legislative Council to Hon. Sue Ellery MLC, Leader of the Opposition, dated 7 November 2011. *Letter tabled in the Legislative Council on 8 November 2011 - TP 4059*
Appendix 4:	Letter from Mr George Tannin SC, State Counsel for Western Australia, to Hon. Michael Mischin MLC, Parliamentary Secretary to the Attorney General, dated 8 November 2011. *Letter tabled in the Legislative Council on 9 November 2011 - TP 4067*
Appendix 5:	Letter from the Clerk of the Legislative Council to the Procedure and Privileges Committee, dated 15 November 2011.
Appendix 6:	Letter from Mr George Tannin SC, State Counsel for Western Australia, to the Procedure and Privileges Committee, dated 17 November 2011.
Appendix 7:	Legal advice received by the Procedure and Privileges Committee from Mr Bret Walker SC, dated 18 November 2011.
Appendix 8:	Outline of further advice sought from Mr Bret Walker SC.
Appendix 9:	Further legal advice received by the Procedure and Privileges Committee from Mr Bret Walker SC, dated 25 November 2011.

APPENDIX 1

LETTER FROM THE CLERK OF THE LEGISLATIVE COUNCIL TO HON. SUE ELLERY MLC, LEADER OF THE OPPOSITION, DATED 26 OCTOBER 2011

Sk

RECEIVED 27/10

26 October 2011

Hon. Sue Ellery MLC
Leader of the Opposition in the
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Ellery

Confidential

The Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 and its Implications for Parliamentary Privilege

Background

As the Clerk of the Legislative Council it is my role to provide advice to Members on the procedure and privileges of the House. Accordingly, I have an obligation to advise Members of any circumstances where it is proposed in the terms of a Bill that a privilege of the House is to be waived, or purported to be waived, or that Parliament's proceedings are to be infringed in any way. I have provided the Leaders of each party and the Parliamentary Secretary to the Attorney General in the Legislative Council with a copy of this advice.

On Thursday 20 October 2011 the Parliamentary Secretary to the Attorney General introduced into the House the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 (the **Bill**).

The media reported that the Bill's provisions: *"would mean journalists are no longer compelled to give evidence in court or to* ***state parliament*** *when they have promised anonymity to their source".*

It is clear, however, from an examination of the Bill's provisions that this statement may not be completely correct.

Relevant Provisions of the Bill

Clause 5 of the Bill proposes, amongst other things, to insert the following new provisions into the *Evidence Act 1906*:

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20H. Application of protection provisions (journalists)

(3) The protection provisions (journalists) apply to a person acting judicially in any proceeding even if the law by which the person has authority to hear, receive, and examine evidence provides that this Act does not
apply to the proceeding.

(4) The protection provisions (journalists) are not intended to exclude or limit the operation of section 5 or the power that a person acting judicially has under any other law of the State to take any action if it is in the interests of justice to do so.

20I. Protection of identity of informants

If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor a person for whom the journalist was working at the time of the promise is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained (***identifying evidence***).

20J. Direction to give identifying evidence

(1) Despite section 20I, a person acting judicially may direct a person referred to in that section to give identifying evidence.

(2) A person acting judicially may give a direction only if satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs —

(a) any likely adverse effect of the disclosure of the identity on the informant or any other person;
and

(b) the public interest in the communication of facts and opinions to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

The second reading speech on the Bill indicates that the Bill's purpose is to introduce responsible and accountable protections for professional persons and journalists which, in appropriate circumstances, *preclude them from being compelled to give evidence.*

The proposed protection will prevent a journalist from being compelled to give evidence disclosing the identity of their source unless it is determined that the protection should not apply in the circumstances of the proceedings in question.

In the second reading speech the Parliamentary Secretary stated:

The purpose of permitting a person acting judicially to give a direction under the protection provisions is to ensure that the protection, and the qualification to the protection, afforded to journalists applies not only in courts and tribunals, but also to inquiries, such as hearings before the Legislative Assembly or Legislative Council, or committee hearings of both houses of Parliament. The protection will apply in this manner regardless of whether the empowering statute of the relevant tribunal or inquiry excludes the application of the Evidence Act 1906, which is the act that the bill amends.

Parliamentary proceedings and the Evidence Act 1906

The phrase *"person acting judicially"* is not defined in the Bill, but is defined in section 3 of the *Evidence Act 1906* to mean any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence. Presumably, the Government opinion has obtained legal opinion that a Presiding Officer of a House of Parliament or a Chair of a parliamentary committee is a *"person acting judicially"*. The implication of such an assertion appears to be that Parliament can be argued to surrender its privileges without an express provision to that effect.

It has, however, been suggested by the Government that parliamentary privilege will not, in fact, be abrogated by the Bill, but that the Bill merely restricts certain proceedings in Parliament in certain circumstances.

A person acting judicially for the purpose of the Bill is defined in section 3 of the *Evidence Act 1906* to mean:

> *Any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence.*

The proposition is that this definition extends to proceedings of the Houses and their committees, particularly when read together with section 4 of the *Evidence Act 1906*. Section 4 of the *Evidence Act 1906* provides that:

> *All the provisions of this Act, except where the contrary intention appears, shall apply to every legal proceeding.*

Section 3 of the *Evidence Act 1906* provides, relevantly, that:

> ***legal proceeding*** *or* ***proceeding*** *includes any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration;*

The proposition advanced in the second reading speech on the Bill is that the term "legal proceeding as defined in the *Evidence Act 1906* is exceedingly broad, particularly with respect to the term "*inquiry*". In addition, it is suggested that *"a person acting judicially"* is capable of application to circumstances where a journalist may be required to appear before a parliamentary inquiry, to give evidence".

The proposition advanced in the second reading speech therefore appears to imply that the *Evidence Act 1906* extends, and always has extended to, parliamentary inquiries.

It is interesting that both the definition of *"person acting judicially"* and *"legal proceeding or proceeding"* were included in the *Evidence Act 1906* as originally passed, yet there has never been any suggestion in over one hundred years that those provisions applied to Parliamentary inquiries. It should be noted that, although a presiding officer or committee chair may speak for the House or Committee as the case may be, an order of a House or Committee is not in any sense the order of an individual person. It will therefore be appreciated that, for the proposition advanced in the second reading speech to be accepted, the relevant fetter must apply to a House or Committee, and not an individual member or presiding officer.

Parliamentary Privilege

Erskine May (*"Parliamentary Practice"*, 21st Edition, p.69) defines *"Parliamentary Privilege"* as:

> [T]*he 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.*

In short, the term encompasses those rights, powers and immunities which in law attach to the individual Members of Parliament and to them collectively constituting the Houses of Parliament, as against (in particular) the prerogatives of the Crown and the authority of the ordinary courts of law.

Section 36 of the *Constitution Act 1889* provides that any Act of the Parliament may define the privileges, immunities and powers to be held, enjoyed, and exercised by the Legislative Council and the Legislative Assembly, and by the Members thereof respectively. The Parliament enacted the *Parliamentary Privileges Act 1891* to provide in part, at section 1 that the Houses and its 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.*

Section 7 of the *Parliamentary Privileges Act 1891* provides an excuse for a witness before a House of Parliament or its committees in circumstances where the witness objects to answer any question that may be put to him, or to produce any such paper, book, record, or other document on the ground that the same is of a private nature and does not affect the subject of inquiry. The President reports such objection/refusal to comply, with the reason thereof, to the House, who shall thereupon ***excuse the answering of such question***.

Section 8 of the *Parliamentary Privileges Act 1891* provides that each House of the Parliament is empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person —

> ...
>
> *(b)* *refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee,* ***unless excused by the House in manner aforesaid;***

In my opinion, section 7 of the *Parliamentary Privileges Act 1891* provides the only legal right not to answer a lawful question of a House of the Parliament of Western Australia or its committees.

The sources of parliamentary privilege are to be found chiefly in ancient practice, asserted by Parliament and accepted over time by the Crown and the courts as the law and custom of Parliament.

The touchstone of parliamentary privilege is enshrined in Article 9 of the *Bill of Rights 1689* (Imp):

> *That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out side of Parliament.*

It is settled law that Article 9 of the *Bill of Rights 1689* (Imp) is made applicable in Western Australia by the *Parliamentary Privileges Act 1891*: *Halden v Marks* (1995) 17 WAR 447 at 461.

In addition to Article 9, there is a long line of authority which supports a wider principle, of which Article 9 is merely one manifestation; namely that the Courts and Parliaments are both to be assiduous to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in the performance of its legislative functions and the protections of its established privileges: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332. In *Prebble*, the Judicial Committee of the Privy Council cited with approval the comment of Blackstone that; *"whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere"*.

In *Egan v Willis* (1998) 195 CLR 424 at 490-491, Kirby J described the purpose of Article 9 as being:

> [T]*o defend, relevantly against legal enquiry or sanction in a court, the freedoms belonging to a House of Parliament. The freedoms include its right to conduct its affairs, answerable, on matters of truth, motive, intention or good faith, only to the House concerned and through it to the electors.*

In *Prebble v TV New Zealand* [1995] 1 AC 321 the Privy Council summed up the position on freedom of speech guaranteed by Article 9 as follows:

> *So far as the courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.*

This principle is usually known as *"exclusive cognisance"*. Cognisance here bears its obsolete legal meaning of jurisdiction, or the right to deal with a matter judicially.

In *Stockdale v Hansard* (1839) 9 AD&E 1; 112 ER 1112, it was put by Patterson J (at 195; 1185) as follows:

> *It is, indeed, quite true that the members of each House of Parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must necessarily adjudicate on the extent of their privileges.*

The UK Joint Committee on Parliamentary Privilege's 1999 report, at Chapter 5 headed *"control by parliament over its affairs"*, makes the following point on page 63:

> *The ability to ask questions under parliamentary privilege, uninhibited by rules of evidence or other legal safeguards, carries with it special responsibilities.*

Each House has the right to administer its internal affairs within the parliamentary precincts. The courts have accepted this principle in full measure. In *Bradlaugh v Gosset*[1] the court declined to intervene when the House of Commons refused to allow a member who was an avowed atheist to take the oath even though he was required to do so by statute.

Abrogation of Parliamentary Privilege

As indicated above, in Western Australia, section 36 of the *Constitution Act 1889* makes it lawful for the Parliament to statutorily define the: *"privileges immunities and powers to be held, enjoyed and exercised by the Legislative Council and Legislative Assembly, and by the Members thereof respectively."*

Pursuant to that power, State Parliament has passed certain legislation including the *Parliamentary Privileges Act 1891*, which in section 1, claims for both Houses of the Parliament of Western Australia the same privileges, immunities and powers as are *"held, enjoyed and exercised"* by the House of Commons in England.

Amongst the powers held by the House of Commons is that to punish for contempt. Again, as *Erskine May* says (at page 115):

> *Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even if there is no precedent of the offence.*

Thus, disobedience to the order of a committee made within its authority is a contempt of the House by which the committee was appointed. This includes disobedience by witnesses of orders for their attendance or production of papers, by committees with the necessary powers to send for persons and order production of documents.

There can be no doubt that each House of the Parliament of Western Australia inherited the power of the House of Commons to summon witnesses and order production of documents. Be that as it may, section 4 of the *Parliamentary Privileges Act 1891* put the matter beyond doubt, in expressly providing that:

> *Each House of the Parliament of the said Colony, and any Committee of either House, duly authorised by the House to send for persons and papers, may order any person to attend before the House or before such Committee, as the case may be, and also to produce to such House or Committee any paper, book, record, or other document in the possession or power of such person.*

---

[1] (1883) 12 QBD 271; Erskine May, 22nd Ed (1997), p89.

The courts impose strict tests on statutory provisions if they purport to modify or abrogate a common law privilege or immunity.[2] It is a settled principle of statutory construction that statutes will not be interpreted as derogating from the privileges of Parliament (including Article 9 of the *Bill of Rights 1689* (UK)) in the absence of clear legislative expression.

The House of Lords considered the impact of the bankruptcy laws on Members of Parliament in *Duke of Newcastle v Morris.*[3] By the English *Bankruptcy Act 1861* all debtors were made liable to the bankruptcy laws. Nothing was said in the 1861 Act to preserve to those debtors who enjoyed Parliamentary privilege, their freedom from personal arrest. It was argued that the common law privilege had been removed by the Act, on the grounds that wherever the Legislature intended such privilege to be preserved it had expressly so provided. This argument was unsuccessful.

The Lords held that the privileges of Parliament exist at common law and are not taken away by implication, merely because a statute makes persons enjoying those privileges subject to the law of bankruptcy and does not specially reserve the privileges. Having referred to the previous legislative practice of incorporating in bankruptcy statutes express reservations of the privilege of Parliament, the Lord Chancellor (Lord Hatherly) said, at 668:

> *It seems to me that a more sound and reasonable interpretation ... would be, that the privilege which had been established by Common Law and recognized on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute ... .*

In similar vein, Lord Westbury, at 680, denied altogether -

> *... an assumption that has been made, namely that the privilege of the person will be lost ... in consequence of there being no stipulation in the statute saving the privilege. I do not think that that would be the consequence at all - I think it would be left still. ...*[T]*hat the privileges of Parliament would remain, and would override any enactments which, in the case of ordinary individuals, might infringe upon personal immunity.*

And Lord Colonsay, at 677, likewise concluded that in the circumstances then before the House: *" they who have the privilege of Parliament do not lose it ... Indeed, I think that was a protection which could not be lost without being expressly taken away. "*

The position taken by the House of Lords in *Duke of Newcastle v Morris* was reinforced by the High Court of Australia in *Hammond v Cth* [1982] HCA 42; (1982) 152 CLR 188, where Murphy J at 200 made the following remarks, regarding another common law privilege, namely; the privilege against self-incrimination:

> *I agree generally with the Chief Justice's reasons, with the exception of one aspect to which I will refer later. The privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber. (See Quinn v. United States [1955] USSC 56; (1955) 349 US 155 (99 LawEd 964)). In the United States it is entrenched as part of the Federal Bill of Rights. In Australia*

[2] In context "common law immunity" means *"recognised by the common law and therefore claimable in the ordinary courts"* rather than whether it was developed by the courts or given by statutory grant. Article 9 is statutory immunity interpreted and applied by common law rules.
[3] (1870) LR 4 HL 661.

it is a part of the common law of human rights. The privilege is so pervasive and applicable is so many areas that, like natural justice, it has generally been considered unnecessary to express the privilege in statutes which require persons to answer question. On the contrary, the privilege is presumed to exist unless it is excluded by express words or necessary implication, that is, by unmistakable language. I am not satisfied that the Royal Commissions Act 1902 has excluded the privilege against self-incrimination. In my opinion, the privilege remains under that Act and also under the Evidence Act 1958 (Vic) in relation to Royal Commissions despite the provisions in each law which have been relied upon in argument as excluding it.

However, counsel for the Commonwealth government claimed that there was no privilege under the Royal Commissions Act 1902 except that mentioned in s.6D(1) protecting secret processes of manufacture and contended that all other privileges were overridden by the plain words of the Act. This contention involved, as the Commonwealth accepted, that the privileges of Parliament were overridden. That is unacceptable. Until this case I would have thought it beyond question that such an Act does not affect parliamentary privilege (see Odgers, Australian Senate Practice, 5th ed. (1976), Ch. XXXIV, and "Privilege of Parliament" Australian Law Journal, vol. 18 (1944), p. 70). The privileges of Parliament are jealously preserved and rightly so. Parliament will not be held to have diminished any of its privileges unless it has done so by unmistakable language. It has not done so in the Royal Commissions Act 1902, nor has it abridged the privilege against self-incrimination.

Conclusion

In summary, it is my opinion that:

1. Unless a statutory provision in unmistakable language expressly purports to vary or abrogate parliamentary privilege, the provision does not vary or abrogate parliamentary privilege, or otherwise apply to any proceedings of a House of Parliament, or of its committees

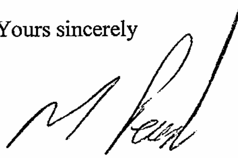
2. Parliament cannot be assumed to have varied or abrogated its privileges by mere implication of statute. It follows then, that the broad definitions of the terms "*legal proceeding or proceeding*", "*inquiry*" and "*person acting judicially*" contained within the *Evidence Act 1906* must be construed in their historical legal context, and in the light of the common law pertaining to parliamentary privilege. Viewed properly in this context, nothing in the Bill or the *Evidence Act 1906* can be said to vary or abrogate the privileges of the Legislative Council in the manner suggested in the second reading speech.

3. Proposed section 20H in clause 5 of the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 would not affect the privileges of the Parliament and would not apply to an inquiry of the House or its committees. In the absence of any express statutory provision in the Bill the House and its committees will continue to have the ability to ask questions under parliamentary privilege, without reference to the *Evidence Act 1906*.

4. The term *"proceeding in Parliament"* has a specific and judicially recognised meaning. If the policy of the Bill is indeed to vary or abrogate the privileges of the parliament, the term "proceeding in parliament" would have been expressly included within the definition of *"legal proceeding or proceeding"* in section 3 of the *Evidence Act 1906* to put it beyond doubt.

5. Notwithstanding the theoretical power to compel answers or the production of documents; political realities, conventions, and professional courtesies may militate against the practical exercise of the power. In particular, a witness's reliance on a general statutory professional confidential relationship provision may be accepted by the House as a reasonable excuse for non-disclosure despite the existence of a power ultimately to compel disclosure even where the provision in question does not expressly apply to proceedings in parliament. This is already the situation with respect to common law principles of natural justice or procedural fairness, which, while not strictly having application in parliamentary proceedings, are routinely respected nonetheless.

Yours sincerely



Malcolm Peacock
Clerk of the Legislative Council
A313801

APPENDIX 2

LETTER FROM MR GEORGE TANNIN SC, STATE COUNSEL FOR WESTERN AUSTRALIA, TO THE ATTORNEY GENERAL, DATED 31 OCTOBER 2011

STATE SOLICITOR'S OFFICE

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SSO 4148-08

HON ATTORNEY GENERAL

Privileged and Confidential

EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

I refer to the Clerk of the Legislative Assembly, Mr Malcolm Peacock's letter to the Hon Michael Mischin MLC dated 26 October 2011, which has been provided to me for consideration. In that letter, Mr Peacock raises his concern that, as it currently stands, the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011* (the Bill) extends the protections accorded to journalists under the Act to hearings before Parliament.

This intention was expressly and correctly identified by the Hon Parliamentary Secretary in the second reading speech for the Bill in Legislative Council.

It appears to be Mr Peacock's concern that this provision abrogates from parliamentary privilege, thereby requiring express and "unmistakable language" in order to be effective.

Operation of the Bill

As recognised by Mr Peacock, clause 5 of the Bill proposes to introduce s. 20H into the *Evidence Act 1906* (WA), which extends the operation of the journalists' protection provisions to "a person acting judicially in any proceeding even if the law by which the person has authority to hear, receive, and examine evidence provides that this Act does not apply to the proceeding". There is no definition of "person acting judicially" in the Bill, but in s. 3 of the *Evidence Act 1906*, it is defined to refer to "any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence". At common law, it is recognised that a requirement that a body or person "act judicially" does not require that they exercise judicial power.[1] Rather, it means the power is to be exercised in a judicial manner, ie fairly and independently and in accordance with principles of natural justice.[2]

Parliament is not formally bound by principles of natural justice, but nonetheless Members of Parliament are held to the highest standards of integrity and impartiality when conducting inquiries and hearings both in the Legislative Council and the Legislative Assembly and Committee hearings of both houses of Parliament. The high standards demanded of Members of Parliament means that, in practice, hearings are bound to be conducted fairly and in a judicial manner, and on this basis, are taken to be acting judicially.

The intended reach of the Bill

Whether it is desirable that the Bill's protection of journalists extend to Parliamentary hearings is foremost a question of policy. The intention of the Bill, and its deliberate design, is to extend those protections to Parliamentary hearings. The reason why it is important that the protections attached to confidential information received by journalists extends to hearings in Parliament and by Parliamentary Committees, is to ensure the consistency of the protection across all public hearings. In my respectful opinion, to maintain Parliamentary hearings as an exception to the protection would undermine the purpose of the Bill in preserving the confidentiality of information. This confidentiality is in turn vital to safeguarding the free flow of information in this State.

The extension of these protections to Parliamentary and Committee hearings qualifies, but does not abrogate from, Parliamentary privilege. The Bill provides

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[1] *Commr of Taxation (Cth) v Munro* (1926) 38 CLR 153; *Love v Attorney General (NSW)* (1990) 169 CLR 307 at 321–322; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39 per Windeyer J (Barwick CJ and Owen J concurring).

[2] *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 234 per Barwick CJ.

guidance as to when confidence can be sought, and if necessary, taken away, by Parliament: it does not remove evidence as to the sources of a journalist's confidential information from the purview of Parliament altogether. Rather, the Bill extends a presumption that a journalist is not compellable to identify their source to Parliamentary hearings. That presumption may be overcome if Parliament determines that the public interest favours disclosure, and that it outweighs any likely adverse effect on the informant or any other person and the public interest in the ability of the news media to access sources of fact. This position is, in my opinion, preferable to the archaic and limited method of excusal provided for in s. 7 of the *Parliamentary Privileges Act 1891*, in which Parliament may choose to protect information deemed to be of a "private nature", whatever that quaint phrase may be taken in any case to signify.

Whether amendment is required

In my opinion, the Bill is sufficiently drafted for the purpose of extending the protection to Parliamentary hearings. Nonetheless, in order to place this important issue beyond any doubt or controversy, it may be advisable that s. 3 of the *Evidence Act* be amended to have the definition of "legal proceeding or proceedings" expressly include "proceedings in Parliament".

Yours faithfully

GEORGE TANNIN SC
STATE COUNSEL

31 October 2011

Encl

APPENDIX 3

LETTER FROM THE CLERK OF THE LEGISLATIVE COUNCIL TO HON. SUE ELLERY MLC, LEADER OF THE OPPOSITION, DATED 7 NOVEMBER 2011

SL

7 November 2011

Hon. Sue Ellery MLC
Leader of the Opposition in the
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Ellery

Confidential

EVIDENCE AND PUBLIC INTEREST DISCLOSURE BILL 2011 AND ITS IMPLICATIONS

Further to my correspondence regarding the *Evidence and Public Interest Disclosure Bill* and the proposition I advanced that the provisions do not apply to proceedings in Parliament, I bring the following additional matters to your attention for consideration.

If, contrary to my opinion, you consider the *Evidence and Public Interest Disclosure Bill* does apply to Proceedings in Parliament then consider the necessary constitutional and procedural implications.

If for example, a Member of a committee discloses a draft report or leaks a commercial in confidence document to a journalist and the journalist is asked to disclose the source, what would occur?

In the first instance, the committee cannot compel the journalist to answer. This situation would not alter under the Bill. The *Parliamentary Privileges Act 1891 **(PP Act)*** section 7 requires a committee to report the refusal to answer to the House. A committee has no power to compel or punish for such contempt.

Section 8 of the PP Act provides that each House is empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House. In the event the fine is not immediately paid, the House may order imprisonment until such fine is paid, or until the end of the then existing session or any portion thereof, for refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee.

Consider the following question: "Before the House considers the report of the committee and debates the question of whether to call the journalist before the Bar of the House, can the journalist seek an injunction from the Supreme Court to stay the proceedings?

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As stated above, if the House compels an answer and the journalist refuses, a House may fine the journalist. What action might the journalist have before the Courts to have the fine set aside? How might a court determine the conflict of laws issue as between the PP Act on the one hand, and those provisions introduced by the Bill? How could a Court decide such a question without necessarily breaching Art 9 of the Bill of Rights 1688?

If the fine is not paid and the House imprisons the journalist could the journalist seek a declaration from the Court that the House breached the Act?

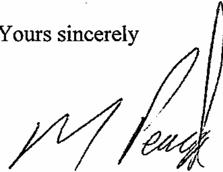
This leads to a number of constitutional issues. Firstly, where does this leave article 9 of the Bill of Rights in that **the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.**

Secondly, do the provisions of the Bill undermine the comity between the Parliament and the Court?

Thirdly, if a Court can't intervene then what do the provisions in the Bill in fact accomplish? What real protection is there for a journalist called before the House?

Lastly, there is the question, has the House lost the power to take any action in the future against a member for disclosing information to journalist, as it would be unlikely without that disclosure a member could be identified. The potential is for other witnesses not to be fully co operative with committees fearful their evidence may be disclosed by the media.

Yours sincerely



Malcolm Peacock
Clerk of the Legislative Council
A316100

APPENDIX 4

LETTER FROM MR GEORGE TANNIN SC, STATE COUNSEL FOR WESTERN AUSTRALIA, TO HON. MICHAEL MISCHIN MLC, PARLIAMENTARY SECRETARY TO THE ATTORNEY GENERAL, DATED 8 NOVEMBER 2011

STATE SOLICITOR'S OFFICE

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Hon Michael Mischin MLC
Parliamentary Secretary to the Attorney General
PO Box 3044
JOONDALUP WA 6027

Privileged and Confidential

Attention: Hon Michael Mischin MLC

Dear Michael

EVIDENCE AND PUBLIC INTEREST DISCLOSURE BILL 2011 (WA)

I refer to the Clerk of the Legislative Council, Mr Malcolm Peacock's letter to you dated 7 November 2011, in which he raises a number of policy concerns regarding provisions in the *Evidence and Public Interest Disclosure Bill 2011* (WA) (the Bill) that extend journalist privileges to Parliamentary proceedings. These concerns are in addition to those he raised with you on 26 October 2011, and to which I provided a response to the Hon Attorney General on 31 October 2011.

The essence of Mr Peacock's concern appears to be that the Bill is designed to detract from Parliamentary privilege. As I explained previously in my advice to the Attorney General of 31 October 2011, the extension of these protections to Parliamentary and Committee hearings qualifies, but does not abrogate from, Parliamentary privilege. The Bill simply provides guidance as to when confidence can be sought from, and if necessary, be taken away by Parliament.

Nonetheless, I shall address each of Mr Peacock's specific concerns, in the order in which he raises them.

Implications of a journalist refusing to disclose a source in Parliamentary proceedings under the Bill

Mr Peacock raises the possibility that Member of a committee may disclose a draft report or leak a commercial "in confidence" document to a journalist. His question relates to what would then occur if the journalist was asked to disclose the source in a Committee hearing, and the journalist declined to do so under the protection provided by clause 5, section 20H of the Bill.

The protection accorded to journalists under this clause operates as a presumption that a journalist may not be compelled to identify their source before Parliamentary proceedings.

This presumption may be overcome if Parliament deems that the public interest favours disclosure. This much is made clear by section 20J of the Bill.

If, in the event that Parliament demands disclosure the journalist continues to refuse, the usual provisions regarding punishment for contempt as provided under section 8 of the *Parliamentary Privileges Act 1891* (WA) will apply.

Whether the protection may be ensured by the Supreme Court

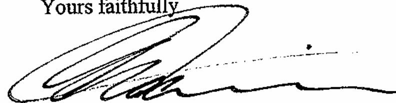
The second question Mr Peacock raises is whether a journalist facing summons before Parliament or a Committee would be able to seek an order from the Supreme Court to stay the proceedings.

Such a scenario is far-fetched. Parliament will only compel a journalist to identify their source if it determines that the public interest favours such disclosure. For this reason, a basis of a stay of proceedings would not arise. In any case, an intrinsic aspect of the doctrine of separation of powers is that the processes of Parliament are not subject to judicial review. This extends to the other hypothetical situations put by Mr Peacock, in which a journalist may apply to have a fine for contempt imposed by Parliament set aside, or seek release from imprisonment.

In addition, there is no conflict between the Bill and the *Parliamentary Privileges Act* requiring resolution. As I have indicated above, the protection of journalists in Parliamentary proceedings operates as a presumption, not a complete abrogation from Parliamentary privilege. In the same vein, the Bill does not impact upon article 9 of the *Bill of Rights 1688*.

It is true that a court cannot intervene to ensure Parliament complies with the protection ensured to journalists under the Bill: this is a necessary corollary of Parliamentary sovereignty. However it does not follow that the Bill therefore has no effect or no point. It may be assumed, as it is with many legislative instruments, including the *Parliamentary Privileges Act* and the Standing Orders of each House, that Parliament will observe the laws it has set for itself. There is no reason to believe this will be any different in respect of journalist privileges in Parliamentary proceedings.

Yours faithfully



GEORGE TANNIN SC
STATE COUNSEL

8 November 2011

APPENDIX 5

LETTER FROM THE CLERK OF THE LEGISLATIVE COUNCIL TO THE PROCEDURE AND PRIVILEGES COMMITTEE, DATED 15 NOVEMBER 2011

Hon. Barry House MLC
Chair
Procedure and Privileges Committee
Parliament House
PERTH WA 6000

Attention: Mr Nigel Lake, Deputy Clerk

Dear Chair

Submission to the Standing Committee on Procedure and Privileges regarding the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*

Thank you for inviting me to make a submission to the Committee's inquiry into the provisions of this Bill, which raise a very important matter of parliamentary privilege previously thought settled. This submission is further to my letters tabled in the House on Wednesday 10 November 2011.

I make the following submission:

> *It would only be in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations, and legislate so as to limit itself in some way.*[1]

The Committee's terms of reference from the House are to consider Clause 5 sections 20G to 20M of the *Evidence and Public Interests Disclosure Legislation Amendment Bill 2011* (the **Bill**) and their effect, if any, on parliamentary privilege.

There are five issues, as I see it, that the Committee must consider:

1. **Are the proceedings in Parliament, in fact, caught by the provisions of the Bill?**
2. **Should the House agree to proposed amendments, if the Bill's provisions do not apply to proceedings in Parliament?**
3. **The precedent value such provisions might provide if they are followed to amend the many other laws containing general protection provisions.**
4. **What is the Bill's effect (as printed or containing the proposed amendments) on the proceedings in Parliament as part of the privileges of the House and its committees?**

[1] The Senate report on the provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 to the Privileges Committee for inquiry and report.

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5. **Should the privileges of the House be codified and/or modified, even in part, in the *Evidence Act 1906*?**

In regards to the first issue, the Committee should consider the potential diminution of parliamentary privilege by other Bills adopting a similar approach.

The *Criminal Investigation (Covert Powers) Bill 2011* **(Covert Powers Bill)** is a good example of the issue I have raised. Sections 80 and 96 of that Bill provides:

court includes —
(a) a tribunal or other body established or continued under a written law and having a power to obtain evidence or information;
(b) a Royal Commission established under the Royal Commissions Act 1968;
(c) a commission, board, committee or other body established by the Governor or by either or both Houses of Parliament or by the Government of the State to inquire into any matter;

96. Disclosure offences

(1) A person must not do something (the ***disclosure action***) that discloses, or is likely to lead to the disclosure of, the true identity of an operative for whom a witness identity protection certificate has been given or where the operative lives unless —

(a) the certificate has been cancelled under section 94 before the person does the disclosure action; or
(b) the disclosure action is —
(i) required by section 89; or
(ii) authorised by leave or by an order under section 90; or
(iii) permitted under section 95.

Penalty: imprisonment for 10 years.

Summary conviction penalty: a fine of $24 000 or imprisonment for 2 years.
(2) An offence against subsection (1) is an indictable offence.

The State Counsel proposition on the Bill appears to be that Covert Powers Bill does not waive privilege, but merely "qualifies" parliamentary privilege. I reject such the proposition as it evinces a lack of appropriate understanding of Parliamentary Law.

I will not labour the point further, as the Covert Powers Bill is before the Uniform Legislation and Statutes Review Committee. I am sure the Committee will detail its analysis of those clauses in its report to the House. However, it does demonstrate the point that the Executive has an undeveloped understanding of the proper constitutional role of the Parliament and is prepared to interfere with the independence of the Parliament.

State Counsel appears to take the view that Parliament is just another court, and that the rules of evidence and procedure that developed to apply in courts of law are appropriate for the grand inquest of the State. Such a view pays insufficient regard to the fact that Parliamentary inquiries are fundamentally inquisitorial, and not adversarial in nature. Coronial inquests are

similarly inquisitorial in nature, and are not bound by the rules of evidence or court procedure. I reject the proposition underlying the learned State Counsel's view.

When the Western Australian Royal Commission on Government[2] considered parliamentary privilege, it was its opinion that there should be no changes in the law, and in particular, there should be no general or specific power to waive Article 9 of the *Bill of Rights*. "Any diminution or qualification of Parliament's immunities would", it believed, "eventually erode the rights and freedoms of every citizen". The Commission did not explain why it considered that a power to waiver might be detrimental to the freedom of speech and debate in Parliament.

Interestingly, the NSW *Evidence Act 1995*, much of which is the basis of the Bill, has not included proceedings in Parliament. In fact, section 10 of that Act specifically preserves parliamentary privilege. Section 126K restricts the journalist privilege relating to identity of informant to a court.

Report of the Senate Standing Committee of Privilege

I can find no more compelling reason as to why the Bill should not include parliamentary proceedings, than the report by Senate Standing Committee of Privileges on Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Tabled 4 June 2010).

That report states:

- The Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 was referred to the committee with particular reference to the provisions in the Bill relating to the disclosure of taxpayer information to parliamentary committees and the conflict which these provisions may have with the *Parliamentary Privileges Act 1987* (the Privileges Act).

- Specifically, the Bill seeks to place conditions on the access by parliamentary committees to certain information, and in so doing, fundamentally undermines both the powers and immunities of parliamentary committees and the rights of unfettered access by witnesses to parliamentary committees.

- A further feature of the provisions in question is the application of a criminal sanction to a witness who gives evidence to a parliamentary committee in other than defined circumstances, in contradiction of three and a half centuries of parliamentary law.

- The first principle – the supremacy of parliamentary privilege.

- The law of parliamentary privilege protects proceedings in Parliament from being questioned or impeached in any place outside of Parliament. The principle has a long and consistent history. It took its first statutory form in 1689 in article 9 of the Bill of Rights. The Commonwealth Parliament inherited it in 1901 through section 49 of the

[2] Report, No1 (1995) 369.

Submission to the Standing Committee on Procedure and Privileges regarding the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 – Malcolm Peacock (15 November 2011)

3

Australian Constitution. The principal has been since codified in section 16 of the *Parliamentary Privileges Act 1987*.

- Because of this principle, the Houses and committees, members and witnesses of the Parliament are able to operate without their proceedings being questioned or interfered with in any way. Any statutory provision which seeks to limit this freedom is therefore fundamentally obnoxious to this general principle.

- It would only be in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations, and legislate so as to limit itself in some way.

- However, there is a second policy included in the Bill, namely, to override the operation of parliamentary privilege by making parliamentary committee operations justiciable, by setting conditions of access between parliamentary committees and their witnesses, by dictating the manner in which parliamentary committees must hear evidence and by making any departure from those conditions a criminal offence. This second policy is a major departure from the long-standing supremacy of parliamentary privilege and a significant trespass on the powers, privileges and immunities of the Houses and their committees and on the rights of witnesses of the Parliament.

- The question that should always be asked with any proposed statutory provision, is "what is the need for the provision and what is the evil which it seeks to remedy?" One of the oldest rules of statutory interpretation, the mischief rule, has at its core the question, "what is the mischief or defect which is not provided for in the law as it stands at present?"

- In addressing this point, the Clerk of the Senate noted in her submission to the committee:

    - There are no known instances where Senate committees have requested (or ordered the production of) tax file numbers or other information pertaining to individual taxpayers. There is one occasion where a document which may have included a tax file number was tabled in the Senate. It was subsequently established that the number was part of a longer reference sequence on correspondence and was not identified as a tax file number (Senate Debates, 19 June 1996, p. 1805).

- Parliamentary committees rarely investigate individual cases and while they are often approached by individuals with an individual case, such cases are not usually investigated. Rather they serve as an illustration of systemic or wider policy issues.

- As to whether Senate committees would ever inquire into the taxation affairs of individual taxpayers, the committee considers this would be highly unusual. As noted by the Clerk of the Senate, it has not happened in the past:

    - there is no justification that has been put forward for these provisions. In my view they are unnecessary. They are addressing a problem that does not exist.

Committees have not needed individual taxpayer information to conduct the kinds of inquiries they undertake, which tend to be into systemic issues. Historically, committees have not asked for this kind of information.

- Standing Order 37 sets out procedures for dealing with in camera evidence obtained by Senate committees. Privilege resolution 1 sets out "procedures to be observed by Senate committees for the protection of witnesses", including ensuring all witnesses are afforded the opportunity to give their evidence in a private session of the committee. Finally, the committee draws attention to a resolution setting out the procedures to be followed by Senate committees and witnesses in relation to claims of public interest immunity. An application under this resolution, could, for example, include an application by a witness that they not be required to divulge confidential taxpayer information unless it is received on an in camera basis, or an application that it not be divulged at all.

- What is of concern to the committee is that while the requirement for "the record or disclosure is for the purpose of the committee performing any of its functions or exercising any of its powers" sounds reasonable, once that requirement is in the statute it becomes justiciable. It is justiciability which causes the collision with parliamentary privilege. If a matter were ever to come before a court under this provision, the court would be required to adjudicate on whether the record or disclosure was for the purpose of the committee. It would involve a court inquiring into the relevance of the committee's activities to its terms of reference. This is a matter which has always been considered to be the exclusive responsibility of each House in relation to its own committees and beyond the competence of courts to adjudicate on.

- Furthermore, there would be a need to lead evidence. Questions would be asked about whether the record or disclosure was for the purpose of the committee performing any of its functions or exercising any of its powers; about what was the purpose of the committee; and about what any of the committee's functions or powers were. Evidence of these matters could only come from parliamentary proceedings.

- The likely source of such evidence would either be debate in the House establishing the terms of reference of the committee's inquiry, or deliberations of the committee in interpreting or applying the terms of reference. This would be needed to establish what the "purpose of the committee in performing any of its functions or exercising any of its powers" was. Inevitably, the court would be involved in all manner of questioning about the committee proceedings themselves.

The Senate Committee's recommendations included:

- The committee does not accept that it is necessary to overturn centuries of accepted law and practice in relation to parliamentary privilege in order to safeguard the privacy of individual taxpayer information.

- Having examined the provisions closely and taken evidence from expert witnesses, the committee is not satisfied that the need for the provisions has been demonstrated. In response to direct questioning by both the Economics Legislation Committee and

this committee on this point, Treasury officials were unable to provide a clear and demonstrated need for the provisions. No precedents were cited and no examples given that any protected taxpayer information had ever been provided to a parliamentary committee. Further, in relation to the key policy of the Bill, the maintenance of the privacy of taxpayers' information, no evidence was forthcoming that there has ever been either a request for, or an attempt to present, such information to a parliamentary committee.

- On the contrary, the committee is satisfied that the rigours of the existing controls operating within the Parliament are more than sufficient to maintain and protect the privacy of taxpayers' information.
- It is on the last question, dealing with the principle of the provisions and the potential they have to set a bad precedent for inroads into the powers of the Parliament and its committees that the committee has the greatest concern. To have statutory provisions interfering in the powers and operations of the Parliament is obnoxious in principle. In view of the very large number of statutory secrecy provisions already enacted at the Commonwealth level, the committee draws the attention of senators to the real danger of a creeping reduction in the areas of parliamentary inquiry as one area after another of Commonwealth government activity seeks exemptions for itself from providing information to Parliamentary committees.

Response to the State Counsel's Letters

In response to the State Counsel's letters, I make the following points. In the letter dated 31 October 2011, State Counsel does not address the issue of the need to have unmistakable language expressly purporting to vary or abrogate parliamentary privilege. However, State Counsel in his last paragraph does acknowledge to put it "*beyond doubt*" it may be advisable that s.3 of the *Evidence Act 1906* be amended to include the definition of proceedings in Parliament.

The State Counsel acknowledges that my proposition is correct, and that the Bill does not specifically include proceedings in Parliament and neither does the *Evidence Act 1906*. State Counsel's suggestion to amend s.3 of the *Evidence Act* would make proceedings in Parliament apply to the whole of the *Evidence Act1906*. Any reading of the *Evidence Act 1906* clearly demonstrates why such a suggestion would be a nonsense.

Since State Counsel's letter, I note the Parliamentary Secretary to the Attorney General has lodged in the Supplementary Notice Paper an amendment to insert two new definitions to include proceedings in Parliament to proposed section 20G. This will mean the definition and application of proceedings in parliament will apply to sections 20G to 20M, and not to the whole *Evidence Act 1906* as State Counsel has suggested.

Had the department for the Attorney General taken the time to consult with the Presiding Officers about the proposed policy, they would not now be in the embarrassing position trying to defend their position.

Should Parliamentary Privilege be codified

Parliamentary Privilege as defined in the *Parliamentary Privileges Act 1891* **(PPAct)** is the *privileges, immunities and powers* set out in this Act. Section 7 of PP Act provides the "power" to order any person to attend the House, or to any Committee and require any question to be answered other than on the ground that the same is of a private nature and does not affect the subject of inquiry. This would not be the position if the Bill's provisions were applied to proceedings in Parliament.

In the UK Joint Committee on Parliamentary Privilege 1998-99[3] the committee took the view that argument in the past against codifying parliamentary privilege in statute is that this will place its interpretation in the hands of the courts.

This is clearly a radical departure from the long established principle that "it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise". (*R v Richards; Ex parte Fitzpatrick and Browne* per Dixon CJ, speaking for the whole Court,).

If the journalist cannot seek a court injunction, then what enforceability lies behind the text of the Bill should a committee adopt an interpretation of the requirements of the Bill, which is at variance with the views of the Courts? In fact, the Bill has little force at all and provides no "certainty" for journalists.

When the House considered the Corruption Crime Commission Bill 2003, the Hon Peter Foss QC MLC made the following comments -

> I picked what the Government was doing with this, but my concern is that it has now been made very much a matter of statutory interpretation; it is now highly justiciable. It seems to assume - I know there are arguments to this effect - that parliamentary privilege has been codified, and I do know that the House would accept that. I do not have a problem with trying to make the clause more precise, but the difficulty is trying to leave it within the definition of the House, so that if there is any doubt, the commission will notify the House to see if it can go ahead. It would be unwise to remove that altogether, simply because the net result will be that the matter will end up being justiciable, rather than being dealt with by the House.

Hon Peter Foss QC MLC's concern on that Bill is the same concern I have with the *Evidence and Public Interest Disclosure Bill.*

State Counsel suggests the Bill's provisions "*qualifies, but does not abrogate from Parliamentary Privilege*". I respectfully suggest that is not the case. The Oxford Dictionary defines "*waive*" as refrain from insisting on or using (a **right**, claim, opportunity, legitimate plea). If the provisions are applied to proceedings in Parliament, then a House or one of its committees or no longer be able, as a "*right*" to compel answers without limitation. A Committee or House must ensure they comply with the provisions of any relevant law. The test to be applied to determine whether or not the discretion should be exercised is:

[3] page 96

> *(a) any likely adverse effect of the disclosure of the identity on the informant or any other person; and*
> *(b) the public interest in the communication of facts and opinions to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.*
>
> *Without limiting the matters that a person acting judicially may have regard to for the purposes of this section, the person acting judicially must have regard to the following matters —*
> *(a) the probative value of the identifying evidence in the proceeding;*
> *(b) the importance of the identifying evidence in the proceeding;*
> *(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;*
> *(d) the availability of any other evidence concerning the matters to which the identifying evidence relates;*
> *(e) the likely effect of the identifying evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the informant or any other person;*
> *(f) the means, including any ancillary orders that may be made under section 20M, available to the person acting judicially to limit the harm or extent of the harm that is likely to be caused if the identifying evidence is given;*
> *(g) the likely effect of the identifying evidence in relation to —*
> *(i) a prosecution that has commenced but has not been finalised; or*
> *(ii) an investigation, of which the person acting judicially is aware, into whether or not an offence has been committed;*
> *(h) whether the substance of the identifying evidence has already been disclosed by the informant or any other person;*
> *(i) the risk to national security or to the security of the State;*
> *(j) whether or not there was misconduct, as defined in section 20K(1), on the part of the informant or the journalist in relation to obtaining, using, giving or receiving information.*
> *A person acting judicially must state the person's reasons for giving or refusing to give a direction.*

Presumably, it will be a requirement for a committee and/or the House to state the reasons for the refusal to answer a question and how the provisions of section 20H were interpreted and complied by the committee or House. Section 20H does restrict the proceedings in Parliament by the virtue that certain criteria must be met before the question can be put to a journalist. This in turn means the current privileges, powers and immunities are modified and necessarily restricted.

Putting to one side the question whether the Bill waives privilege, as Enid Campbell[4] states:

> *Australian parliaments have not shown any inclination to remove or "qualify" the protections accorded by Article 9 of the Bill of Rights1689. The freedoms enshrined in Article 9 are undoubtedly the most important of the privileges of parliaments and are essential in parliamentary democracies.*

[4] Parliamentary Privilege, p68.

I note in a paper presented by The Law Council of Australia in response to the Australian Law Reform Commission's Review of Client Legal Privilege and Federal Investigatory Bodies in which they state:

> *The Law Council does not believe it is necessary to abrogate privilege in any context and, in summary, notes the following:*
>
> *(a) No empirical case has been made out by the ALRC or any other Federal agency to justify the abrogation of client legal privilege in Royal Commissions, covert investigations, or in any other federal investigation.*
>
> *(b) The primary justification for privilege, as acknowledged by the ALRC6, is that it exists in the public interest of preserving the administration of justice and encouraging compliance with the law, as well as being a fundamental common law right. The existence of this public interest rationale creates a stronger presumption against abrogation than exists for privileges and immunities based solely on individual rights.*
>
> *(c) There has been no suggestion or complaint, of which the Law Council is aware, that client legal privilege has prevented the truth from ultimately being reached in federal investigations and inquiries. Rather, concerns seem to arise because of delays and lack of clear policies and procedures.*

I suggest some of those reasons apply equally if not more to parliamentary privilege and the Bill before your Committee.

Response to Parliamentary Secretary's comments

I consider I should address some of the comments by the Parliamentary Secretary to the Attorney General. On Thursday 10 November the Parliamentary Secretary to the Attorney General states:

> A question was asked by Hon Giz Watson about whether these sorts of amendments more properly ought to be included in standing orders. There are a couple of responses to that. In a sense, they could be, but they have not been. Parliament has been seized of the report of the select committee for quite some time, and nothing has happened in that regard.

It has been the Executive that has not acted, on the recommendations of both Houses, to re-write the Parliamentary Privileges Act. The report the Parliamentary Secretary to the Attorney General refers was for the provisions to apply to the courts and other bodies such as the CCC and not to the Parliament. This is the reason there has been no changes to standing orders.

> Standing orders are certainly the expression of the will of this house of Parliament, not Parliament generally. This bill, when made an act, will be an expression of the will of Parliament as a matter of law rather than as a matter of practice and standing orders.

The above is true and there are good reasons for the standing order to remain outside the general law.

> The other feature, of course, is that if a situation were to arise in which one particular party, or combinations of parties in this place, were to be of a mind to do so, standing orders could be suspended and those rules would then be inapplicable, whereas this will be the law of the land.

The Bill before the House only requires a majority of Members to change the privileges of both Houses. Any Government with the numbers in both Houses can change the law just as quick as a standing order can be suspended. However, as the Parliamentary Secretary to the Attorney General states the standing orders require an absolute majority.

> There is an element of transparency and certainty for those who are subject to inquiries by this Parliament.

How is a provision hidden away in the *Evidence Act 1906* any more transparent or provide more certainty than a provision in Standing Orders with all the other standing orders covering witnesses? If there is no enforcement for a House or committee to comply with the Bill's provisions, where is the certainty?

> I would have thought that what we are proposing is not an abrogation of the powers and privileges of the Parliament or of this House, but a statement of the principles that will be applied, and that they will be applied by not only the Parliament and committees of the Parliament but also courts, tribunals and others, such as the Corruption and Crime Commission, who are receiving evidence. There is that level of certainty and transparency. They cannot simply be suspended by the whim of a party or parties of the day which might seek to suspend standing orders and which have obtained an absolute majority in that regard in a particular case.

A committee calling a journalist to answer questions is unable to suspend standing orders.

> A question has been raised about opening up Parliament to challenges from the courts. With respect, that simply cannot be substantiated. There are no clear words in the legislation that would permit that, there is no standing to be able to challenge a ruling of a parliamentary committee, and there is simply no cause of action that could be brought that would allow a court to interfere with the workings of Parliament, bearing in mind Parliament's paramountcy in that regard.
>
> I have already pointed out and tabled the advice of counsel on those issues. The government is of the view that it correctly expresses the law and Parliament's intent.

I will leave the legal arguments about jurisdiction of the courts to other learned people, however, I do bring the following to the committee's attention.

PJ Hanks[5] makes the following point:

> *In Australia, these standing orders are normally made by pursuance of statutory authority and failure to follow them will not affect the validity of enacted legislation, because their enforcement is regarded (by the courts) as a matter of parliamentary privilege. On the other hand, failure to observe the procedures laid down in statutes will affect the validity of enacted (or supposedly enacted) legislation, where the procedures are regarded as mandatory.*

Much of Western Australia's privilege law is justiciable, not only because of its statutory base but also, potentially, because of the paramountcy of the Commonwealth Constitution. Thus far, the High Court has upheld the traditional view of parliamentary powers and immunities[6] at both Commonwealth and State level but, as Kirby J pointed out:

> *Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in Australian context, be adapted to the entitlement to constitutional review. Federation cultivates the habit of mind which accompanies constitutional superintendence by the courts.*[7]

In *Bradlaugh v Gossett*[8] the court made it clear that the deference to Parliament's control of its proceedings was not based on any inability of a court to consider what happens within the House. If an action was brought by a person to protect his or her rights and this required a court to determine a question regarding a parliamentary proceeding, it must do so. As Lord Coleridge CJ explained:

> *[I]n an action between party and party brought in a court of law, if the legality of a resolution of the House of Commons arises incidentally, and it becomes necessary to determine whether it be legal or not for the purpose of doing justice between the parties to the action; in such a case the courts must entertain and must determine that question.*[9]

Whilst there would be strong reluctance by the courts to make a judicial determination, when considering the Bill's mandatory requirements, I suggest a court would be so inclined. It is for the courts to decide on the interpretation of a statute and if privilege exists. A party might be able to seek the courts interpretation of section 20H and if the House or Committee applied that interpretation correctly.

In the *Murphy*[10] case, the judges said Article 9, on true construction, did not prevent the use of relevant parliamentary proceedings in the course of the trial. Rather, Article 9 prevented legal consequences that would otherwise flow being visited on a party entitled to the privilege.

[5] Australian Constitutional Law Materials and Commentary fourth edition 1990 at p.168.
[6] see Egan v Willis [1998] HCA 71, particularly the opinion of McHugh J, p 13 et seq.
[7] Egan v Willis [1998] HCA 71 at p 36.
[8] (1884) 12 QBD 271.
[9] Ibid at 237.
[10] NSW Supreme Court.

In *Halden v Marks*[11] it was clear the Full Court adopted the position that the absence of precedents for the grant of judicial remedy to restrain action alleged to be in breach of Article 9 could not have been regarded as an absolute bar to grant of the remedy sought by the plaintiffs. They were after all seeking a judicial ruling on the ambit of the protection conferred by Article 9.

A precedent for judicial proceedings to restrain an extra-parliamentary inquiry into what were indisputably proceedings in Parliament was later to be provided in the case of *Arena v Nader*.[12] In that case, the issue was one that necessarily involved interpretation of the special Act and determination of its legal effects.

Enid Campbell raises the possibility that exercise by Houses of a contempt jurisdiction contravenes Art 14 of the International Covenant on Civil and Political Rights, a convention to which Australia is a party. Article 14 provides that persons charged with criminal offences have a right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 6 of the European Convention on Human Rights is similar and in *Demicoli v Malta,*[13] the European Court of Human Rights held that Art 6 had been infringed when Malta's House of Representatives had adjudged Demicoli, a journalist, guilty of contempt and had imposed a penalty upon him.

Such cases as Balog v ICAC (1990) 169 CLR 625; Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; Griner v ICAC (1992) 28 NSWLR 125; Bruce v Cole (1998) 48 NSWLR 163 are examples where reports of extra-parliamentary bodies of inquiry have been judicially reviewed even where those bodies have no power to make findings of guilt or liability. Judicial review of such reports has been sought on the ground of denial of procedural fairness, complete want of probative evidence in support of a finding and excess of jurisdiction.

As Russell Keith stated in his paper to the Federal Law Review[14] in 2000:

> *As Kirby J noted, Australia is accustomed to a higher level of judicial superintendence of Parliament than occurs in England. However, there are still recognised limitations on this superintendence. This may be illustrated by examining six potential forms of judicial intervention in Parliament:*
>
> 1. *invalidation of legislation for want of power;*
> 2. *invalidation of legislation for want of process;*
> 3. *invalidation of resolutions for want of power;*
> 4. *invalidation of resolutions for improper use of power;*
> 5. *intervention in a process to prevent an outcome;*
> 6. *intervention in a process to produce an outcome.*
>
> *Prior to Egan, the courts in Australia have only had unfettered jurisdiction in relation to invalidation of legislation for want of power. Such jurisdiction has been well established in federal systems where legislatures have had limited legislative powers since Marbury v*

[11] (1995) 17 WAR 447; 24, 36.
[12] (1997) 42 NSWLR 427.
[13] (1991) 14 EHRR 47.
[14] Vol 28 No.3 (2000).

Madison.[15] *Judicial intervention in the other five areas has been limited to some degree in Australia.*

The High Court has established jurisdiction to review legislative procedures when the constating instrument of the legislative body requires certain processes be followed. In Trethowan [16] *the High Court reviewed the "manner and form" of an incomplete State legislative process.*[17] *In the PMA Case*[18] *and the First Territory Representation case,* [19]*the High Court declared invalid legislation, purportedly passed under s57 of the Commonwealth Constitution, because of the Parliament's failure to follow procedures prescribed by that section. While the latter two cases*[20] *involved the Court reviewing the internal procedures of the Parliament, it is arguable that such review is consistent with Bradlaugh in that the jurisdiction to review the validity of the proceedings arose incidentally to the Court determining a matter between parties with standing to contest their rights in relation to the purported Acts.*

One area of parliamentary proceedings potentially vulnerable to judicial intervention is the committee inquiry process, particularly in jurisdictions where legislation similar to the Commonwealth Parliamentary Privileges Act 1987 does not apply. To date, parliamentary committees have been able to conduct inquiries with relative informality. The direction and findings of such inquiries are determined by a politically defined public interest which makes them qualitatively different from a royal commission or judicial inquiry. Despite having significant investigatory and reporting powers, inquiries have been run without applying formal rules of evidence and natural justice.

However, their freedom from legal formality provides a unique and valuable opportunity for public fact finding and reporting and can give a public voice to people who are not well resourced or versed in the laws of defamation. The utility of these processes could be severly curtailed if the validity of an inquiry could be questioned in a court for technical legal reasons.

It is such cases above, which do not make it "*far fetched*" that a journalist could seek the courts intervention to seek the courts interpretation of sections 20G to 20M and how they should be applied.

If there is no avenue for appeal or injunction does this preclude further amendments to the Act for that to occur? What is the possibility of other amendments being made in the future for unrelated matters but ultimately has a consequence on parliamentary proceedings? Has any other jurisdiction applied similar provisions to include proceeding in parliament? If not, why?

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[15] 5 US (1 Cranch) 137 (1903); Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 262; The Queen v Kirby; Ex parte Boilermaker's Society of Australia (1956) 94 CLR 254 at 267.

[16] Attorney General for the State of New South Wales v Trethowan (1931) 44 CLR 394; cf Clayton v Heffron (1960) 105 CLR 214.

[17] Upheld by the Privy Council, Attorney General for the State of New South Wales v Trethowan (1932) AC 526.

[18] Victoria v Commonwealth and Connor (1975) 134 CLR 81.

[19] (1975) 134 CLR 201.

[20] In Trethowan (1931) 44 CLR 394, the court proceeded on the basis of a concession by the defendants that an injunction may be granted at the suit of the plaintiffs (Clayton v Heffron (1960) 105 CLR 279 at 234). It may be argued that this concession is what allowed the jurisdiction of the court.

Overall, I find the comments by the Parliamentary Secretary to the Attorney General, on the Bill, as to suggest to the Parliament:

- Members cannot be trusted;
- That the Executive knows what is best for the Parliament;
- That the Committees have or may act contrary to the practices followed by the Select Committee on the Sunday Times.

Are the provisions of Section 20H appropriate

Accepting journalists are entitled to certain protections from being compelled to disclosure their source, it is questionable whether the same criteria apply to proceedings in Parliament. Parliament is not a court. Parliament neither has the same functions as a court and neither bound by the same legal procedures.

In my opinion, other considerations should apply. For example, if a journalist's informant is a Member of Parliament and the matters solely relate to proceedings in Parliament then the committee should be able to ask the journalist to disclose the informant without qualification.

This principle has nothing to do with the public interest test. Such a principle should be clearly expressed so to provide a journalist "*certainty*".

It is for this reason such provision be included in the Standing Orders in the chapter dealing with Witnesses.

Question to the term "person"

There is also a question on the scope of the definition of "person acting judicially". As defined in the *Evidence Act 1906* it means any "person" having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence.

In advice provided to the Clerk by Mr Peter Quinlan in 2007 regarding the Select Committee of privilege on a Matter arising in the Standing Committee on Estimates and Financial Operations on the provision of evidence by the Corruption & Crime Commission obtained pursuant to the *Telecommunications (Interception and Access) Act 1979* his view on the use of the word "*person*" is:

> *In this regard it is to be noted that the prohibition in s63(1) is two-fold: firstly, a prohibition on communications to other "persons" (s63(1)(a)4) and, secondly, the giving of "evidence in a proceeding" (s63(0(b)).*
>
> *In relation to the first prohibition, it has been consistently held that a "person" within the meaning of s63(1)(a) does not include a "court". The law in this respect was summarised by Lindgren J in Kizon v Palmer (No i) 72 FCR 409 at 43o-431, where his Honour (with whom Jenkinson & Kiefel JJ agreed), held that neither word "person" or the expression "another person" in s63(1) or (z) or s67 of the Telecommunications (Interception and Access) Act 1979 applied to proceedings in the Federal Court.*

Submission to the Standing Committee on Procedure and Privileges regarding the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 – Malcolm Peacock (15 November 2011)

14

> *For similar reasons, in my view, it strains the ordinary usage of the word "person", to apply it to the Parliament of a State. It is true that s22(I)(a) of the Acts Interpretation Act 1901 (Cth), provides that the word "person" includes a "body politic". That expression is, however, apt to describe a body politic who may act in a corporate "personality", such as the Crown in right of the Commonwealth or of a State, The expression does not easily apply to the Parliament itself. Insofar as officers of CCC communicated lawfully intercepted information to the Parliament (or a Committee) itself (as opposed to an individual member), in my view, it is unlikely that that officer would be held to be communicating the information to a "person" within the meaning of s63.*

There is no one person acting judicially in proceedings in Parliament; it is a body of people that forms either a committee or the House in such cases. I note this matter may be resolved by the proposed amendment listed on the supplementary notice paper.

It is of interest that the Public Interest Disclosure Acts of NSW and QLD specifically included a section stating that the provisions do not affect the rights and privileges of Parliament. They have not included similar provisions to restrict the House or its committees.

Conclusion

Do the provisions of the Bill have any effect on parliamentary privilege? In my opinion not in its current form - for the reasons I outlined in my letter dated 7 November 2011. However, if the amendments are adopted then there is certainly an effect on parliamentary privilege. The amended Bill will place restrictions on the House and its committees.

It should only be in the rarest and most extraordinary of cases that the Parliament should decide to set some limit on its own operations, and legislate so as to limit itself in some way.

It is a question of where the House draws the line on what is appropriate to incorporate into statute regarding its privileges. Other than the CCC Act, I cannot think of any other statute that influences the proceedings in Parliament. The Bill marks a turning point for parliamentary privilege for what has been to date jealously guarded against by Members of this Parliament and most Westminster Parliaments.

As stated above, New South Wales and Queensland have not included proceedings in Parliament in either their Evidence Act or the Public Interest Disclosure Act. So why did WA decide to include proceedings in Parliament? Alternatively, why did the other jurisdictions not include proceedings in Parliament? Could it be because those jurisdictions acknowledge the paramountcy of the sovereignty of Parliament?

Is the potential risk of opening up the proceedings in Parliament to being questioned in the courts worth having the provisions of the Bill made into law?

The Executive has not demonstrated the need for any proposed statutory provision applying to proceedings in Parliament, based on "*what is the need for the provision and what is the evil which it seeks to remedy*?" One of the oldest rules of statutory interpretation, the mischief rule, has at its core the question, "*what is the mischief or defect which is not provided for in the law as it stands at present*?"

Malcolm Peacock
Clerk of the Legislative Council and Clerk of the Parliaments

15 November 2011

APPENDIX 6

LETTER FROM MR GEORGE TANNIN SC, STATE COUNSEL FOR WESTERN AUSTRALIA, TO THE PROCEDURE AND PRIVILEGES COMMITTEE, DATED 17 NOVEMBER 2011

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Hon Barry House MLC
President of the Legislative Council
Chairman of the Procedure and Privileges Committee
Parliament House
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Confidential

Dear Mr President,

***EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011* – PARLIAMENTARY PRIVILEGE**

I refer to your letter of 11 November 2011 inviting me to provide further advice and information that may assist the Procedure and Privileges Committee of the Legislative Council (the Committee) in its consideration of the effect, if any, on parliamentary privilege of Clause 5 sections 20G to 20M of the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011* (the Bill).

Background to the Bill

The background to the Bill is set out in the Second Reading by the Parliamentary Secretary the Hon. Michael Mischin MLC delivered in the Legislative Council on 20 October 2011[1].

The essential purpose of the Bill, as described in the comprehensive Explanatory Memorandum, is two-fold: it seeks to preserve the necessary confidentiality of certain types of relationships, whilst simultaneously ensuring the free flow of information and facts to the public. It seeks to do this by amending the *Evidence Act 1906* (WA) and the *Public Interest Disclosure Act 2003* (WA) by inserting protections for confidential communications made in the context of professional confidential relationships. These protections will enable the claims of professional persons to refuse to answer questions about their clients in court.

Of particular relevance to this inquiry, the Bill makes special provision for the protection of the identity of persons who give information to journalists in circumstances of express

[1] Legislative Council of Western Australia, *Hansard*, Thursday, 20 October 2011, p8433b-8437a.

or implied confidentiality. The Bill establishes a presumption that in proceedings before "a person acting judicially", the journalist is not compellable to disclose the identity of an informant. It then sets out a framework for when this presumption may be overcome at the direction of a person acting judicially.

As was made clear in the Second Reading Speech to the Bill, delivered by the Hon Michael Mischin MLC on 20 October 2011, this presumption against compelling a journalist to disclose the identity of their informant extends to hearings before the Legislative Assembly and Legislative Council, and to committee hearings of both Houses of Parliament.

The referral to the Committee

Following the introduction of the Bill on 20 October 2011 and during subsequent debate in the Legislative Council, concerns were raised about any effect this Bill may have on parliamentary privilege in respect of the presumption against compelling journalists to disclose the identity of informants. Following those concerns, the Legislative Council by motion referred the Bill to the Committee for further consideration. Specifically, the Committee is to consider clause 5, proposed sections 20G to 20M of the Bill, and their effect, if any, on parliamentary privilege. The Committee is to report to the Legislative Council by 29 November 2011.

Operation of the Bill

The protection of journalists' informants from disclosure is given effect to by clause 5, s. 20I of the Bill, which provides:

> **20I. Protection of identity of informants**
>
> If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor a person for whom the journalist was working at the time of the promise is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained (***identifying evidence***).

However this protection is not absolute, and s. 20J sets out precisely when a journalist may be directed to give identifying evidence by a person acting judicially:

> **20J. Direction to give identifying evidence**
>
> (1) Despite section 20I, a person acting judicially may direct a person referred to in that section to give identifying evidence.
>
> (2) A person acting judicially may give a direction only if satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of the identity of the informant outweighs —

(a) any likely adverse effect of the disclosure of the identity on the informant or any other person; and

(b) the public interest in the communication of facts and opinions to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

(3) Without limiting the matters that a person acting judicially may have regard to for the purposes of this section, the person acting judicially must have regard to the following matters —

(a) the probative value of the identifying evidence in the proceeding;

(b) the importance of the identifying evidence in the proceeding;

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;

(d) the availability of any other evidence concerning the matters to which the identifying evidence relates;

(e) the likely effect of the identifying evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the informant or any other person;

(f) the means, including any ancillary orders that may be made under section 20M, available to the person acting judicially to limit the harm or extent of the harm that is likely to be caused if the identifying evidence is given;

(g) the likely effect of the identifying evidence in relation to —

(i) a prosecution that has commenced but has not been finalised; or

(ii) an investigation, of which the person acting judicially is aware, into whether or not an offence has been committed;

(h) whether the substance of the identifying evidence has already been disclosed by the informant or any other person;

(i) the risk to national security or to the security of the State;

(j) whether or not there was misconduct, as defined in section 20K(1), on the part of the informant or the journalist in relation to obtaining, using, giving or receiving information.

(4) A person acting judicially must state the person's reasons for giving or refusing to give a direction.

Section 20J(2) requires the person acting judicially to weigh the public interest to be served by the disclosure of the informant's identity with the public interest that is protected by the Bill: that is, ensuring the communication of facts and opinions to the public by the news media. Section 20J(3) then stipulates a number of considerations the person acting judicially must have regard to when considering such a direction, though the person acting judicially is not limited to these considerations.

Section 20K addresses the application of the protection to a journalist or their informant in the event that the person acting judicially finds that they have engaged in misconduct, examples of which are provided in s. 20K(1). Upon such a finding, the presumption against compelling a journalist to disclose their informant will not apply, and a person acting judicially may direct them to do so provided it is in accordance with the mandatory considerations detailed in s. 20K(3). The purpose of this restriction upon the protection is to ensure that journalists and informants seeking to rely on the protection provisions have acted consistently with the public interest in the free flow of information and news.

Section 20L provides that an informant's identity may be revealed with the informant's consent. Section 20M empowers the person acting judicially to make ancillary orders to limit the possible harm that may be caused to an informant as a result of a direction to a journalist to reveal their identity. These orders include an order that the evidence be heard *in camera*, and that the publication of the evidence be suppressed.

As mentioned above, it is contemplated that these provisions, relating to "persons acting judicially", extend to hearings before the Legislative Assembly or Legislative Council, or committee hearings of both Houses of Parliament. The Bill relies on the definition of "persons acting judicially" provided by s. 3 of the *Evidence Act 1906*; that is, "any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence". While this definition does not specifically refer to the State Parliament, it is my opinion that the definition is sufficiently broad to implicitly include Parliament. Nonetheless, following concerns raised by the Clerk of the Legislative Council, Mr Malcolm Peacock, it is intended that when in Committee[2], the Bill be amended to include the following definitions in clause 5:

> **person acting judicially** includes a member of either House of Parliament or a Committee of either House, or both Houses, of Parliament who, by law, has authority to hear, receive, and examine evidence;
>
> **proceeding** includes a proceeding before either House of Parliament or a Committee of either House, or both Houses, of Parliament, in which evidence is or may be given;

These definitions will only be relevant to the provisions which clause 5 of the Bill introduces: they will not import the burdensome operation of the whole of the *Evidence Act* to Parliamentary proceedings.

[2] Draft Amendments (No.232-1B) *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*

In short, the Bill proposes to apply a presumption against compelling a journalist from identifying their informant to Parliamentary hearings. That presumption may be overcome if Parliament determines that the public interest favours disclosure, and that it outweighs any likely adverse effect on the informant or any other person and the public interest in the ability of the news media to access sources of fact.

The concern relating to Parliamentary privilege

The concerns regarding clause 5 expressed by Members of the Legislative Council during the course of debate appear to be that these sections may provide a potential basis for judicial review of both Houses of Parliament and parliamentary committees, and in that sense, abrogate or detract from Parliamentary privilege. This issue would arise in the event that a journalist, directed by a House of Parliament or committee, refused to disclose the identity of his or her informant, potentially on the objection that the House or committee had not paid due regard to a mandatory consideration stipulated in s. 20J(3) or s. 20J(4), and was then committed for contempt of Parliament for refusing to answer a question put to him or her. The question would then become whether the finding of contempt by the relevant House of Parliament would be judicially reviewable, and by extension, the direction to the journalist to disclose the identity of his or her informant under s. 20J.

Parliamentary privilege and judicial review

i. Background to Parliamentary privilege in Western Australia

In a recent research paper for the Parliament of Victoria, Rachel Macreadie and Greg Gardiner provided the following definition of parliamentary privilege:

> "The term 'parliamentary privilege' refers to the powers, privileges and immunities enjoyed by Houses of Parliament and their Members in the performance of their duties. These privileges are an exception to ordinary law and are intended to allow parliamentarians to perform their duties without fear of intimidation or punishment, and without impediment."[3]

Parliamentary privilege as a fundamental principle of law and government was inherited from English laws, themselves "found chiefly in ancient practice, asserted by Parliament and accepted over time by the Crown and the courts of law and custom of Parliament".[4]

[3] Rachel Macreadie and Greg Gardiner, *An Introduction to Parliamentary Privilege*, Parliament of Victoria, 2 August 2010, 9.
[4] United Kingdom, Parliament, Joint Committee on Parliamentary Privilege, *First Report*, Session 1998/1999, [5].

The commonly cited formal written source for the privilege is art. 9 of the *Bill of Rights 1689*, which states:

> "That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament."

This privilege has been incorporated into the law of every Australian jurisdiction. Under s. 49 of the Commonwealth Constitution, the "powers, privileges, and immunities" of the Houses of Commonwealth Parliament are matched to the House of Commons of the United Kingdom and developed further as "declared by Parliament".[5]

In Western Australia, similar provision is made by s. 36 of the *Constitution Act 1889* which states:

> "**36. Privileges of both Houses**
>
> It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively."

Under that power, the *Parliamentary Privileges Act 1891* (WA) was passed, which prescribes the powers and privileges enjoyed by the WA Parliament as follows:

> "**1. Privileges, immunities and powers of Council and Assembly**
>
> 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."

Generally, it is accepted that there are two components to parliamentary privilege:[6]

(a) the protection of freedom of speech within Parliament;[7] and

(b) the exercise by Parliament of control over its own affairs.[8]

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[5] See also s. 50 of the *Commonwealth of Australia Constitution Act.*

[6] Rachel Macreadie and Greg Gardiner, *An Introduction to Parliamentary Privilege*, Parliament of Victoria, 2 August 2010, 11.

[7] See *Sankey v Whitlam* (1978) 142 CLR 1 at 35 per Gibbs ACJ for an authoritative judicial pronouncement on the justification for this aspect of parliamentary privilege: "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"; see also *Stewart v Ronalds* [2009] NSWCA 277 at [116].

[8] See *Osborne v Commonwealth* (1911) 12 CLR 321 at 336 per Griffith CJ, at 355 per O'Connor J.

This second aspect of the privilege is a recognition of the doctrine of separation of powers, explained by Blackstone as the principle that "whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".[9] It is the impact that the Bill may have on this principle of parliamentary privilege that is pertinent to the issue to be addressed by the Committee in its report.

ii. Parliamentary privilege and the courts

As explained in *Erskine May*, "the boundary between the competence of the law courts and the jurisdiction of either House in matters of privilege is still not entirely determined".[10] However, by the middle of the 19th century, it was understood that while it remained for Parliament to determine whether the privilege had been breached, parliamentary claims as to whether the privilege existed were justiciable.[11] This remains the status of the law in Australia currently; as explained by Dixon CJ in *R v Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162:

> "it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise." [12]

The privilege will extend to Parliamentary powers deemed to be "reasonably necessary" to the existence and functions of the House of Parliament, and that is a question to be determined by the court.[13]

The power to punish a person for refusing to answer a question put to them by either House of Parliament or by a Committee is uncontentious.[14] In the United Kingdom, the House of Commons had an unfettered power not only to commit a person for contempt, but to "be the judges themselves of what is contempt".[15]

Under s. 1 of the *Parliamentary Privileges Act 1891*, the Legislative Council and Legislative Assembly of Western Australia adopted "the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament".

However, to the extent that the powers, privileges and immunities of the Houses of Parliament arise by statute, courts will have jurisdiction to decide whether the statute

[9] Blackstone, *Commentaries on the Laws of England*, 17th ed (1830), vol 1, 163; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332.
[10] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (2004) (23rd ed) Edited by Sir William McKay, London, LexisNexis, 176.
[11] *Ibid.*, 177.
[12] Cited with approval in *Egan v Willis* (1998) 195 CLR 424 at [27] per Gaudron, Gummow and Hayne JJ.
[13] *Egan v Willis* (1996) 40 NSWLR 650 at 664 per Gleeson CJ, citing *Barton v Taylor* (1886) II App Cas 197 at 203; *Willis and Christie v Perry (1912)* 13 CLR 592 at 597, per Griffith CJ; *Armstrong v Budd* (1969) 71 SR (NSW) 386 .
[14] *Erskine May*, page 130.
[15] *Speaker in the Legislative Assembly of Victoria v Glass* (1871) LR 3 PC App 560, at 572 per Lord Cairns; cited in *R v Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 163 per Dixon CJ.

authorises the privilege claimed.[16] It has been noted by a number of commentators that this tendency for statute to limit parliamentary powers and privileges is a reason for reluctance on the part of the legislature to clearly define Parliament's powers and immunities in statute.[17]

In Western Australia, the grant of Parliamentary privilege is wholly by statute,[18] and the terms of the *Parliamentary Privileges Act 1891* in some respects qualify the breadth of powers and privileges historically enjoyed by the House of Commons.

With regard to summoning persons to appear before a House of Parliament or a Committee, s. 4 of the *Parliamentary Privileges Act 1891* provides:

> "**4. Power to order the attendance of persons**
>
> Each House of the Parliament of the said Colony, and any Committee of either House, duly authorised by the House to send for persons and papers, may order any person to attend before the House or before such Committee, as the case may be, and also to produce to such House or Committee any paper, book, record, or other document in the possession or power of such person."

Section 8 of the *Parliamentary Privileges Act 1891* empowers both Houses of Parliament to punish persons for contempt of Parliament. The provision states:

> "**8. Houses empowered to punish summarily for certain contempts**
>
> Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person —
>
> ...
>
> (b) refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid;"
>
> ...

Appreciating that these provisions qualify the broad powers and privileges that Parliament would otherwise enjoy, the issue that arises, is what is meant by the s.8(b) *Parliamentary Privileges Act 1891* phrase "lawful and relevant question"? It is possible to understand the

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[16] *Namoi Shire Council v Attorney General for NSW* [1980] 2 NSWLR 639 at 643

[17] Rachel Macreadie and Greg Gardiner, *An Introduction to Parliamentary Privilege*, Parliament of Victoria, 2 August 2010, 37, citing Harry Evans 'Parliamentary Privilege: Legislation and Resolutions in the Australian Parliament', (1988) *The Table,* vol 56, 21-22 and Sylvia Song, 'The Reform of Parliamentary Privilege: Advantages and Dangers', (1997) *Legislative Studies,* vol 12, no 1, Spring, 35.

[18] *Aboriginal Legal Service v Western Australia* (1993) 9 WAR 297 at 305 per Rowland J.

phrase as a qualifying precondition to the protection of parliamentary privilege: i.e. in order to punish a person for contempt, the question asked must have been "lawful and relevant", and this, being a question of whether the privilege applies, is a matter for the courts.[19]

If it is a justiciable question, then it may be that the Bill exposes parliamentary proceedings to judicial review in the discrete situation of questions asked of journalists regarding the identity of their informants. If the effect of the Bill is to render directions to journalists to disclose their sources otherwise than in accordance with s. 20J unlawful, then a decision by either House to punish a journalist for contempt of Parliament for refusing to disclose their source may not attract parliamentary privilege. In the least, such a question would feasibly be open to judicial consideration.

In *Aboriginal Legal Service v Western Australia* (1993) 9 WAR 297, heard before the Supreme Court of Western Australia, the validity of two resolutions passed by the Legislative Council ordering the plaintiff to produce documents was challenged on the basis that they did not satisfy the procedural requirements provided by s. 4 of the *Parliamentary Privileges Act.* The question for the Court was whether the procedural requirements of s. 4 were justiciable.

Rowland J held that "the Court has jurisdiction, in my opinion, to construe the Act so as to ascertain the extent of such powers and privileges, and their manner of exercise if it be governed by the Statute".[20] The procedural requirements established under s. 4 of the *Parliamentary Privileges Act 1891* were therefore reviewable. Rowland J recognised that the Parliament has, at first instance, the breadth of powers and privileges claimed by the House of Commons, but Parliament also has the power to limit its powers and privileges by statute and such a limitation will be justiciable.[21] This proposition confirmed that of McLelland J in *Namoi Shire Council v Attorney General for NSW* [1980] 2 NSWLR 639 at 643:

> "in the case of a legislature the existence and authority of which is derived from statute, it is clear that if, on the true construction of the relevant statute, some act or event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise of the validity of a supposed law, it necessarily follows that the question whether that act, event or circumstance has occurred is examinable in a court in which the validity of the supposed law is in issue, notwithstanding that that question may involve the internal proceedings of one of the constituent Houses of the legislature." [22]

[19] For a discussion of contempt of Parliament as a justiciable issue, see Harry Evans, "Parliamentary Privilege: Changes to the Law at Federal Level" (1988) 11 *UNSWLJ* 31, 41.
[20] At 305.
[21] See 305 -306; see also Nicholson J at 312-313.
[22] This position, that statutory limits set by Parliament on its own proceedings are justiciable, is analogous to, and seems to have been developed upon, the principle that the courts have power to declare a law invalid on the basis that its passage did not comply with the constitutionally protected law-making process: *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 118 per Barwick CJ; *Clayton v Heffron* (1960) 105 CLR 214 at 235, per Dixon CJ, McTiernan, Taylor and Windeyer JJ.

Arguably, such a result in this instance would be more serious and invasive than the question of procedural validity of resolutions raised in *Aboriginal Legal Service v Western Australia* (1993) 9 WAR 297. In order to determine whether the direction made to the journalist to reveal the identity of their informant was lawful, the court would be required to review the processes of the members of Parliament in order to ascertain whether due regard had been paid to the mandatory considerations in s. 20J(3). In addition, the Houses of Parliament and Committees are required to provide reasons for giving or refusing to give a direction, s. 20J(4). Again, the adequacy of the reasons provided may be open to scrutiny by the court.

In order to ascertain whether the Bill limits the application of parliamentary privilege in this way, it is necessary to take a closer look at the construction of the Bill. It seems evident, adopting the language of Rowland J, that "courts will require clear words in a statute to limit the powers, privileges and immunities of (a) House (of Parliament)"[23]. There is no sufficiently unambiguous statement in the Bill that would allow such a result. Indeed, the mandatory requirements of s. 20J(3) and s. 20J(4) are to the contrary. Failure to adhere to those requirements could lead to a jurisdictional error that may be amenable to judicial review. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24.*

Options for the consideration of the Committee

The referring motion binds the Committee to consider the effect, if any, on parliamentary privilege of Clause 5 sections 20G to 20M of the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011* (the Bill). It is entirely a matter for the Committee to determine how it proceeds and what it recommends in its report to the Legislative Council. Without in any way seeking to constrain or limit the Committee's review there are a number of possible alternatives to consider.

In its present form, journalist protection remains in the Bill. It is transparent and consistent with the whole of the Bill. The protection under the Act will extend to all "persons acting judicially", including courts, tribunals and executive decision makers. The proposed amendments to Clause 5 in Committee[24] will extend the reach of the Act to the Houses of Parliament and the Committees of the Parliament. If the assurance that the Act is designed to make to journalists, and more importantly, to the people who provide them with information, is removed or qualified in a marked way with respect to parliamentary proceedings, the purpose underlying this Bill in protecting confidential communications would, in my respectful opinion, be undermined. The mandatory requirements of s. 20(J)(3) and s. 20J(4) are not conceptually difficult or unusually onerous. They entail basic protections of fairness and justice that Parliament can easily accord in each case without compromising the integrity of its proceedings. The Committee may consider, in light of the very serious consequences that may arise where there is any failure to accord the protections mandated by s. 20(J)(3) and s. 20J(4), that the availability of some independent judicial scrutiny is appropriate.

[23] *Aboriginal Legal Service v Western Australia* (1993) 9 WAR 297 at 304 per Rowland J.

[24] Draft Amendments (No.232-1B) *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*

On the other hand, the Committee may take the view that any form of judicial oversight or review in the case of parliamentary proceedings is an undesirable compromise of the separation of powers and may consider the situation warrants an amendment to the Bill to preserve the powers and privileges of Parliament from any judicial interference.

This may be done in a number of different and not entirely satisfactory ways.

For example, an express exclusion of judicial review in the case of parliamentary proceedings by means of a wide finality or privative clause may carry an inherent risk of constitutional invalidation under the principles recently reiterated by the High Court of Australia in *Kirk v Industrial Relations Commission of NSW* [2010] 239 CLR 531. However, it is not entirely clear whether or not the principles in *Kirk v Industrial Relations Commission of NSW* [2010] 239 CLR 531 would be applied to render invalid a State law that purports to prevent the Court from reviewing decisions made in Parliament in relation to the taking of evidence, where the privative clause would be purporting to retain, not limit, Parliamentary privilege. Chapter 3 of the Commonwealth Constitution was invoked in *Kirk v Industrial Relations Commission of NSW* [2010] 239 CLR 531 to hold that it is beyond the power of the State legislature to deprive the State's Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power. The High Court of Australia was not required to consider the unique effect of privative clauses in the context of the preservation of Parliamentary privilege.

An alternative approach would be the insertion of an express provision guaranteeing the lawfulness and relevance of any question asked or any direction given in parliamentary proceedings together with a provision, in clause 5, stating that:

> "Nothing in this Act is to be interpreted as abrogating from or qualifying parliamentary privilege as protected under the *Parliamentary Privileges Act 1891*."

However, such an amendment may nevertheless leave open the question of judicial review of parliamentary proceedings by not removing the application of the mandatory requirements of s 20(J)(3) and s 20J(4) to Parliament.

A further more radical alternative would be amendments to the Bill to ensure that the mandatory requirements of s 20(J)(3) and s 20J(4) do not apply to proceedings in Parliament or otherwise modifying the reach and effect of the Bill in Parliament. As I have already foreshadowed, the express exclusion of Parliament from the application of the Bill will inevitably be seen as anomalous. The acceptability of such an approach is primarily a matter of policy for the Government and ultimately a matter for determination by Parliament.

In the course of debate in the Legislative Council, an alternative option was raised by Members whereby the application of journalist protections in parliamentary proceedings would be entirely removed from the Bill and instead included in the Standing Orders of each House. The benefit of including the protection in the Standing Orders, it was argued, is that they are undoubtedly within the protection of parliamentary privilege, and not

subject to judicial review.[25] That view has some merit but it must also be remembered that Standing Orders of each House can be simply suspended. Furthermore, unless the Houses agree to adopt Joint Standing Orders, the Standing Orders of the Legislative Assembly may differ from those of the Legislative Council, creating further potential for anomalies. In my respectful opinion, the clearest expression of the true and abiding will of Parliament in a democracy is the enactment of legislation.

For your consideration.

Yours faithfully

GEORGE TANNIN SC
STATE COUNSEL

17 November 2011

[25] *Namoi Shire Council v Attorney General for NSW* [1980] 2 NSWLR 639 at 644 per McLelland J; *Philip Morris Ltd v Department of Health and Ageing* (2011) 120 ALD 643 at [105] per Deputy President Forgie

APPENDIX 7

LEGAL ADVICE RECEIVED BY THE PROCEDURE AND PRIVILEGES COMMITTEE FROM MR BRET WALKER SC, DATED 18 NOVEMBER 2011

IMPLICATIONS FOR PARLIAMENTARY PROCEEDINGS BY THE *EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011*

OPINION

I am asked to advise the Standing Committee on Procedure and Privileges of the Legislative Council of the Parliament of Western Australia on certain aspects of the *Evidence and Public Interest Disclosure Legislation Amendment Bill 2011*. I refer to the brief to me dated 11th November 2011 without reproducing its detail. I set out my answers to the specific questions asked of me below, following an explanation of my reasoning in general.

2 On the basis that the proposed amendment notified on 8th November 2011 to the Bill would insert the explicit references to a member of either House, to parliamentary committees and to parliamentary proceedings there set out, the position is clear as to application of the provisions proposed to be enacted by the amended Bill, set out in its cl 5 as secs 20G to 20M of the *Evidence Act 1906* (WA). By dint of the definitions of "a person acting judicially", "legal proceeding" and "proceeding" in sec 3 of the *Evidence Act*, as well of course as the proposed terms of sec 20G in accordance with the notified amendment to the Bill, the provisions will incontestably apply to parliamentary inquiries.

3 This is so notwithstanding the arguable inappositeness of some of these provisions to the character of the Legislative Council and its committees and members. For example, subsec 20H(4) (including its reference to sec 5) much more readily pertains to courts and quasi-judicial tribunals administering enacted law than to a parliamentary inquiry directed to the scrutiny of administration or consideration of policy. Nonetheless, in my opinion these are relatively minor matters of discordance, incapable of denying the explicit application to the Legislative Council of these proposed provisions.

4 It follows that there is no room for arguments to the effect that the special constitutional importance of parliamentary privilege (in the full and proper sense of power) prevents application to the Houses of provisions generally applying to persons, bodies and tribunals. The proposed amendment to the Bill certainly constitutes the unmistakeable and unambiguous language, or express words, expected of statutory provisions said to abrogate or qualify a parliamentary privilege: eg see per McPherson JA in *CJC v PCJC* [2002] 2 Qd R 8 at 23.20. In my opinion, furthermore, the definitions noted in 2 above may well have amounted to the requisite clarity of legislative intention to affect the Houses' privileges.

5 This would not be the only statutory provision affecting the power of the Legislative Council itself or by an authorized committee to compel a journalist to disclose his or her confidential source. The scheme set out in secs 4-8 of the *Parliamentary Privileges Act 1891* (WA) sets out the relevant powers and corresponding obligations and penalties in a familiar way, stemming from the

institutional provenance of Australian Houses' privileges in the 19th century House of Commons at Westminster.

6 In this present state of legislative regulation affecting the power of the Legislative Council to compel a journalist to disclose his or her confidential source, it is very significant, for present purposes, to note the terms of sec 7. They empower the House, upon report to it of a witness's objection to answer "with the reason thereof", to "excuse the answering of such question … or order the answering … thereof, as the circumstances of the case may require" (emphasis added). It is, in my opinion, clear beyond argument that it is for the House, deciding by resolution in accordance with its own standing orders or particular procedures adopted for the occasion by decision of the House itself, to determine what the circumstances of the case may require.

7 In particular, I strongly doubt whether there could be any challenge brought in a Supreme Court (or any court of law) which involved seeking a judge or judges to disagree with the House's determination of what the circumstances of the case required and seeking to overturn, say, an order of the House for a journalist to disclose the identity of his or her confidential source: cf *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 – "… given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise".

8 There is no difficulty with the orthodox interpretation of the statutory provisions noted in 5 and 6 above according the traditional respectful non-interference by the courts of law in the procedures of the Houses. The subject matter of the statute in question is, obviously, directed to parliamentary matters alone.

9 But the opposite would be true of provisions such as the proposed secs 20G-20M of the *Evidence Act*. That is, as implicit from the general definitions and explicit from the proposed amendment to the Bill, parliamentary inquiries would only be one of many places and occasions where those provisions would operate. None of those other places or occasions could possibly attract the non-interference or reticence on the part of the judges that can be so readily granted in the case of the *Parliamentary Privileges Act*. The question would thus arise whether the courts could or should construe these new provisions differentially depending whether the case before them concerned a parliamentary inquiry or one of the other kinds of proceeding to which they apply.

10 In my opinion, notwithstanding the very substantial weight of the non-interference principle noted in 6 and 7 above, there is considerable uncertainty whether the courts of law could lawfully decline to decide a case that sought judicial review of the Legislative Council's decision, say, to give a direction under sec 20J (to a journalist to disclose the identity of his or her informant). The text of the proposed provisions provides virtually no foothold for reading them so as to permit judicial review in all cases except parliamentary inquiries. And the only textual shred would be contained in the proposed amendment to the Bill, which of course extends the provisions explicitly to parliamentary inquiries.

11 The possible availability in the case of parliamentary inquiries of judicial review of a House's direction under sec 20J is, in my opinion, a grave matter in relation to the privileges of the Legislative Council. If judicial review were available, as is quite possible under these proposed provisions, to the same extent for all kinds of

proceedings covered by them, the effect would be that (among other things) a Supreme Court judge would have the power and in an appropriate case the duty to examine the parliamentary proceedings and to determine whether, say, the 20J direction by the Legislative Council should be set aside on the ground that it was so unreasonable that no rational members could have so decided. That so-called *Wednesbury* possibility of judicial review of discretionary decisions is the most unattractive way of envisaging a conflict between a House and the courts, but other possibilities such as a judicial determination that a House had failed to take into account a relevant consideration or had taken into account an irrelevant consideration are also ways in which differences and disagreements between the judges and the parliamentarians may be decided in court.

12 This prospect is the antithesis of the non-interference by courts of law which is part of the defining character of Australian legislative chambers.

13 I am not suggesting, of course, that this non-interference amounts to immunity of the Houses from judicial supervision of the limits of their power. Obviously, the courts will adjudicate challenges to purported exercises of power by the Houses, according to law, and so as to bind the Houses. As *Fitzpatrick and Browne* illustrated, that is very different from courts undertaking judicial review of the manner in which a House has exercised a power it does possess.

14 If a 20J direction by the Legislative Council were justiciable in the sense discussed above, the exercise of that jurisdiction by the Supreme Court (or any court of law) of its nature would diminish the scope of immunity from judicial review of

parliamentary proceedings. But for provisions such as are proposed, the effect of Article 9 of the *Bill of Rights* would prohibit any court from entertaining the contention that the Legislative Council was wrong in its decision. Its decision could not be "called into question" before the court. The record of debate in the Chamber could not be considered in court with a view to the court determining whether it was reasonable or unreasonable. If the argument noted in 9-11 above were correct, however, the position would be reversed.

15 I therefore answer the questions asked as follows.

(a) *Will cl 5 (secs 20G-20M) of the Bill, if passed, apply to the Legislative Council and its committees?*

Yes.

(b)(i) *Would parliamentary privilege be abrogated, and if so to what extent?*

The power to compel answers to questions, notwithstanding they seek disclosure of a journalist's informant, would be qualified or regulated, rather than abrogated.

Possibly, the jurisdiction of the courts to entertain challenges to decisions of the Legislative Council to compel such answers would entrench on Article 9 of the *Bill of Rights*.

7

(b)(ii) *Which provisions of the Evidence Act 1906 and/or other legislation will, as a consequence, apply to proceedings of the Legislative Council and its committees?*

Only secs 20G-20M, of the *Evidence Act* together with the applicable definitions and saving provisions of secs 3 and 5.

(b)(iii) *Will proceedings of the Legislative Council and its committees, as a consequence, be exposed to the possibility of action being taken in the courts (such as injunctions or prerogative writs) by witnesses called before the Legislative Council or its committees?*

Yes.

(b)(iv) *Will investigations by the Legislative Council Standing Committee on Procedure and Privileges into the unauthorised disclosure of confidential material by Members of Parliament be restricted by these provisions?*

Yes.

8

(c) *Will the Government's proposed amendments to the Bill on Supplementary Notice Paper No 1, if passed, better achieve the Government's objective of applying cl 5 (secs 20G-20M) of the Bill to the Legislative Council and its committees?*

Yes.

(d) *Would the Government's proposed amendments, if passed, change any of your responses to questions (b)(i)-(iv) above?*

No.

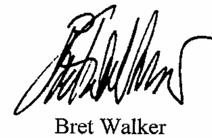
16 In summary, the proposed regulation of the Legislative Council's powers to compel journalists to reveal their sources by means of the provisions proposed by the Bill has the following features. A power to compel would still be available. Circumstances relevant to its exercise would be expressly stipulated. That regulation of power would be imposed by provisions applying – apparently in the same way – to other proceedings outside Parliament. No recognition would be given by this regulation of power to the issue of parliamentary privilege (or power). No express words would distinguish the susceptibility of the Legislative Council to judicial review from the susceptibility of all those other proceedings outside Parliament. No express words would deal with the Article 9 problem raised by that common treatment of parliamentary proceedings with all other proceedings.

17 The exactly same proposed regulation of parliamentary power to compel journalists to reveal their sources could be achieved without the difficulties or radical constitutional shift discussed above. That is, the same wording as appears in secs 20G-20M – adapted so as to apply only to the Council and its committees – could be promulgated if the Legislative Council saw fit, as part of its Standing Orders. In that fashion, the same balancing approach would be required by the Legislative Council for its own proceedings as Parliament had enacted for inquiries outside Parliament. Importantly, there would be no viable suggestion that challenges in court could be made to the Legislative Council's observance (or not) of its own Standing Orders.

FIFTH FLOOR,

ST JAMES' HALL.

18th November 2011



Bret Walker

APPENDIX 8

OUTLINE OF FURTHER ADVICE SOUGHT FROM MR BRET WALKER SC

Further Advice Requested from Bret Walker SC

In noting your opinion (of 18 November 2011) that the Bill in its current form will qualify or regulate parliamentary privilege, the question arises as to the best means to address this matter in the Bill, if the House so desires. The adoption of Standing Orders will not of itself ameliorate the current effect of the Bill. Further to the obvious recommendation that the Government's proposed amendments are not adopted, an option (**option 1.1**) is to propose an amendment to the Bill that would prescribe that the sections of the Bill relating to the protection of identity of journalists' informants do not apply to the operations of the Parliament.

A further option (**option 1.2**) is to also propose that this amendment include a provision that "the Houses shall adopt Standing Orders that accord with the provisions of s20G to 20M inclusive of the Act [full title]" or wording of a similar effect. Proponents of such an amendment may argue that this would indicate the Parliament's intent to adopt the policy of this section of the Bill in relation to parliamentary proceedings, albeit in the Standing Orders of the Houses.

Without specifically seeking your drafting assistance in regards to these options above, I would appreciate your further advice as to the effect of each option.

In regards to option 1.1, would you consider that to be sufficient to counter the adverse impact of the current Bill upon parliamentary privilege? Would you recommend a different, superior course of action to achieve the same outcome?

In regards to option 1.2, would the inclusion of such an amendment give rise to further potential parliamentary privilege issues, such as possible judicial review as to the adequacy of the Standing Orders or similar?

Nigel Lake
Deputy Clerk
22 November 2011

APPENDIX 9

FURTHER LEGAL ADVICE RECEIVED BY THE PROCEDURE AND PRIVILEGES COMMITTEE FROM MR BRET WALKER SC, DATED 25 NOVEMBER 2011

IMPLICATIONS FOR PARLIAMENTARY PROCEEDINGS BY THE *EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011*

SUPPLEMENTARY OPINION

I am asked to supplement the Opinion I gave on 18th November 2011 to address issues raised with me by the Deputy Clerk's letter dated 22nd November 2011. The topic is alternative possibilities to leave the protection of journalists' sources to Standing Orders.

2 The option 1.1 raised with me is an amendment to the Bill expressly providing that the relevant provisions not apply "to the operations of the Parliament". In my opinion, for the reasons that follow, this is by far the superior course, from the point of view of those concerned to protect the proceedings of the Houses of Parliament from inappropriate judicial supervision.

3 At the risk of pedantry, it is the proceedings of each of the two Houses of Parliament that are in question – we are not concerned with the Governor as the other component of Parliament. The text and intent of any amendment to the Bill should make this clear.

4 I do consider option 1.1 to be sufficient to counter the adverse impact of the current Bill upon parliamentary privilege. In terms, it would remove entirely the threat in question.

5 Because of this character of option 1.1 there is no better course of action in order to serve the end of parliamentary proceedings being free of inappropriate judicial supervision.

6 By contrast, I think the further option 1.2 is not a good idea, from the same point of view. An obligation on the Houses to adopt Standing Orders with a specified effect at the very least raises the question whether there is a justiciable issue as to a supposed failure of one or other or both of the Houses to do so. That question raises, in turn, the central issue whether the courts of law would decide for themselves whether Standing Orders adopted by one or other of the Houses answer the description required by the provisions envisaged by option 1.2.

7 There is no need for option 1.2, in order to "indicate the Parliament's [scil the Houses'] intent to adopt the policy of this section of the Bill in relation to parliamentary proceedings". It suffices for the Houses actually to do so, which may precede rather than follow a vote on the Bill.

8 As raised with me in the Deputy Clerk's letter the obvious difficulty, from a parliamentary point of view, of option 1.2 is the "possible judicial review as to the adequacy of the Standing Orders". In my experience, this would be a unique provision, virtually inviting the courts to consider whether they may examine the merits of a chamber's determination, and if so whether the judge or judges agree with

3

it. This is precisely the state of affairs which, in my respectful opinion, parliamentarians should shy away from.

FIFTH FLOOR,

ST JAMES' HALL.

25th November 2011

Bret Walker