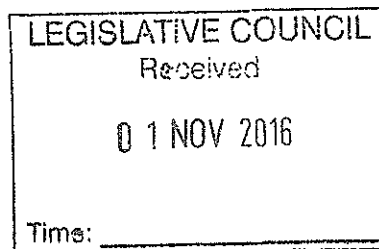




Hon Peter Collier MLC
Minister for Education; Aboriginal Affairs; Electoral Affairs
Leader of the Government in the Legislative Council

Our Ref: 34-68936

Mr Nigel Pratt
Clerk of the Legislative Council
Parliament House
GPO Box A11
PERTH WA 6000



Dear Mr Pratt

As you aware, concerns were raised in the Legislative Assembly on 18 October 2016 regarding the provisions of the *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* (Bill).

The Department of Education has advised that it will not receive any additional funds from the consolidated account arising from the passing of the Bill.

I can confirm that the Bill will not create new costs against the consolidated fund nor create a potential or contingent liability. Funding currently allocated to the Country High School Hostels Authority from the consolidated account will be transferred to the Department of Education on the passing of the Bill.

I hope that this information clarifies this matter.

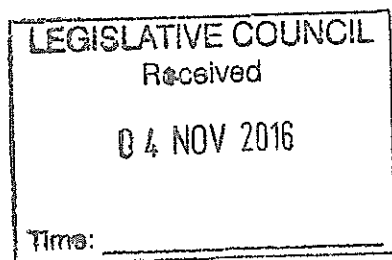
Kind regards

Hon Peter Collier MLC
MINISTER FOR EDUCATION

28 OCT 2016

GREG MCINTYRE, S.C.

BARRISTER



JOHN TOOHEY
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Mr N Pratt
Clerk of the Legislative Council and Clerk of the Parliaments
Legislative Council
Parliament House
Perth WA 6000

MEMORANDUM OF ADVICE

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Introduction

I have been asked to provide an opinion regarding the status of the above Legislative Council Bill with regard to section 46(i) of the *Constitution Acts Amendment Act 1899*.

The Legislative Council seeks my opinion on the following questions:

- (a) Is the *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* a Bill "appropriating revenue or moneys" for the purposes of section 46(1) of the *Constitution Acts Amendment Act 1899*?
- (b) Is there any constitutional or other legal impediment that would prevent the *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* originating in the Legislative Council?

The Bill originated in the Legislative Council, having been introduced and first read in the Legislative Council, on motion of the Minister for Education. It passed through the Council and was delivered by a message to the Legislative Assembly for concurrence.

However, the Legislative Council subsequently received Message No 183 from Hon Michael Sutherland MLA, Speaker of the Legislative Assembly advising that he had ruled the Bill "out of order as it contains a clear appropriation provision contrary to section 46(1) of the *Constitution Acts Amendment Act 1899*".

LEVEL 3, COUNCIL HOUSE, 27-29 ST GEORGES TCE
PERTH, WESTERN AUSTRALIA 6050

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

The Speaker had, on the same day, ruled that "the bill appropriates revenue or moneys and, in accordance with section 46 of the *Constitution Acts Amendment Act 1899*, the bill can only originate in the Legislative Assembly, not the Legislative Council." He reasoned that –

It is the longstanding practice of this house that if a bill has the effect of creating new costs against the consolidated revenue or creates a potential or contingent liability for those costs, it is considered to be a bill appropriating revenue or moneys. The house does not require there to be specific words in the bill appropriating revenue before classifying a bill as one that appropriates revenue or moneys.

Turning to the bill, it empowers the Minister for Education to establish residential colleges.... Given the large cost of acquiring, improving and developing student residential colleges, the bill will have significant financial implications for the state.

Constitutional constraints

Western Australia's constitution was first embodied in the *Western Australian Constitution Act 1889* - based on Imperial legislation enacted in the House of Commons in London – and consists of those parts of the original Act which have not been repealed and all the subsequent amendments, most of which are embodied in the *Constitution Acts Amendment Act 1899*. It relevantly provides as follows:

CONSTITUTION ACT 1889

64. All duties and revenues to form Consolidated Account

All taxes, imposts, rates, and duties, and all territorial, casual, and other revenues of the Crown (including royalties) from whatever source arising within the Colony, over which the Legislature has power of appropriation, shall form one Consolidated Account together with all other moneys lawfully credited to that Account, and that Account shall be appropriated to the Public Service of the Colony in the manner and subject to the charges hereinafter mentioned.

68. No part of public revenue to be issued except on warrants from Governor

No part of the public revenue of the Colony arising from any of the sources aforesaid shall be issued except in pursuance of warrants under the hand of the Governor directed to the Treasurer.

72. Consolidated Account to be appropriated by Act of the Legislature: ...

After and subject to the charges hereinbefore mentioned, all the Consolidated Account shall be appropriated to such purposes as any Act of the Legislature shall prescribe...

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

CONSTITUTION ACTS AMENDMENT ACT 1899

46. Powers of the 2 Houses in respect of legislation

- (1) *Bills appropriating revenue or moneys, or imposing taxation, shall not originate in the Legislative Council; but a Bill shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand of payment or appropriation of fees for licences, or fees for registration or other services under the Bill.*

Those provisions make clear that an appropriation of money from the Consolidated Account cannot be made except by a prescription of an Act of the Legislature. They are consistent with *Bill of Rights 1688* (UK), Clause 4, which states –

That levying money for or to the use of the Crown by prerogative without grant of the Parliament for longer time or in other manner than the same is or shall be granted is illegal.

Meaning of “appropriating”

“Appropriate” means to devote (money or assets) to a special purpose (Oxford Living Dictionary); to set apart; to assign to a special purpose; to assign or attribute specially or exclusively to; to make, or select as, appropriate to (Shorter Oxford English Dictionary).

An **appropriation bill** or running bill or supply bill is a legislative motion (bill) that authorizes the government to spend money. It is a bill that sets money aside for specific spending. In most democracies, approval of the legislature is necessary for the government to spend money.¹ As Justices Isaacs and Rich said in *Commonwealth v Colonial Ammunition Company Limited*²–

An Appropriation Act has a twofold purpose. It has a negative as well as a positive effect. Not only does it authorise the Crown to withdraw money from the Treasury, “it restrict[s] the expenditure to the particular purpose”.

Latham CJ in *Attorney-General (Vic) ex rel Dale v Commonwealth (Pharmaceutical Benefits Case)*³ made it clear that a statute does not operate as an Appropriation Act unless it defines the purpose for which the money can be spent, saying:

¹ https://en.wikipedia.org/wiki/Appropriation_bill

² [1924] HCA 5; (1924) 34 CLR 198 at 224; quoted by Hon Barry House MLC, President of the Legislative Council (*Hansard*, Legislative Council, 30 June 2016 p4364).

³ (1945) CLR 237 at 253.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

... there can be no appropriations in blank, appropriations for no designated purpose, merely authorising expenditure with no reference to purpose. An Act which merely provided that a minister or some other person could spend a sum of money, no purpose of the expenditure being stated, would not be a valid Appropriation Act.

Commonwealth of Australia

The *Commonwealth Constitution* provides, at section 81, that:

All revenues or monies raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed under this Constitution;

And, at section 83, that:

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

These sections of the *Commonwealth Constitution* do not themselves confer a spending power, but make it clear that a law must be identified as appropriating money before it may be withdrawn from the Treasury.⁴

An example of such an appropriation by law is in the *Appropriation Bill (No. 1) 2016-2017* (Cth), which, in its primary operative provisions, provides in section 6, headed “Summary of appropriations”—“The total of the items specified in Schedule 1 is \$49,418,953,000”; and in section 12: “The Consolidated Revenue Fund is appropriated as necessary for the purposes of this Act”.

United States of America

In the United States, there are two types of appropriations. When the US Congress sets up particular programs, the legislation may itself set up the necessary appropriation mechanism, such as for social security, where payment of benefits is “mandatory”. A mandatory programme does not need an additional authorisation in order for spending under the program to occur. An authorization bill can create programs and make known the US Congress’ intended level of spending for programs that also require an appropriation.⁵ What distinguishes a mandatory program from a discretionary program in the US is that after Congress enacts a law creating a mandatory program, the program is permitted to spend funds until the program expires based on

⁴ See French CJ, Hayne, Keifel, Bell and Keane J in *Williams v Commonwealth of Australia* (No 2) [2014] HCA 23 at [20].

⁵ Oleszek, Walter J. (2008). *Congressional procedures and the policy process* (7. ed., [NACHDR]. ed.). Washington, D.C.: CQ Press. p 42. ISBN 9780872893030.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

a provision in law, or until a subsequent law either terminates the program or reauthorizes it. "Discretionary" programs typically require annual appropriations legislation.⁶

An **appropriations bill** in the US is a bill that appropriates (gives to, sets aside for) money to specific federal government departments, agencies, and programs. The money provides funding for operations, personnel, equipment, and activities.⁷ Regular appropriations bills are passed annually, with the funding they provide covering one fiscal year. The *fiscal year* is the accounting period of the United States government, which runs from October 1 to September 30 of the following year.⁸

In the United States an **authorization bill** authorizes the activities of the various agencies and programs that are part of the federal government. Authorising such programmes is one of the powers of the United States Congress. Authorizations give those things the legal power to operate and exist.⁹ Authorisation bills may originate in either chamber of the US Congress, unlike appropriations bills, which must originate in the House.¹⁰ In that sense the US Congress operates in a similar way to the Australian and Western Australian Parliaments.

Western Australia

In Western Australia the principle provision which guides appropriations is as follows:

Financial Management Act 2006

33. Consolidated Account, payments from to be under Governor's warrant etc.

A payment that is to be charged to the Consolidated Account may be made —

- (a) only in accordance with a warrant under the hand of the Governor; and*
- (b) only if—*
 - (i) the payment may be made under an appropriation made by an Act; or*
 - (ii) the payment is authorised to be charged to the Consolidated Account by or under an Act.*

⁶ https://en.wikipedia.org/wiki/Appropriation_bill

⁷ Tollestrup, Jessica (23 February 2012). "The Congressional Appropriations Process: An Introduction". Congressional Research Service. Retrieved 23 January 2014.

⁸ Heniff Jr., Bill (26 November 2012). "Basic Federal Budgeting Terminology" (PDF). Congressional Research Service. Retrieved 9 January 2014.

⁹ Oleszek, Walter J. (2008). *Congressional procedures and the policy process* (7. ed., [Nachdr.] ed.). Washington, D.C.: CQ Press. p. 42. ISBN 9780872893030.

¹⁰ "Forms of Congressional Action". *How Our Laws Are Made*. Library of Congress. Retrieved 12 February 2014.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

The *Financial Management Act 2006*, section 3, provides a statutory definition of "Appropriation Act" as follows:

Appropriation Act means an Act appropriating the Consolidated Account for a financial year for the recurrent services and other purposes for the year, or for the capital purposes for the year, as expressed in the Act;

The Western Australian Parliament has made abundantly clear what it means when it uses the term 'appropriation', both in the above statutory definition and in its use in the *Financial Management Act 2006* and in the annual Appropriation Bills passed by the Parliament. An example of the operative provisions, from the Appropriation Bills for the 2015-2016 financial year, being as follows:

Appropriation (Capital 2015-16) Bill 2015

4. Appropriation for capital purposes

The sum of \$1 934 909 000 granted by section 3 as supply is appropriated from the Consolidated Account for the capital purposes expressed in Schedule 1 and detailed in the Agency Information in Support of the Estimates for the year.

Appropriation (Recurrent 2015-16) Bill 2015

3. Issue and application of moneys

(1) The sum of \$19 143 613 000 is to be issued and may be applied out of the Consolidated Account as supply granted for the year beginning on 1 July 2015 and ending on 30 June 2016.

(2) The sum referred to in subsection (1) is additional to supply granted by the Appropriation (Capital 2015-16) Act 2015.

4. Appropriation for recurrent services and purposes

The sum of \$19 143 613 000 granted by section 3 as supply is appropriated from the Consolidated Account for the recurrent services and purposes expressed in Schedule 1 and detailed in the Agency Information in Support of the Estimates for the year.

An example of appropriation provisions in an Appropriation Act relating to a limited subject matter can be found in the *Salaries and Allowances Act 1975 (WA)*, as follows:

6. Other inquiries into and determinations of remuneration

(4) Any remuneration which is payable pursuant to a determination shall, notwithstanding the provisions of any other law of the State, be paid in accordance with the determination and charged to the Consolidated Account, which is appropriated accordingly, or, where the law creating an office to which a determination applies provides for the remuneration of the holder of the office to be paid from some other fund or source, out of that fund or source.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

64A. Redundancy benefits for members of Parliament

- (4) *Any amount payable in accordance with a determination under this section shall be charged to the Consolidated Account which is appropriated accordingly.*

6B. Determinations relating to entitlements of former Premiers, Ministers and members of Parliament

- (1) *The Tribunal shall from time to time, as it sees fit, inquire into and determine the entitlements and benefits to be paid or provided to former Premiers of the State, former Ministers of the Crown and former members of the Legislative Assembly or Legislative Council of the State.*
- (2) *Section 6(2) and (3) apply in relation to a determination under this section.*
- (3) *Any amount that is payable in accordance with a determination under this section shall be charged to the Consolidated Account which is appropriated accordingly.*

...

11A. Arrangements for payment of travelling expenses by Treasurer

- (1) *The Treasurer of the State may from time to time make arrangements under which, in such circumstances, and subject to such conditions, restrictions and limitations, as the Treasurer determines, —*
- (a) *the fares of a member of Parliament for travel in this State or elsewhere;*
- (b) *the fares of a member of the family of a member of Parliament for travel in this State or elsewhere associated with travel by that member of Parliament; and*
- (c) *accommodation or other expenses incurred by a member of Parliament in the course of or in connection with travel by him in this State or elsewhere,*
- shall be payable by the Treasurer.*
- (2) *Arrangements made under subsection (1)(c) shall not authorise the payment of expenses in respect of which an allowance is payable or reimbursement may be obtained pursuant to a determination made under Part I.*
- (3) *Any moneys payable under arrangements made under subsection (1) —*
- (a) *may be paid directly or by way of reimbursement or, in the case of expenses referred to in paragraph (c) of that subsection, by way of an allowance in respect of those expenses; and*
- (b) *shall be charged to the Consolidated Account, which is appropriated accordingly.*

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

The use of the terms “appropriation”, “appropriating” and “appropriated” in the *Constitution Acts Amendment Act 1899* and the subsequent Western Australian legislative provisions referred to above, in the absence of any reason to conclude otherwise, must be understood to have a similar meaning and been intended by the Parliament to have a similar meaning, being one which is consistent with the ordinary dictionary meaning and the meaning applied in other similar legislative regimes, such as the Commonwealth of Australia and the United States of America.

Distractions from the meaning of “appropriating”

To describe a Bill as a “money bill”¹¹ is a general description which tends to obscure the real issue, when seeking to determine whether a Bill is one “appropriating revenue or moneys”, for the purpose of bringing it within section 46 of the *Constitution Acts Amendment Act 1899*.

Further, it is not helpful to apply a test of whether “the Bill has the effect of creating new and definable costs upon the Consolidated Revenue [Account] or creating the potential [or contingent] liability for such cost” (emphasis added).¹² A legislative provision which suggests the possibility of costs does not comprise an “appropriation” of money, in accordance with any ordinary definition of that word or understanding of it applied in any other legislature.

The approach of the Legislative Assembly has taken the matter a step further removed even than that from any ordinary understanding of the meaning of appropriation. Speaker Strickland in 1997 expressed an intention to maintain the approach of Speaker Barnett in a 1988 ruling that the *Children’s Court of Western Australia Bill 1988* was an appropriation bill when “there may be arguments raised to the effect that the Bill does not appropriate any additional money” and, as he said “we cannot, at this juncture, weigh up the potential alteration to expenditure brought about by repealing one system of court structure and replacing it with another.”¹³

In other words, successive Speakers have proceeded on a basis that a meaning may be given to words in a statute based on an effect about which it is not possible to reach a conclusion. That is not a basis which can be supported in a regime which purports to abide by the Rule of Law.

To be contrasted with that is the view of Speaker Reibeling in 2005, considering the application of section 46(3), which prohibits the Legislative Council from amending any Bill “so as to increase any charge or burden upon the people”, to the *One Vote One Value Bill 2005*. Speaker Reibling considered the hypothetical possibility that an increase in Council members may in the future result in an increase in allowances pursuant to a determination of the Salaries and Allowances

¹¹ See Speaker Strickland, 9 April 1997, quoted by Mr P D Omodei, *Hansard*, Assembly 17 May 2005, p 1602d-1611a; and Speaker Strickland, 19 August 1997, *Hansard*, Assembly, p 4911.

¹² Bruce Okely, 1989 *Guide to Parliamentary Procedure*; and, Speaker Strickland, 9 April 1997; quoted by Speaker Strickland, 19 August 1997, *Hansard* Assembly, p 4911.

¹³ Speaker Strickland, 19 August 1997, *Hansard* Assembly, p 4912.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Tribunal. However, he concluded that it “is not possible to know what the Tribunal will do in four years... [T]he position is too vague to say that the effect of this amendment is to impose an additional charge or burden upon the people”.

In any event, a Bill which merely authorises discretionary activity does not have the effect of creating costs. A liability to pay costs under the *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* is only created if and when the Minister chooses to exercise the power to acquire property, or enter into a contract or business arrangement. The Minister does not have authority, by virtue of the Bill, to bind the State to any specific sum of financial liability to be expended from the Consolidated Revenue or to obtain funds from the Consolidated Account.

The operation of the School Boarding Facilities Legislation Amendment and Repeal Bill 2015

The *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* does not appropriate any money or revenue. It gives the Minister a **discretionary power** to establish residential colleges.¹⁴ It also empowers him to –

- (a) acquire property;
- (b) accept a gift;
- (c) participate in a business arrangement and acquire an interest in a business arrangement;
or
- (d) enter into a contract.

in exercising that discretionary power.¹⁵

Clause 11 of the Bill, proposed new section 213F of the principal Act further provides that, before the Minister exercises any power to participate in a business arrangement, he must notify the Treasurer and seek the Treasurer’s approval, unless the arrangement is of a kind which the Treasurer has determined in writing need not be notified. This provision affirms that the Minister’s discretion is not an unfettered discretion to exercise the powers vested in him by the Act.

The Bill does not, in any of its terms, appropriate any money to enable the Minister to exercise the powers which the Bill vests in him. In fact, it expressly acknowledges in its terms that the appropriation of funds is a separate step which must be undertaken by the Parliament. Clause 11 of the Bill, proposed new section 213T(1)(a) of the principal Act refers to “funds appropriated by Parliament” which are to be credited to the General Purposes Fund. If this Bill were to pass into law, no funds would be appropriated by the Parliament by its passage. No revenue or money is identified in the Bill and no authority to charge any amount to the Consolidated Account.

¹⁴ Clause 11 of the Bill, proposed new section 213B of the principal Act.

¹⁵ See clause 11 of the Bill, proposed new section 213E of the principal Act.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

If nothing more was to happen than the passage of this Bill, then the Minister would have a legal power to establish residential colleges, but he would be bereft of any practical capacity to exercise that power with the use of any government funds or revenue.

The Bill does, however, allow for the possibility that the Minister could exercise the power to establish residential colleges without an appropriation of State revenue or money. Division 5 provides for the establishment of a General Purposes Fund for each residential college.¹⁶ The Fund may comprise funds from private sources.¹⁷

The Bill also provides that the provisions relating to the General Purposes Fund are not subject to the *Financial Management Act 2006* (WA), sections 8 and 34, which would otherwise have required that the money received be deposited to the Consolidated Account or a bank account in accordance with the Treasurer's instructions.¹⁸ The fact of this possibility of establishing residential colleges with private, rather than State, funds adds weight to the conclusion that the Bill ought not be interpreted as an appropriation provision.

The Bill does not **authorise** expenditure. It authorises an exercise of discretionary power to establish residential colleges. The Minister may never choose to exercise that power. One reason why the power may not be exercised, is that the Parliament may never appropriate money to the purpose for which the Minister is authorised to exercise the power.

The Bill does not have the effect¹⁹ of appropriating any money or revenue to a particular purpose. If the Minister exercises the discretion to exercise the power to establish a residential college, then a means of doing so must be identified. That could possibly be done by the identification of a property or funds for the purchase, or building, of a property from a private source. If public funding is identified as the means of establishing the college, then the Minister must take the next step of seeking funds from Consolidated Revenue. The Bill does not provide him with those funds. The Minister, as a member of the Executive Government must obtain the consent to expend such funds, by the enactment of an Appropriation Bill.

If, contrary to the above discussion, the view of Speaker Sutherland was correct, that the Bill appropriates money, then the Bill would operate to permit an appropriation by the Minister from the Consolidated Revenue Fund of such amount as the Minister might choose, at any time when the Minister may choose to exercise the discretion to expend money to establish a residential college. That cannot be the correct interpretation of valid legislation, because the Western Australian constitution, like the *Commonwealth Constitution* (and others in Western democracies), reserves the exercise of the power of appropriation to the Parliament: *Constitution Act 1889*, section 72; *Commonwealth Constitution*, sections 81 and 83.

¹⁶ Clause 11 of the Bill, proposed new sections 213Q-213U of the principal Act.

¹⁷ Clause 11 of the Bill, proposed new sections 213R and 213T of the principal Act.

¹⁸ Clause 11 of the Bill, proposed new section 213V of the principal Act.

¹⁹ To use the term used by Bruce Okely, 1989 *Guide to Parliamentary Procedure* and Speaker Strickland, 9 April 1997; quoted by Speaker Strickland, 19 August 1997, *Hansard Assembly*, 4911.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

As Mason CJ, Brennan, Deane, Dawson and Toohey JJ observed:

It is by ss 81 and 83 that our Constitution assures to the people the effective control of the public purse.

Legislation is not properly to be interpreted as permitting an appropriation where it effectively provides a Minister, as a member of the Executive Government, with a 'blank cheque' to withdraw funds from the Consolidated Revenue Account such sum as he may choose, at such time as he may choose.

Justiciability

It is noted that the interpretation and application of section 46 of the *Constitution Act Amendments Act 1899* is traditionally regarded as non-justiciable.²⁰ This was noted by the President House in a ruling made in the Legislative Council on 30 June 2016. The authority he relied upon for that ruling was dicta of the High Court in *Western Australia v Commonwealth*.²¹ The Court, in that case, was addressing paragraph of s.53 of the *Commonwealth Constitution*, which reads as follows:

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Court said:

[140.] Section 53 is a procedural provision governing the intra-mural activities of the Parliament. The traditional view is that this Court does not interfere in those activities (s57 apart; [references removed].) That view was stated by Mason CJ, Deane, Toohey and Gaudron JJ in Northern Suburbs General Cemetery Reserve Trust v. The Commonwealth [references removed] in reference to s.54 of the Constitution.²²

'a failure to comply with the dictates of a procedural provision, such as s.54, dealing with a 'bill' or a 'proposed law' is not contemporaneously justiciable and does not give rise to invalidity of the resulting Act when it has been passed by the two Houses of the Parliament and has received the royal assent.'

The traditional view accords both with the text of s.53, which speaks of 'proposed laws' rather than 'laws' [references removed] and with the intention manifested in the Convention Debates [reference removed]

²⁰ See justiciability of Cabinet decisions: Editors --- "Justiciability of Cabinet decisions" [1987] AdminRw 31; (1987) 14 Admin Review 82; and justiciability of administrative decisions: Finn, Chris --- "The Justiciability of Administrative Decisions: A Redundant Concept?" [2002] FedLawRw 9; (2002) 30(2) Federal Law Review 239

²¹ [1995] HCA 47; (1995) 183 CLR 373 at [139]-[140].

²² It provides that "The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation".

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

The present situation is that there was no Act passed following the Speaker's ruling upon which a Court can form a view as to its validity. There is, therefore, no justiciable dispute as to the Bill 'proposed' to be enacted into law. The authority of *Western Australia v The Commonwealth*²³ and the cases cited in that case confirm that.

In considering the issue of justiciability of rulings related to matters coming within section 46 of the *Constitution Acts Amendment Act 1899*, sub-section 46(9) is frequently raised. It provides that -

Any failure to observe any provision of this section shall not be taken to affect the validity of any Act whether enacted before or after the coming into operation of the Constitution Acts Amendment Act 1977

It follows that when a bill is enacted it cannot be later challenged in a Court on the basis of a failure to comply with a provision of that section.²⁴ Relevantly, in this instance, there are two competing sub-sections in section 46:

- (1) *Bills appropriating revenue or moneys, or imposing taxation, shall not originate in the Legislative Council;*

and

- (5) *Except as provided in this section, the Legislative Council shall have equal power with the Legislative Assembly in respect of all Bills.*

In this instance, there has been no bill enacted, because of the impact of the Speaker's ruling. Sub-section 46(9), therefore, has no application.

The issue in this instance is whether there is a legal controversy which a Court has jurisdiction to resolve. There is clearly a divergence of views between successive presiding officers of the Houses of Parliament as to the legal meaning and application of a statutory provision: section 46(1) of the *Constitution Acts Amendment Act 1899*.

There is also a divergence of views between successive Speakers of the Legislative Assembly (with the exception of the ruling by Speaker Reibling on 17 May 2005) and Government Ministers and their legal advisers as to the extent of the capacity of the Legislative Council to pass Bills first introduced into that House. That controversy relates not to a **proposed** Bill, but an existing Constitutional provision of the State.

The first question is whether there is a party with standing to seek relief in relation to a dispute which a Court has jurisdiction to determine and then whether there is a form of relief which the Court can grant.

²³ [1995] HCA 47; (1995) 183 CLR 373.

²⁴ Referred to by Mr M J Birney, *Hansard*, Assembly, 17 May 2005, extract, p1602d-1611a.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Standing

An obvious party who has a special interest in whether the Legislative Council has power to pass a bill introduced in that House is the Minister for Education, who introduced the Bill upon which the Speaker has ruled and had an interest in its passage through both Houses of Parliament. Alternatively, the Attorney-General, representing the Government which sought to introduce this Bill and other bills the subject of previous similar rulings has an interest. Either Minister has a sufficient special interest in the litigation beyond that of the general public, which readily meets the test for standing to commence proceedings in *Australian Conservation Foundation Inc v Commonwealth*²⁵ and *Onus v Alcoa of Australia Ltd.*²⁶

It is also the case that any Member of the Legislative Council, including the President or a Member sponsoring a Bill, has a sufficient special interest in the authority of the Legislative Council to pass legislation originating in that House to satisfy the common law test for standing to commence proceedings.

Declaratory relief

An appropriate form of proceeding to before a Court of law directed to the issue of statutory interpretation in dispute would be an application for a declaration. Sir Anthony Mason²⁷ has said that:

[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.

Chief Justice French has written:²⁸

The utility of the declaration that makes it worth talking about derives from its flexibility and procedural simplicity. Sarah Worthington made the point explicitly in her monograph Equity:

'Declarations can be made that a person is a member of a club; that her purported expulsion is invalid; that she is the owner of land; that the terms in a will or a trust have a particular meaning; that a contract exists or has been breached or terminated; that an agreement is binding or illegal; or that a form of notice is reasonable. The list is endless. Indeed a declaration may prove appropriate in virtually any situation imaginable.'

²⁵ (1980) 28 ALR 257; 146 CLR 493.

²⁶ [1981] HCA 50; (1981) 36 ALR 425; 149 CLR 27.

²⁷ Writing extra-judicially, quoted in *Bateman's Bay Local Aboriginal Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 256 [24]-[25] per Gaudron, Gummow and Kirby JJ (footnotes omitted). See also *McHugh J* at 280 [92]-[94] ('Bateman's Bay').

²⁸ R French, "Declarations: Homer Simpson's Remedy – Is there anything they cannot do?" in *Dharmananda & Papamatheos, Perspectives on Declaratory Relief* (2009), 28-29.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Well may we ask rhetorically of declarations as Homer Simpson asked of donuts—‘is there anything they can’t do?’

The High Court in *Edwards v Santos Ltd*²⁹ suggested that there should be no narrow conception of the power to grant declaratory relief.³⁰

Questions which run parallel to the issue of whether declaratory relief is obtainable are questions of whether the discretion should be exercised in the absence of a contradictor and what is required to constitute a party a contradictor to the relief sought.

Gibbs J (as his Honour then was) in *Forster v Jododex Australia Pty Ltd*,³¹ with respect to declaratory relief allowed for under section 10 of the *Equity Act 1901* (NSW), said³²:

*It is neither possible nor desirable to fetter the broad discretion given by s.10 by laying down rules as to the manner of its exercise. It does, however, seem to me that the Scottish rules summarized by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* should in general be satisfied before the discretion is exercised in favour of making a declaration:*

“The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.”

Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*³³ explained that a proper contradictor was “some one presently existing who has a true interest to oppose the declaration sought”.

Dawson J, sitting in the High Court’s original jurisdiction, in *Oil Basins Ltd v Commonwealth of Australia*³⁴ stated:

[12] ... it is plain that the plaintiff has a real interest in obtaining a declaration ...

[13] *The question raised by the plaintiff is neither abstract nor hypothetical and the answer to that question will clearly produce consequences for the parties. In those circumstances I would, for my own part, doubt whether the failure on the part of the Commissioner to indicate whether or not he disputes the plaintiff’s claim could preclude the plaintiff from seeking against him the relief which it does. The most that could be*

²⁹ [2011] HCA 8; (2011) 242 CLR 421.

³⁰ *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56 at [13].

³¹ [1972] HCA 61; (1972) 127 CLR 421 at 437-438; quoted in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56 at [12].

³² Footnote references omitted.

³³ [1921] 2 AC 438; quoted in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56 at [14].

³⁴ [1993] HCA 60 [12], [13] and [14]; (1993) 178 CLR 643 at 648-650 (underlining added).

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

urged is that there is no proper contradictor, but I doubt whether that is so when the Commissioner's participation in the action is likely to force him to abandon his present stand of neutrality. Even if he were to maintain that stand, I doubt whether that would prevent him from being a proper contradictor. He clearly has a true interest in the plaintiff's claim and, if he were to choose not to oppose it and to abide by any order which the Court might make, that might perhaps amount to no more than the performance of his role as a contradictor in a particular manner.

[14] But there is no need in this case to reach any conclusion whether the Commissioner is a proper contradictor because the producers obviously have a true interest in opposing the declaration sought. There is no requirement that all defendants in an action claiming a declaration must oppose the plaintiff. In *Forster v Jododex Australia Pty Ltd*, for example, the mining warden submitted to the order of the court, but the court made a declaration binding upon him where another party opposed the declaration being made.

French J (as his Honour then was) in *IMF (Australia) Ltd v Sons Of Gwalia Ltd (Administrator Appointed)*³⁵ was of a similar view, saying:³⁶

The requirement of a proper contradictor in a declaratory context is not merely to ensure that the court will be provided with all materials but also that absent a contradictor there is no person to be bound by the relief sought: *Acis v Anderson* [1975] 1 NSWLR 212 at 215 per Hutley JA citing PW Young, *Declaratory Orders*, 1st ed, Butterworths, Sydney, 1975, p 210. A proper contradictor, for jurisdictional purposes, in my opinion cannot be confined to the class of party who comes to court ready to oppose the relief sought. There may be a case in which a party, whether a private person or body or a statutory regulator, expresses opposition to, and an intention to oppose, a proposed course of action by another party on the basis that it is in breach of some contractual or statutory prohibition. The party opposing the conduct may however decide for any one or more of a variety of reasons not to contest declaratory proceedings about the lawfulness of the proposed conduct. So the declaration may be made by consent or may be uncontested. This does not mean that the court lacks jurisdiction or power to grant the declaration in such a case. The proceedings will have resolved a pre-existing controversy. A more difficult question arises where a party with an interest in opposing a particular course of conduct refuses to say whether it will take any action in respect of that conduct. Such a party may be said to be one which, notwithstanding its silence, has an interest in opposing the proposed conduct.

In *Australian Competition and Consumer Commission v MSY Technology Pty Ltd*³⁷ Greenwood, Logan and Yates JJ said:³⁸

The correct position is as opined by Dawson J in Oil Basins and by French J in IMF (Australia) Ltd v Sons Of Gwalia in the passages quoted above. In this case, the MSY parties had an interest to oppose the declaratory

³⁵ [2004] FCA 1390; (2004) 211 ALR 231 (*IMF (Australia) Ltd v Sons Of Gwalia*).

³⁶ At [47]; quoted in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56 at [17] (underlining added).

³⁷ [2012] FCAFC 56.

³⁸ At [30].

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

relief sought. That was sufficient to make them a proper contradictor. There was no want of power to grant declaratory relief. Rather, the question was whether, in light of the events which had transpired, which relevantly included a lack of any continued opposition to the declaratory relief sought, that relief ought still to be granted as a matter of discretion. B.M.I. should be understood as a case where, because the question of the invalidity had become academic, that discretion had been exercised so as to refuse the declaratory relief sought. As the passage from their Honours' joint judgment reveals, that was an additional basis upon which Keely and Beaumont JJ refused the application for declaratory relief.

The question in this instance thus becomes who is a contradictor able to be joined to the application for declaratory relief. The obvious respondent party who has an interest in the matter is the Speaker of the Legislative Assembly, because it is his ruling which would be the subject matter of any hypothetical proceedings. An issue then arises as to whether Parliamentary privilege precludes the possibility of joining the Speaker as a competent party.

Parliamentary privilege

Section 36 of the *Constitution Act 1889* provides that it shall be lawful for the Parliament by an act to "... define the privileges, immunities and powers to be held, enjoyed and exercised by the Legislative Council and Legislative Assembly."

The Parliament has enacted the *Parliamentary Privileges Act 1891*, section 1 of which provides -

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.*

The principal parliamentary immunity is the immunity from civil or criminal action, and examination in legal proceedings, of members of the houses and of witnesses and others taking part in proceedings in Parliament. This immunity is known as the right of freedom of speech in Parliament, because it has the effect of ensuring that members, witnesses and others cannot be sued for defamation, contempt or a breach of statutory prohibition or prosecuted for anything they say or do in the course of parliamentary proceedings. This freedom of speech has always been regarded as essential to allow the houses to debate and inquire into matters without fear of interference.³⁹

Relevantly the 1689 UK *Bill of Rights* at Article 9 declares that:

³⁹ [http://www.apf.gov.au/About Parliament/Work of the Parliament/Parliament at Work/Parliamentary Privilege](http://www.apf.gov.au/About%20Parliament/Work%20of%20the%20Parliament/Parliament%20at%20Work/Parliamentary%20Privilege); [http://www.apf.gov.au/about parliament/house of representatives/powers practice and procedure/00 - infosheets/infosheet 5 - parliamentary privilege](http://www.apf.gov.au/about%20parliament/house%20of%20representatives/powers%20practice%20and%20procedure/00%20-%20infosheets/infosheet%205%20-%20parliamentary%20privilege)

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

The freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.

Parliamentary Privilege, in the United Kingdom, allows members of the House of Lords and House of Commons to speak freely during ordinary parliamentary proceedings without fear of legal action on the grounds of slander, contempt of court or breaching the Official Secrets Act.⁴⁰ It also means that members of Parliament cannot be arrested on civil matters for statements made or acts undertaken as an MP within the grounds of the Palace of Westminster, on the condition that such statements or acts occur as part of a *proceeding in Parliament*—for example, as a question to the Prime Minister in the House of Commons. This allows Members to raise questions or debate issues which could slander an individual, interfere with an ongoing court case or threaten to reveal state secrets.

Parliamentary privilege also provides that Members of Parliament may not be required to attend courts or tribunals as witnesses or be arrested or detained in civil matters on sitting days.⁴¹

Absolute Parliamentary privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament's sole jurisdiction or "**exclusive cognisance**".⁴² The 1999 report of the UK parliamentary Joint Committee on Parliamentary Privilege examined a number of rights under the umbrella of exclusive cognisance. They include the right to judge the lawfulness of its own proceedings; and the power of the House to determine, judge or depart from its own procedures.⁴³

Parliament enjoys sole jurisdiction—described as "exclusive cognizance"—over all matters subject to parliamentary privilege. As Sir William Blackstone noted in his *Commentaries on the Laws of England*, the maxim underlying the law and custom of Parliament is that "whatever matter

⁴⁰ <http://www.parliament.uk/commons/lib/research/briefings/snpc-04905.pdf>.

⁴¹ [http://www.apf.gov.au/About Parliament/Work of the Parliament/Parliament at Work/Parliamentary Privilege](http://www.apf.gov.au/About%20Parliament/Work%20of%20the%20Parliament/Parliament%20at%20Work/Parliamentary%20Privilege)

⁴² www.publications.parliament.uk/pa/lt201314/ltselect/ltprivi/30/3004.htm, Report of the Joint Committee on Parliamentary Privilege, UK Parliament (1999) para 229; and Leslie Gonye, Exclusive Cognisance – Selected Recent Developments in New South Wales A paper for the ASPPG Conference 'Parliament's Accountability to the People' Adelaide, August 2007, p 2
<http://www.asppg.org.au/conferences/adelaide2007/Gonye.pdf>

⁴³ Report of the Joint Committee on Parliamentary Privilege, UK Parliament (1999), para 229; Leslie Gonye, Exclusive Cognisance – Selected Recent Developments in New South Wales A paper for the ASPPG Conference 'Parliament's Accountability to the People' Adelaide, August 2007, p 2
<http://www.asppg.org.au/conferences/adelaide2007/Gonye.pdf>

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere".⁴⁴

Exclusive cognisance in certain circumstances may over-ride other generally accepted legal rights. It is, in effect, an exception to the general principle of the rule of law. This has been accepted by the courts since at least the case of *Bradlaugh v. Gosset*⁴⁵ in 1884, in which the court held that the decision of the House of Commons in resolving not to allow an elected Member, Charles Bradlaugh, to take the oath, and the actions of the Serjeant at Arms in preventing Bradlaugh from entering the House, were subject to the sole jurisdiction of the House—even though Bradlaugh was under a statutory obligation to take the oath in accordance with the Parliamentary Oaths Act 1866.⁴⁶

In his judgment, Mr Justice Stephen held that "the House of Commons is not subject to the control of Her Majesty's courts in its administration of that part of the statute law which has relation to its own internal proceedings".⁴⁷

In *Stockdale v. Hansard*⁴⁸ Lord Chief Justice, Lord Denham, while accepting in terms that "whatever be done within the walls of either [House] must pass without question in any other place", rejected the proposition that the House of Commons, in its guise as a court, had sole jurisdiction over the *extent* of its own privileges:

*Where the subject matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it.*⁴⁹

This approach was endorsed and re-stated by Lord Phillips of Worth Matravers in *R v. Chaytor*: "the extent of parliamentary privilege is ultimately a matter for the court".⁵⁰

The question in this case is whether a consequence of these privileges is that there cannot be any legal proceeding commenced seeking a declaration in relation to the legal meaning of the words "appropriating revenue or moneys" in section 46(1) of the *Constitution Acts Amendment*

⁴⁴ Sir William Blackstone, *Commentaries on the Laws of England* (1765), pages 58 to 59 ; <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3004.htm>

⁴⁵ (1884) 12 QBD 271.

⁴⁶ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 24th edition, ed. Sir Malcolm Jack KCB (hereafter *Erskine May*, 24th edition), page 291; <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3004.htm>

⁴⁷ As quoted in *Bradlaugh v. Gosset* (1884) 12 QBD 271 at 278.

⁴⁸ (1839) 9 Ad & E 1.

⁴⁹ *Stockdale v. Hansard* (1839) 9 Ad & E 1, pages 147 to 148.

⁵⁰ *R v. Chaytor and others* [2010] UKSC 52, paragraphs 15 and 16.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Act 1899 interpreted and applied in the Speaker's ruling, or joining him as a party to such a proceeding.

The privilege of exclusive cognisance would, arguably, not be interfered with provided that -

- (1) the direct question, about which a declaration is sought, is not the lawfulness of the proceedings of the Parliament or any House of the Parliament, but about the meaning of words in *appropriating revenue or moneys* in section 46(1) of the *Constitution Acts Amendment Act 1899*; and
- (2) the Court is not asked to make any declaration in relation to the lawfulness of any proceeding in either House of the Parliament.⁵¹

Further, while the privileges might be argued to make the Speaker, as a member of Parliament, immune from being **compelled** to participate in the proceedings and immune from any coercive order binding upon him, the privileges do not make him **incompetent** to participate in the proceedings, and a proceeding against him, in relation to an application for declaratory relief, is not coercive. The proceeding is arguably, therefore, not incompetent. The Speaker is arguably a competent contradictor to such an application. Following the test of who comprises a contradictor, discussed above, that is so, however he chooses to participate in, or respond to, the proceedings,

The immunity which attaches to the Speaker would make him immune from being obliged to comply with any order which sought to control his conduct in the course of Parliamentary proceedings, including any ruling he might have made in the past or may make in the future. However, a declaration (not accompanied by any application for injunctive relief) does not have the effect of binding any party to any conduct. It merely states the Court's conclusion as to the issue in dispute raised, and is arguably unaffected by any immunity which attaches to the Speaker as a Member of Parliament.

Rule of law

The Speaker, Hon Hugh Guthrie, in a 1970 paper presented to a conference of Presiding Officers and Clerks expressed the view that the determination of what is a "money bill" is a political question "steeped in political history and should be determined by Parliamentarians with a political approach and not by lawyers with a legal approach".⁵²

⁵¹ There may be a question, which it is not necessary to answer, as to whether the 'exclusive cognisance' privilege is limited to the procedures of each House separately; and does not extend to matters relating to the respective powers of the Houses in a bi-cameral legislature, which are governed by the constitution, established by statute.

⁵² Speaker Strickland, *Hansard*, Assembly, 19 August 1997 p 4911 referring to Guthrie, Hon H "Agenda Item 11. The Problem of the Money Bill in 1970" in proceedings of the *Third Conference of Presiding Officers and Clerks of the Parliaments of Australia, Papua and New Guinea, Nauru and Western Samoa*. Parliament House, Melbourne, 1-3 April 1970 (NSWGP October 1970) 99 at 104.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Apart from the difficulty of assigning any definitive meaning to the word “political” in this context and the Speaker’s use of the generic term “money bill”, that view seeks to side-step the fact that what is truly in question is the meaning to be given to the words “Bills appropriating revenue or money” in a statute enacted by the Parliament, which is a foundation document of the Constitution of the State.

If the Rule of Law is to be observed, provisions in a statute must be given a legal meaning, in accordance with ordinary rules of statutory interpretation. The Rule of Law implies that every citizen is subject to the law, including law makers themselves. If the Parliament (or any House of the Parliament or its presiding officer) is to abandon that approach, then it is abandoning the Rule of Law and substituting it with the “rule of men” (and women).⁵³

Dr Adam Tucker, Lecturer in Law at the University of Manchester, has asserted that “Parliamentary privilege undermines the rule of law. Specifically it undermines the requirement, which is central to the rule of law, that the law be general”.⁵⁴ But, he continued: “The rule of law is not, however, an absolute principle. Its claims must be balanced against the competing claims of other principles. One of those competing principles is the separation of powers, specifically the requirement that no branch of government should interfere in the operation of another branch of government. There are occasions when insisting upon the general application of the law would cause (or risk causing) the judiciary or the executive to interfere with the proper operation of Parliament.”

In the United Kingdom, Parliament's exception to the general application of the law has, over time, become a fundamental constitutional principle, itself part of the law. The European Court of Human Rights has also acknowledged that the immunity conferred by parliamentary privilege, even though it may restrict the right of access to the courts, is proportionate.⁵⁵

However, constitutional provisions of the State must be given a meaning, as laws of the State, and are not to be regarded as open to any meaning other than a legal meaning.

To conclude otherwise is to unlawfully deprive members of the Legislative Council of their lawful right, in accordance with the State's Constitution, to introduce laws into the Parliament. If the Rule of Law is to apply in the State, then the rights of a member of Parliament should not be abrogated by a view based on anything other than the legal meaning of statutory provisions. It is arguably

⁵³ Stephenson, Matthew. “Rule of Law as a Goal of Development Policy”, World Bank Research (2008); David Clarke, “The many meanings of the rule of law” in Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia* (New York: Routledge, 1998); Cooper, John et al. *Complete Works By Plato*, at 1402 (Hackett Publishing, 1997); <http://skepticallawyer.com.au/2011/11/03/retrospective-legislation-against-the-rule-of-law/>; Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 QR 195 at 198.

⁵⁴ Dr Adam Tucker response to Government consultation on the Green Paper, Cm 8318, paragraph 2; <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3004.htm>

⁵⁵ *A v. The United Kingdom* [2002] ECHR 35373/97; <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/3004.htm>.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

Conclusion

It follows from the above discussion that my opinion is that:

1. the *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* is not a Bill "appropriating revenue or moneys" for the purposes of section 46(1) of the *Constitution Acts Amendment Act 1899*; and
2. there is no constitutional or other legal impediment that would prevent the *School Boarding Facilities Legislation Amendment and Repeal Bill 2015* originating in the Legislative Council.

The view I have taken is consistent with, and so supported by, the views previously provided in relation to various pieces of legislation, where similar questions have arisen, by:

- (1) Mr Peter Nisbet QC, 9 June 1997;
- (2) Mr Robert Cock, Crown Counsel, 14 March 1996;
- (3) Greg Calcutt, Parliamentary Counsel, 28 November 1989;
- (4) Kevin Parker, Solicitor General, 27 November 1989
- (5) Jeremy Talbot, Deputy Parliamentary Counsel, 6 June 1997

The conclusion reached by the Speaker is incorrect in law, contrary to the Constitution of the State and contrary to the Rule of Law.

In the light of the same, and an apparent historical impasse between the views of presiding officers of the two Houses of the Western Australian Parliament, I have considered whether the previous assumption that this issue was not justiciable is indeed the case, when the circumstances and the law are carefully examined.

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

inconsistent with Parliamentary privilege for the Constitution to be interpreted as extending to preclude any adjudication upon the extent of the rights of members of Parliament.

To deprive Members of the Legislative Council of their constitutional rights to introduce Bills into the Parliament on any other basis than a proper view of the law is to suggest that there is some entitlement of the Legislative Assembly that its view should prevail over that of the Legislative Council.

This is inconsistent with the view expressed by Barwick CJ in *Victoria v Commonwealth*⁵⁶ (in relation to the Commonwealth Parliament, but of equal application to the Western Australian Parliament) which speaks to the appropriate relationship between the Houses in a bi-cameral system:⁵⁷

[46] [T]he Commonwealth consistently asserted that the purpose of s. 57 was to enable the will of the House of Representatives always, and, indeed inevitably, to prevail, ... (at p121)

[47] It seems to me that this submission is untenable. The Senate is a part of the Parliament and, except as to laws appropriating revenue or money for the ordinary annual services of the Government or imposing taxation, is co-equal with the House of Representatives. Bills may originate and do originate in the Senate. Section 53 of the Constitution makes it abundantly clear that the Senate is to have equal powers with the House of Representatives in respect of all laws other than those specifically excepted. The only limitations as to the equality of the powers of the Senate with those of the House of Representatives are those imposed by the first three paragraphs of that section, to the terms of which the limitations must be confined. (at p121)

The fact that Speakers of the Legislative Assembly have a “long standing practice”,⁵⁸ similar to that of Speaker Sutherland in this instance, in relation to bills originating in the Legislative Council does not make it a legal and constitutionally correct position in accordance with the Rule of Law, particularly where, as Speaker Strickland has conceded⁵⁹ –

All the information provided by the Minister⁶⁰ establishes a consistency of view by legal authorities on what constitutes a Bill appropriating money for the purposes of section 46 of the Constitution Acts Amendment Act 1899. There can be no doubt that, if the matter could go to court, their view would be upheld. That is clear. What is more, that position has been clear for years, almost before living memory. Notwithstanding that, the Assembly has continued to take the view that it will look to the effect of a Bill, and not simply for an appropriating phrase, to make a determination on whether a Bill falls within section 46.

⁵⁶ [1975] HCA 39; (1975) 134 CLR 81.

⁵⁷ At [46] and [47].

⁵⁸ Speaker Strickland ruling 9 April 1997, quoting himself, *Hansard*, Assembly, 19 August 1997 p 4911.

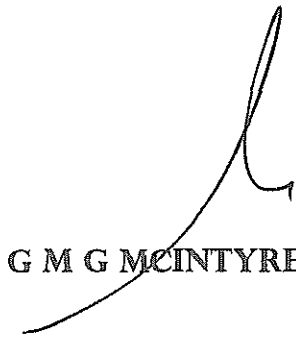
⁵⁹ *Hansard*, Assembly, 19 August 1997 p 4911.

⁶⁰ Having previously referred to opinions of Mr Peter Nisbet QC, 9 June 1997; Mr Robert Cock, Crown Counsel, 14 March 1996; Mr Greg Calcutt, Parliamentary Counsel, 28 November 1989; Mr Kevin Parker, Solicitor General, 27 November 1989; and Mr Jeremy Talbot, Deputy Parliamentary Counsel, 6 June 1997

GREG MCINTYRE, S.C.

SCHOOL BOARDING FACILITIES LEGISLATION AMENDMENT AND REPEAL BILL 2015

That has led me to the view that there is an option for the situation to be addressed by way of resort to the Court by the Minister for Education, the Attorney-General, the President of the Legislative Council or any other Member of the Legislative Council for a declaration as to the correct legal interpretation of section 46(1) of the *Constitution Acts Amendment Act 1899*.

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by 'M G' and a small flourish.

G M G MCINTYRE S.C.

4 November 2016

