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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

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