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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*

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[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

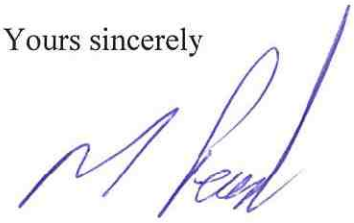
2. Parliament cannot be assumed to have varied or abrogated its privileges by mere implication of statute. It follows then, that the broad definitions of the terms "*legal proceeding or proceeding*", "*inquiry*" and "*person acting judicially*" contained within the *Evidence Act 1906* must be construed 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



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7 November 2011

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Dear Ms Ellery

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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

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