2009

Parliament of Tasmania

JOINT SELECT COMMITTEE

WORKING ARRANGEMENTS OF THE PARLIAMENT

REPORT NO. 18

ATTENDANCE OF MINISTERS WHO ARE MEMBERS OF THE LEGISLATIVE COUNCIL AT HOUSE OF ASSEMBLY QUESTION TIME

MEMBERS OF THE COMMITTEE

Mr *Parkinson* MLC (Chair)
Mrs *Smith* MLC
Mr *Wilkinson* MLC
Mr *Wing* MLC

Ms *Giddings* MP
Mr *Llewellyn* MP
Mrs *Napier* MP
Mr *McKim* MP

INTRODUCTION

The Committee was first established by both Houses of the Tasmanian Parliament at the commencement of the First Session of the Forty-fourth Parliament on 7 October 1998. The Terms of Reference for the Committee are set out below.

TERMS OF REFERENCE

That a Joint Select Committee be appointed with power to send for persons and papers, with leave to sit during any adjournment of either House and with leave to adjourn from place to place, and with leave to report from time to time, to inquire into and report upon —

(1) Measures for reform which may improve the performance and efficiency of the Parliament and its Members having particular regard to, but not confined by, a consideration of —

(a) the Statement of Principles agreed to by resolution of the Legislative Council on the 3rd and 4th day of September 1997;

(b) the procedures for the resolution of dispute and deadlocks between both Houses including standing order provisions and Parliamentary custom and conventions;

(c) the system of Statutory Standing, Joint Sessional and Joint Select Committees of both Houses, their roles, functions and relevance to contemporary Parliamentary practice;

(d) whether a separate Appropriation Act for —

(i) the Parliament;
(ii) the Auditor-General's office;
(iii) the Ombudsman's Office;
(iv) the Electoral Office;

is desirable.

(e) and any other matters incidental thereto.

(2) That the Committee be authorised to disclose or publish, as it thinks fit, any evidence or document presented to it prior to such evidence being reported to either House.

(3) That the Committee finalise its report by 31 March 1999.*

*Since the initial establishment of the Committee, it has been reconstituted as necessary following prorogations to allow for the

continuation of its enquiries. The latest re-establishment of the Committee occurred on Wednesday, 5 March 2008.

The Committee has tabled the following reports to date –

Report No. 1	Estimates
Report No. 2	Parliamentary Standing Committees
Report No. 3	Government Business Enterprises and Government Corporations Scrutiny Committees
Report No. 4	Review of the Estimates Committees Process November 1998
Report No. 5	Arrangements for the Opening of Parliament
Report No. 6	Citizen's Right of Reply
Report No. 7	New Parliamentary Committee System
Report No. 8	Committee Meeting Times and Resources
Report No. 9	Selection of Government Businesses for Scrutiny
Report No. 10	Acknowledgement of Traditional People
Report No. 11	Issues of Parliamentary Procedure
Report No. 12	E-Petitions
Report No. 13	Electronic Committee Meetings
Report No. 14	Dissenting Statements
Report No. 17	Timing of Government Businesses Scrutiny Hearings

BACKGROUND

The appointment to the Ministry of an additional two Members of the Legislative Council in September 2008 gave rise to debate about the extent to which Ministers of the Crown who were Members of the Legislative Council were accountable to Parliament. This debate focused on one aspect of achieving accountability of the Executive in contemporary parliamentary practice – the capacity of Ministers to provide information by answering questions without notice during 'Question Time'.[1]

Each House of the Tasmanian Parliament has a procedure for Question Time. Under these procedures Members of a House of Parliament may ask questions without notice of a Minister[2] who is a member of that House about their portfolio responsibilities; or question a private Member who has the carriage of a Bill or other matter in that House.[3]

Members of each House of the Tasmanian Parliament are currently not able to directly question Ministers who are Members of the other House during the Question Time procedure. This is also the case in other bicameral legislatures in Australia and in the United Kingdom Parliament at Westminster. This issue has been addressed in other Australian bicameral legislatures by the appointment of Ministers or Members[4] in one House who represent Ministers in the other House.[5] Although these representative Ministers may be asked questions during Question Time, the representative nature of their role necessarily requires some notice of the question to be given to the Minister concerned. This is so the Minister may authorise his or her representative to give an answer that has been approved by the Minister.

The appointment of representative Ministers in other jurisdictions does not resolve the complaint that Ministers in one House are not able to be questioned directly in the other House during its Question Time. However, the resolution in other Australian parliaments through the use of representative Ministers reflects two important parliamentary principles:

---

1 See Hansard: House of Assembly – 24 & 25 September 2008 and 22 October 2008; and Legislative Council – 30 September 2008 and 30 October 2008.

2 Including the Leader of the Government in the Legislative Council.

3 Legislative Council Standing Order 49; House of Assembly Standing Orders 85, 86, 87, 87A, 87B, 87C and Sessional Order 87D.

4 Sometimes appointed as Parliamentary Secretaries. See *Constitution Acts Amendment Act 1899* (WA) s. 44A.

5 Victoria; New South Wales; South Australia; and Western Australia.

1. that each House is the master of its own destiny, is the sole judge of the lawfulness of their proceedings, and may settle - or depart from – their own codes of procedure free from interference from the other House or other external influences;[6] and

2. Members of each House are answerable only to the House of which they are a Member.[7]

The formal practice of the Executive appointing representative Ministers in each House for the purpose of answering questions, having the carriage of Bills or other procedures on behalf of a Minister in another House, as occurs in other Australian bicameral parliaments, has not been adopted in the Tasmanian Parliament.[8]

The Committee observes that three political parties are represented in the Lower House and only one party is represented in the Upper House, which is comprised of a majority of independent Members and a minority of Government Members. This political composition results in the two non-Government parties having no capacity, through its parliamentary membership, to directly question Ministers that are Members of the Legislative Council.

The House of Assembly put forward a view that the most effective means to fully scrutinise the portfolio areas of Ministers who are Members of the Legislative Council was to have these Members available in its chamber to answer directly the questions put to them by Members of the House of Assembly and Members of the Legislative Council sitting together for a joint 'Question Time'.

MESSAGES BETWEEN THE HOUSES

On 25 September 2008, the Premier, Hon David Bartlett MP, moved, and the House of Assembly resolved, that the proposition of a Joint Question Time be considered by the Committee in order to address the suggested deficiency in the opportunity for scrutiny of Ministers who

---

6 Erskine May, Parliamentary Practice, Twenty Second Edition, pp 88-89. An aspect of the Parliamentary Privilege accorded to each House of 'Exclusive Cognisance'.

7 Erskine May, Parliamentary Practice, Twenty Second Edition, p. 149. Neither House can claim, or exercise, any authority over a Member or officer of the other, and therefore cannot punish any breach of privilege or contempt by such Member or officer.

8 An informal practice has developed in the Legislative Council in which the Leader of the Government is asked questions during Question Time in respect of portfolio areas that are not his responsibility. In the House of Assembly a practice has developed in which the Premier makes a statement advising the House which Ministers will field questions directed to Ministers that are Members of the Legislative Council. In each case the Houses have acquiesced to this practice. The acceptance of such a practice is a matter for the House and not the Executive.

were Members of the Legislative Council. The resolution was transmitted to the Legislative Council for its concurrence as follows:

> "*Resolved*, That the House, noting the appointment of three members of the Legislative Council as Ministers of the Crown, agree in principle to joint sittings of both Houses for the purpose of Question Time and refer consideration of this reform to the Working Arrangements of Parliament Committee for it to report by 18 November 2008 with the Committee's report to include specific recommendations on the operational and implementation mechanisms required to effect the reform as soon as practicable after that date, and any matters incidental hereto. "

On 30 September 2008, the Legislative Council considered the resolution of the House of Assembly but adjourned this debate. By separate motion moved and debated on the same day, the Legislative Council resolved as follows:-

"*Resolved,*

> With regard to Question Time in the House of Assembly, the Legislative Council, if so requested by the Assembly shall –
>
> (1) Support the giving of leave for the following Members of the Legislative Council, having been appointed by His Excellency the Governor as Ministers of the Government of Tasmania, to attend in the House of Assembly Chamber on sitting days during Question Time between the hours of 10.00 o'clock and 11.00 o'clock am if they think fit -
>
> > The Honourable Member for Derwent, Michael Aird MLC – Treasurer, Minister for Economic Development and Minister for Racing.
> >
> > The Honourable Member for Rumney, Lin Thorp MLC – Minister for Human Services.
> >
> > The Honourable Member for Pembroke, Allsion Ritchie MLC –Minister for Planning and Workplace Relations.
>
> (2) Any leave granted by any subsequent Resolution would cease upon the prorogation of the Parliament and the dissolution of the House of Assembly for the next General Election of that House."

The Legislative Council resolution was considered by the House of Assembly on Wednesday, 22 October 2008 and the House resolved as follows:-

"*Resolved*, That the House:—

(1) Notes the content of the Resolution of the Legislative Council of 30 September 2008 with regard to Ministers of the Crown who are Members of the Legislative Council attending the House of Assembly for participation in Question Time.

(2) Refers the procedural, legal and related issues with regard to the attendance of Ministers from the Legislative Council in the House of Assembly to the Working Arrangements of the Parliament Committee for investigation and report.

And that the Clerk of the Legislative Council and the Clerk of the House of Assembly provide advice to the Committee on the procedural, legal and related issues."

The Legislative Council considered this resolution on 30 October 2008 and resolved as follows:

> "*Resolved*, That the Council refers the procedural, legal and related issues with regard to the attendance of Ministers from the Legislative Council in the House of Assembly to the Working Arrangements of the Parliament Committee for investigation and report. And that the Clerk of the Legislative Council and the Clerk of the House of Assembly provide advice to the Committee on the procedural, legal and related issues."

THE INQUIRY

Pursuant to the resolutions of the two Houses, the Committee subsequently commenced its inquiry. The Committee met on three occasions; 12 November 2008 and 3 and 10 March 2009.

The proposal is novel and in accordance with the resolutions of the two Houses the Committee sought the best advice available to assist it in its deliberations. The Committee resolved to invite the Clerk of the Legislative Council and the Clerk of the House of Assembly to obtain an opinion from Mr Bret Walker SC on the legal, constitutional and related issues associated with the proposal for the participation during Question Time in the House of Assembly of Members of the Legislative

Council who are Ministers of the Crown. The Clerks provided a copy of their letter seeking advice and Mr Walker's opinion to the Committee to assist it in its deliberations. (See Annexure 1 & 2).

The Committee recommended that the Clerks communicate with other Clerks of Parliaments in Australia and New Zealand in relation to the procedural, legal and related aspects of the proposal for the participation during Question Time in the House of Assembly of Members of the Legislative Council who are Ministers of the Crown.

The Committee requested the Government to provide advice from the Solicitor-General of Tasmania, Mr Leigh Sealy SC, on the legal, constitutional and related issues associated with the proposal for the participation by Members of the Legislative Council who are Ministers of the Crown during Question Time in the House of Assembly (See Annexure 1 & 3).

The legal opinion of the Solicitor-General was provided to the Clerks to assist them in providing their advice to the Committee. The Clerks determined that the proposed attendance in the House of Assembly of Ministers who are Members of the Legislative Council may be enabled by joint order of the Legislative Council and the House of Assembly without any need for legislative action. The Clerks advised the Committee accordingly and provided a draft motion to enable the procedure to be implemented on a trial basis until the prorogation of the two Houses and the dissolution of the Assembly prior to the next General Election for that House (See Annexure 4).

At its meeting on Tuesday, 3 March 2009 the Committee formally received the legal opinions of Messrs Walker and Sealy, together with the joint advice from the Clerks containing a draft motion that, if agreed to by both Houses, would give effect to the procedure. The Committee adopted the draft motion with minor amendments.

RECOMMENDATION

The Committee recommends to the Legislative Council and the House of Assembly that the following motion be agreed to:-

"That the Legislative Council and the House of Assembly agree to the following provisions relating to the participation by Members of the Legislative Council, who are Ministers of the Crown, in Question Time in the House of Assembly –

1. That the Assembly seek the attendance of Members of the Legislative Council who are Ministers of the Crown by separate message requesting that leave be given to those Ministers to attend the Assembly so as to respond specifically to Questions without Notice seeking information of the kind covered by the Standing Orders of the House of Assembly.

2. That the Standing Orders and practices of the House of Assembly have application, with qualification in relation to the requirement for any punishment for offences which constitute a contempt of the Assembly, committed by a Member of the Legislative Council, be not enforced until concurred with by the Legislative Council.

3. That the Speaker of the House of Assembly have sufficient authority over a member of the Legislative Council participating in Question Time so as to retain control of proceedings and maintain the decorum of the House.

4. That a member of the Legislative Council attending in the Assembly be not eligible to vote, be counted for the purpose of a quorum, attempt to make any motion or act in a way to initiate any business whatsoever.

5. That a member of the Legislative Council attending the Assembly be not subject to Questions beyond the time of 11.00 o'clock a.m. on any sitting day on which sittings of the Legislative Council are to commence.

6. That this Resolution expire upon the prorogation of the Houses of Parliament and the dissolution of the House of Assembly prior to the next general election of that House."

Parliament House
Hobart
10 March 2009

Hon. D. J. Parkinson M.L.C.
Chair

ANNEXURES

1. Letters to Mr Bret Walker SC and Attorney-General, Hon Lara Giddings MP seeking advice;
2. Advice of Mr Bret Walker SC;
3. Advice of Solicitor General of Tasmania, Mr Leigh Sealy SC; and
4. Joint advice of Clerk of Legislative Council and Clerk of the House of Assembly.

Annexure 1

1. Letter dated 17 November 2007 from Clerk of the Legislative Council and Clerk of the House of Assembly to Mr Bret Walker SC.

2. Letter dated 17 November 2007 from the Chair, Hon Doug Parkinson MLC to the Attorney-General, Hon Lara Giddings MP.

28 NOV 2008

COPY

Tel: (03) 62 332333
Fax: (03) 62 311849
Email: nigel.pratt@parliament.tas.gov.au

Parliament House
HOBART TASMANIA 7000

17 November 2008

Mr Bret Walker SC
5th Floor
St James Hall
169 Phillip Street
SYDNEY 2000

Dear Mr Walker,

QUESTION TIME IN THE HOUSE OF ASSEMBLY OF TASMANIA – PARTICIPATION BY MEMBERS OF THE LEGISLATIVE COUNCIL WHO ARE MINISTERS OF THE CROWN

We refer to the telephone conversation between Mr Nigel Pratt, Deputy Clerk of the Legislative Council, and your personal assistant Ms Maggie Dalton on Thursday, 13 Nvember 2008.

We write seeking your advice in relation to the legal issues surrounding the proposal for the participation during Question Time in the House of Assembly of Members of the Legislative Council who are Ministers of the Crown.

The matter has been referred by the Houses to a joint select committee and the Clerks of each House have been requested to provide advice to the committee on the "procedural, legal and related issues."

It is anticipated that the proposal, if adopted, will take the form of a trial the terms of which will be agreed to between the Houses by the passing of resolutions and the exchange of messages.

The history of this matter is set out in the messages exchanged between the Houses, and the Hansard transcript of the debates contained in the attached Brief to Counsel.

We would be pleased if you could address the following questions:

The Privilege Issues

1. Whether resolutions of the Houses to give effect to the procedure would be sufficient to provide absolute immunity to participating members under the *Bill of Rights 1688* as a 'proceeding in parliament';

2. If the answer to 1 above is 'no', what amendments would be necessary to the *Parliamentary Privilege Act 1858* (Tas) or other legislative measure;

3. The extent to which any and what existing privileges of the Legislative Council or the House of Assembly would be abridged or eroded in the event that Members of the Legislative Council are subject to the Standing Orders of the House of Assembly during those proceedings; and

4. Whether the House of Assembly has the power to discipline or take coercive action against Members of the Legislative Council participating in Question Time and if so, the limits of the discipline or coercion that can be applied.

The Constitutional Issues

5. Whether the proceedings would be to any extent inconsistent with the *Constitution Act 1934* (Tas), and if so in what way.

6. If the answer to 5. above is 'yes', what amendments, would be necessary to the *Constitution Act 1934* (Tas) or other legislative measure.

We would appreciate your advice in relation to the above issues and any other matters that you consider relevant by **Monday, 15 December 2008.** We would be pleased to discuss any of the above matters with you should you require further information. Our contact details are as follows:

David Pearce
Clerk of the Legislative Council
(w) 6223 2331
(f) 6231 1849
e-mail David.Pearce@parliament.tas.gov.au

Peter Alcock
Clerk of the House of Assembly
(w) 6223 2374
(f) 6223 3803
e-mail Peter.Alcock@parliament.tas.gov.au

Please note that upon receipt of your advice it will be made available, on an initially confidential basis, to the Members of the Joint Select Committee on the Working Arrangements of the Parliament.

Depending upon the requirements of that committee, it may make a request of us to permit the opinion to be made public (for instance, by way of inclusion of the advice, in whole or in part, within a report of the Committee tabled in the Parliament). It would therefore be

appreciated if you could please indicate whether you have any objection to your advice being made public, either in whole or in part.

Yours sincerely

David Pearce
Clerk of the Legislative Council

Peter Alcock
Clerk of the House of Assembly

BRIEF TO COUNSEL

QUESTION TIME IN THE HOUSE OF ASSEMBLY OF TASMANIA - PARTICIPATION BY MEMBERS OF THE LEGISLATIVE COUNCIL WHO ARE MINISTERS OF THE CROWN

---

1. THE FACTS

1.1 The facts leading to the referral of this matter to a joint committee and this brief to you are set out in copies of Messages between the Houses and the extracts of *Hansard* debates at Appendix 1.1 & 1.2 respectively.

1.2 The Legislative Council comprises 15 Members. Its political composition is Independents (11) and ALP (4). There are no Members of the Liberal Party or the Greens in that Chamber.

1.3 The House of Assembly comprises 25 Members. Its political composition is ALP (14), Liberal (7) and Greens (4).

2. HISTORICAL MATERIAL

2.1 Attached at Appendix 2.1 are copies of several Bills originating in the House of Assembly that propose amendments to the *Parliamentary Privilege Act* or *Constitution Act* to enshrine in law the capacity for Ministers of the Crown to sit in a House of Parliament of which they are not a member for the purpose of explaining a Bill but not to vote.

2.2 None of the Bills were passed into law.

3. AUSTRALIAN JURISDICTIONAL PRACTICE

3.1 The State of Victoria has similar provisions to the Bills in Appendix 2.1 contained in its *Constitution Act 1975*. The Houses of the Victorian Parliament have Joint Standing Orders to support the Constitutional power. A Minister sitting in the House of which he or she is not a Member is subject to the Standing Orders and practices of that House (See Appendix 3.1). The power and rules currently permit the Treasurer (a member of the Legislative Council of Victoria) to introduce in the Legislative Assembly the annual appropriation Bills and to deliver the budget speech.

3.2 You should note that the Treasurer of Tasmania, Hon Michael Aird MLC, reads the budget speech in the House of Assembly after the introduction and first reading of the Appropriation Bills by the Leader of the House or Premier. Although the Treasurer is participating in proceedings in a House of which he is not a member, there is no motion

before the Chair at the time of the speech. This practice is supported by resolutions between the Houses. (See Appendix 3.2)

3.3 Each House of the Tasmanian Parliament also gives leave for Ministers in one House to appear before committees of the other House. This occurs for committees examining the estimates of expenditure (as you will note from Appendix 3.2) and also those committees established to scrutinise Government Businesses. Attached at Appendix 3.3 is an extract of the Votes and Proceedings of the Legislative Council and the House of Assembly that support the practice.

3.4 The attendance of Ministers from one House before committees for both estimates and government business scrutiny is achieved by the passing of resolutions granting leave to attend. No legislation underpins these procedures.

3.5 No House of any Australian jurisdiction has instituted a practice of Ministers from one House attending the Question Time of the other House. Attached at Appendix 3.4 are responses received from Australian Parliaments in respect of each jurisdiction's knowledge of such a practice or similar practices in their parliament.

4. RELEVANT LAW

Parliamentary Privilege

4.1 The *Bill of Rights 1688* is part of Tasmanian Law upon establishment of the legislature as a matter of common law. *R v Turnbull* [1958] Tas S.R. 80. (Appendix 4.1)

4.2 Other privileges have been defined by the four Tasmanian Parliamentary Privilege Acts.

4.3 It should be noted that the *Parliamentary Privilege Act 1957* was enacted due to concerns that joint committees of the Houses did not possess the powers and privileges of committees of the individual houses.

4.4 If it is instituted, the proposal for the attendance of Council Ministers in the House of Assembly will be for a trial period. It is therefore preferable that no legislative change be made if sufficient protection is provided under existing Tasmanian privilege law.

5. STATUTES

5.1 Attached at Appendix 5.1 are the following statutes.

- *Parliamentary Privilege Act 1858*
- *Parliamentary Privilege Act 1885*
- *Parliamentary Privilege Act 1898*
- *Parliamentary Privilege Act 1957*

- *Constitution Act 1936*

6. REFERENCE MATERIAL

6.1 Drinkwater, Derek: '*To Speak of not to Speak: Ministerial Accountability in The Senate and the House of Representatives*'. An address to the Australasian Study of Parliament Group, 20th Annual Conference, 'Parliament Beyond 2000: One House or Two?', September 1998 (Appendix 6.1).

6.2 Standing Orders of the House of Assembly of Tasmania (Appendix 6.2).

6.3 Erskine May, 22nd Edition.

7. REQUEST FOR ADVICE

7.1 The Committee seeks your legal advice on the following:

The Privilege Issues

1. Whether resolutions of the Houses to give effect to the procedure would be sufficient to provide absolute immunity to participating members under the *Bill of Rights 1688* as a 'proceeding in parliament';

2. If the answer to 1 above is 'no', what amendments would be necessary to the *Parliamentary Privilege Act 1858* (Tas) or other legislative measure;

3. The extent to which any and what existing privileges of the Legislative Council or the House of Assembly would be abridged or eroded in the event that Members of the Legislative Council are subject to the Standing Orders of the House of Assembly during those proceedings; and

4. Whether the House of Assembly has the power to discipline or take coercive action against Members of the Legislative Council participating in Question Time and if so, the limits of the discipline or coercion that can be applied.

The Constitutional Issues

5. Whether the proceedings would be to any extent inconsistent with the *Constitution Act 1934* (Tas), and if so in what way.

6. If the answer to 5. above is 'yes', what amendments, would be necessary to the *Constitution Act 1934* (Tas) or other legislative measure.

Thank you for your acceptance of this brief.

Please note that this document (including any attachments) is privileged. You should only use, disclose or copy the material if you are authorized to do so. Please contact Committee staff if you have any queries.

COPY

Tel: (03) 62 332333
Fax: (03) 62 311849
Email: nigel.pratt@parliament.tas.gov.au

Parliament House
HOBART TASMANIA 7000

17 November 2008

Hon Lara Giddings MP
Attorney-General
10/15 Murray Street
HOBART 7000

Dear Attorney-General,

QUESTION TIME IN THE HOUSE OF ASSEMBLY OF TASMANIA – PARTICIPATION BY MEMBERS OF THE LEGISLATIVE COUNCIL WHO ARE MINISTERS OF THE CROWN

I refer to the meeting of the Select Committee on the Working Arrangements of the Parliament ('Committee') on Wednesday, 12 November 2008.

At that meeting the Committee considered the referral of the above matter from the Legislative Council and House of Assembly and resolved as follows:

That:

1. *The Committee request the Government to provide advice from the Solicitor General on the legal and related issues associated with the proposal for the participation by Members of the Legislative Council who are Ministers of the Crown during Question Time in the House of Assembly; and*

2. *The advice be provided by Monday, 15 December 2008.*

It was agreed that as you are a member of the Committee, and as Attorney-General the Chief Law Officer of the Crown, it was appropriate that I write to you to make this request on its behalf.

Accordingly, please find attached a Brief to Counsel for the Solicitor-General.

The Committee looks forward to receiving the advice by the requested date. Should the Solicitor-General require any further information he may contact one of the joint committee secretaries:

Mr Nigel Pratt
Deputy Clerk
Legislative Council
(w) 6233 2333
(Fx) 6231 1849
E-mail Nigel.Pratt@parliament.tas.gov.au

or

Mr Shane Donnelly
Clerk Assistant and Sergeant-at-Arms
House of Assembly
(w) 6233 2220
(fx) 6223 6266
E-mail Shane.Donnelly@parliament.tas.gov.au

Please note that upon receipt of the advice it will be made available, on a confidential basis to the members of the Committee.

Depending upon the requirements of the Committee, it may resolve to make the advice public (for instance, by way of inclusion of the opinion, in whole or in part, within a report of the Committee tabled in the Parliament). It would therefore be appreciated if you could ask the Solicitor-General when forwarding the Brief to him whether he has any objection to his advice being made public, either in whole or in part.

Yours sincerely

Hon Doug Parkinson MLC
Chair

Enc. Brief to Counsel

COPY

BRIEF TO COUNSEL

QUESTION TIME IN THE HOUSE OF ASSEMBLY OF TASMANIA - PARTICIPATION BY MEMBERS OF THE LEGISLATIVE COUNCIL WHO ARE MINISTERS OF THE CROWN

---

1. THE FACTS

1.1 The facts leading to the referral of this matter to a joint committee and this brief to you are set out in copies of Messages between the Houses and the extracts of *Hansard* debates at Appendix 1.1 & 1.2 respectively.

1.2 The Legislative Council comprises 15 Members. Its political composition is Independents (11) and ALP (4). There are no Members of the Liberal Party or the Greens in that Chamber.

1.3 The House of Assembly comprises 25 Members. Its political composition is ALP (14), Liberal (7) and Greens (4).

2. HISTORICAL MATERIAL

2.1 Attached at Appendix 2.1 are copies of several Bills originating in the House of Assembly that propose amendments to the *Parliamentary Privilege Act* or *Constitution Act* to enshrine in law the capacity for Ministers of the Crown to sit in a House of Parliament of which they are not a member for the purpose of explaining a Bill but not to vote.

2.2 None of the Bills were passed into law.

3. AUSTRALIAN JURISDICTIONAL PRACTICE

3.1 The State of Victoria has similar provisions to the Bills in Appendix 2.1 contained in its *Constitution Act 1975*. The Houses of the Victorian Parliament have Joint Standing Orders to support the Constitutional power. A Minister sitting in the House of which he or she is not a Member is subject to the Standing Orders and practices of that House (See Appendix 3.1). The power and rules currently permit the Treasurer (a member of the Legislative Council of Victoria) to introduce in the Legislative Assembly the annual appropriation Bills and to deliver the budget speech.

3.2 You should note that the Treasurer of Tasmania, Hon Michael Aird MLC, reads the budget speech in the House of Assembly after the introduction and first reading of the Appropriation Bills by the Leader of the House or Premier. Although the Treasurer is participating in proceedings in a House of which he is not a member, there is no motion

before the Chair at the time of the speech. This practice is supported by resolutions between the Houses. (See Appendix 3.2)

3.3 Each House of the Tasmanian Parliament also gives leave for Ministers in one House to appear before committees of the other House. This occurs for committees examining the estimates of expenditure (as you will note from Appendix 3.2) and also those committees established to scrutinise Government Businesses. Attached at Appendix 3.3 is an extract of the Votes and Proceedings of the Legislative Council and the House of Assembly that support the practice.

3.4 The attendance of Ministers from one House before committees for both estimates and government business scrutiny is achieved by the passing of resolutions granting leave to attend. No legislation underpins these procedures.

3.5 No House of any Australian jurisdiction has instituted a practice of Ministers from one House attending the Question Time of the other House. Attached at Appendix 3.4 are responses received from Australian Parliaments in respect of each jurisdiction's knowledge of such a practice or similar practices in their parliament.

4. RELEVANT LAW

Parliamentary Privilege

4.1 The *Bill of Rights 1688* is part of Tasmanian Law upon establishment of the legislature as a matter of common law. *R v Turnbull* [1958] Tas S.R. 80. (Appendix 4.1)

4.2 Other privileges have been defined by the four Tasmanian Parliamentary Privilege Acts.

4.3 It should be noted that the *Parliamentary Privilege Act 1957* was enacted due to concerns that joint committees of the Houses did not possess the powers and privileges of committees of the individual houses.

4.4 If it is instituted, the proposal for the attendance of Council Ministers in the House of Assembly will be for a trial period. It is therefore preferable that no legislative change be made if sufficient protection is provided under existing Tasmanian privilege law.

5. STATUTES

5.1 Attached at Appendix 5.1 are the following statutes.

- *Parliamentary Privilege Act 1858*
- *Parliamentary Privilege Act 1885*
- *Parliamentary Privilege Act 1898*
- *Parliamentary Privilege Act 1957*

- *Constitution Act 1936*

6. REFERENCE MATERIAL

6.1 Drinkwater, Derek: '*To Speak of not to Speak: Ministerial Accountability in The Senate and the House of Representatives*'. An address to the Australasian Study of Parliament Group, 20th Annual Conference, 'Parliament Beyond 2000: One House or Two?', September 1998 (Appendix 6.1).

6.2 Standing Orders of the House of Assembly of Tasmania (Appendix 6.2).

6.3 Erskine May, 22nd Edition.

7. REQUEST FOR ADVICE

7.1 The Committee seeks your legal advice on the following:

The Privilege Issues

1. Whether resolutions of the Houses to give effect to the procedure would be sufficient to provide absolute immunity to participating members under the *Bill of Rights 1688* as a 'proceeding in parliament';

2. If the answer to 1 above is 'no', what amendments would be necessary to the *Parliamentary Privilege Act 1858* (Tas) or other legislative measure;

3. The extent to which any and what existing privileges of the Legislative Council or the House of Assembly would be abridged or eroded in the event that Members of the Legislative Council are subject to the Standing Orders of the House of Assembly during those proceedings; and

4. Whether the House of Assembly has the power to discipline or take coercive action against Members of the Legislative Council participating in Question Time and if so, the limits of the discipline or coercion that can be applied.

The Constitutional Issues

5. Whether the proceedings would be to any extent inconsistent with the *Constitution Act 1934* (Tas), and if so in what way.

6. If the answer to 5. above is 'yes', what amendments, would be necessary to the *Constitution Act 1934* (Tas) or other legislative measure.

Thank you for your acceptance of this brief.

Please note that this document (including any attachments) is privileged. You should only use, disclose or copy the material if you are authorized to do so. Please contact Committee staff if you have any queries.

Annexure 2

1. **Advice dated 17 December by Mr Bret Walker SC.**

QUESTION TIME IN THE HOUSE OF ASSEMBLY OF TASMANIA – PARTICIPATION BY MEMBERS OF THE LEGISLATIVE COUNCIL WHO ARE MINISTERS OF THE CROWN

OPINION

I am asked by the Clerks of the Legislative Council and of the House of Assembly of the Parliament of Tasmania to advise the Members of the Joint Select Committee on the Working Arrangements of the Parliament on certain legal issues surrounding the proposal for the participation during Question Time in the House of Assembly of Members of the Legislative Council who are Ministers of the Crown.

2 The occasion for the Committee's task, and for this advice, arises in the way set out in detail in my brief, which I will not rehearse. On 25th September 2008, by resolution the House of Assembly agreed in principle to joint sittings of both Houses for the purposes of Question Time. On 30th September 2008, by resolution the Legislative Council anticipated, if so requested by the House of Assembly, giving leave to Ministers who are Members of the Legislative Council to attend the House of Assembly during Question Time. On 22nd October 2008, and 30th October 2008, the House of Assembly and the Legislative Council respectively referred issues with regard to the attendance of Ministers of the Legislative Council in the House of Assembly to the Committee, directing the Clerks to provide advice.

3 In my opinion, the proposal for the attendance by Council Ministers in the Assembly Chamber for the purposes of Question Time (**"the proposal"**) may be put

into effect without legislation being required to that end. The existing statutes do not prohibit the proposal being carried out.

4 In my opinion, carrying out the proposal by means of complementary resolutions of the Houses will not weaken to any degree the immunity of Members participating in Question Time under it, ie Council Ministers attending the Assembly Chamber. Their immunity is an aspect of parliamentary privilege.

5 Furthermore, in my opinion, effecting the proposal by means of complementary resolutions of the Houses would have the distinct advantage of each House retaining full control over its Members, including Members who are Ministers – so long as those resolutions deal with the disciplining of Council Ministers with respect to their conduct in the Assembly Chamber during Question Time in accordance with the principles suggested below.

6 In order to reflect my approach to the analysis of the lawfulness and efficacy of the proposal, I have reordered the six questions asked in my brief. (The brief's questions 5 and 6 are 1 and 2 below, and the brief's questions 1-4 are 3-6 below.)

7 *1 Would the proceedings envisaged by the proposal be to any extent inconsistent with the Constitution Act 1934 (Tas), and if so in what way?*

No.

8 The Houses were established by the *Constitution Act 1856* (Tas), and expressly continue as such pursuant to subsec 9(1) of the *Constitution Act 1934* (Tas) ("**the Constitution**"). Their membership is separate from each other's: subsec 14(3).

Subject to particular provisions in Part IV of the Constitution chiefly dealing with money bills, the Council and the Assembly "in all respects, have equal powers": sec 45.

9 The Constitution does not spell out, at all, the powers of Parliament, or of the Houses of Parliament. In 1855-1866, in Van Diemen's Land/Tasmania and in Westminster, the central conception of what "parliament" was and did would not have been uncertain. Apart from legislating, the Houses of Parliament also scrutinized the workings of executive government. As a matter of common law, as shown in the New South Wales case of *Egan v Willis*, discussed below, the powers of Australian State parliaments, being formerly colonial legislatures, are those which are reasonably necessary for the proper discharge of their functions. Legislation, of course, may also provide for, or regulate the exercise of, the powers of the Houses.

10 Those powers include the crucial faculty of controlling their own proceedings, by the now familiar Westminster method of standing rules and orders. The provisions of subsec 17(1) of the Constitution relevantly are:

> *Each House, as occasion may arise, shall prepare and adopt such standing rules and orders as shall appear to it to be best adapted for the orderly conduct of the business of such House; for the mode in which such House shall confer, correspond, and communicate with the other House; ... ; and generally for the conduct of all business and proceedings of such House and of both Houses collectively.*

11 As it happens, there is also legislation regulating proceedings in Parliament. For present purposes, the most important of these statutes is the *Parliamentary Privilege Act 1858* (Tas). In relation to the question of power to carry out the proposal, I draw to attention subsec 2(2), which expressly empowers the ordering of a

Member of either House to attend before the other House or a committee of it – "in the manner heretofore accustomed". The last phrase squarely recognizes Westminster practices concerning relations between the two parliamentary chambers, as followed and adapted in Tasmania. In relation to the question of power to carry out the proposal, it is significant that Parliament has legislated, recognizing parliamentary custom, for the attendance of a Member of one House in the other House for the purpose of (in effect) giving evidence or producing papers.

12 I also note that sec 3 of the 1858 Act empowers each House "to punish in a summary manner, as for contempt, by imprisonment in such custody and in such place as it may direct ... " offences including disobedience of any such order – "whether committed by a Member of the House or by any other person". It is at least well arguable, and in my opinion more likely than not, that the expression "any other person" in this provision includes Members of the other House. Certainly, it is difficult to see any sufficiently clear legislative purpose which would grant immunity to a visiting Member not available any other visitor, given that a Member of the other House may be a witness, and that any visitor (a Member of the other House or not) could offensively disrupt proceedings in the House in question.

13 Thus, participation as a witness in a House, and subjection to disciplinary – penal, in fact – control by that House, in both cases on the part of a Member of the other House, are expressly contemplated and regulated by statute.

14 Of course, it would be unfortunate to regard the participation of a Council Minister in House of Assembly Question Time merely by analogy with the same office holder being a witness, or a casual visitor, in the House of Assembly, as secs 2

and 3 of the 1858 Act envisage. The whole point of the proposal, as I understand it in light of Parliamentary debate concerning it, is to facilitate one of the most acute forms of contemporary accountability of the ministerial party to the people's elected representatives.

15 First, the proposal is for a form of proceedings in the lower House, the confidence of which makes a government. Second, Question Time is, nowadays, a valuable tool for the working of responsible government. The proposal has the virtue, as a matter of political science, of placing responsible Ministers for all portfolios among the Members of the House of Assembly to permit proper questioning in the Chamber where support (or not) makes (or breaks) a government.

16 My point derived from the 1858 Act is that these provisions potentially involve a Council Minister participating in and being the subject of control of the Assembly. (It is to be remembered, as well, that the same provisions contemplate an Assembly Member, who could be a Minister, also participating in and being the subject of control of the Council.) While the *Parliamentary Privilege Act 1858*, the *Parliamentary Privilege Act 1898* and the *Parliamentary Privilege Act 1957* may not strictly be cognate legislation with the Constitution, they do address and regulate more or less important aspects of proceedings in Parliament, as the Constitution also does (as well as continuing the 1856 institution of Parliament). In my opinion, the general terms of sec 17 of the Constitution ought not be interpreted in any narrow way, or so as to suggest that eg the 1858 Act was necessary (as opposed to expedient) in order for a House to be able to order the attendance of one of its own Members in the other House, on public business.

17 Accordingly, I advise that the general power in sec 17 of the Constitution, directed as it is to securing what is "best adapted for the orderly conduct of the business of [a] House", and contemplating as it does standing rules and orders "generally for the conduct of all business and proceedings ... of both Houses collectively", clearly comprehends arrangements to put the proposal into effect.

18 In essence, my conclusion on the question of power can be justified in both negative and positive ways. Negatively, it can be seen that there is no legislated or judge-made rule of law preventing the Houses from carrying out the proposal. Positively, by reason of the importance of responsible government to the parliamentary democracy which is Tasmania, in my opinion the proposal is a good example of the permissible shaping of their own practices by the Houses, so as to reflect in particular the perceptions from time to time of Members of both Houses as to what is reasonably necessary for the proper exercise of their functions.

19 This positive explanation for the present existence of power in the Houses to effect the proposal by means of appropriate resolutions, or standing rules and orders, may be elaborated by quotation from the New South Wales Court of Appeal and the High Court of Australia respectively in *Egan v Willis* (1996) 40 NSWLR 650 and (on the unsuccessful appeal) (1998) 195 CLR 424. (Before setting out the relevant passages, I note there are differences, which are at least historical and may arguably have some current significance, between the Tasmanian and New South Wales Parliaments – notwithstanding they are virtually co-evals. In my opinion, none of these differences has any relevance whatever to the question of power to carry out the proposal, or indeed any of the other issues addressed below.)

20 The litigation concerned the propriety of the Legislative Council having a Member removed because, he being a Minister, had disobeyed an order for papers made by the Council. The defence to his common law action for trespass to the person raised the issue of the power of the Legislative Council not only to make orders for papers, but also to enforce them (so to speak) by sanctions such as suspending a delinquent Member from the service of the House. Gleeson CJ commented (at 40 NSWLR 660E-F):

> *The nature and extent of the responsibility which is involved in responsible government depends as much upon convention, political and administrative practice, and the climate of public opinion, as upon rules of law. A newer term, accountability, has entered into political discourse. Its meaning, also, is protean.*
>
> ...
>
> (at 40 NSWLR 664A-B) *Conventions and courtesies which apply to dealings between the three branches of government, or between the two Houses of Parliament, are not lightly to be disregarded. They are an important aspect of our constitutional arrangements.*
>
> ...
>
> (at 40 NSWLR 665D-E) *The capacity of both Houses of Parliament, including the House less likely to be "controlled" by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.*

21 In the same authority, Mahoney P stated (at 40 NSWLR 676E):

> *The decisions in this area of the law show that the powers which have been held to be inherent in legislative bodies have not been limited to powers without which it would not have been possible for the bodies to function. They have extended to powers which are clearly adapted to the needs and purposes of the body in question. I do not mean by this that the test is mere convenience.*
>
> ...
>
> (at 40 NSWLR 676G-677A) *The concept of necessity involves that the court must consider, from time to time and as the need arises, what are the functions of the body and the purposes it is to achieve*

> *and accordingly what it must be able to do. These will change as society changes and the functions and purposes of the body in question change with it ...*
>
> ...
>
> (at 40 NSWLR 677D-E) *It is, I think, to be expected that legislation in this State will now be based, not upon assumptions or ideologies but upon what [available] information shows to be necessary and appropriate. It is not merely convenient but necessary that the legislature has access to information of every kind relevant to the informed discharge of its functions.*

22 The third Member of the Court of Appeal, Priestley JA concluded (at 40 NSWLR 692F-693A):-

> *In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power, in my opinion, in the two parts ordinarily called parliament of the three part legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and the Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way existing laws are operating; possible changes to existing laws; and the possible making of new laws. The first of these subjects clearly embraces the way in which the Executive Government is executing the laws.*

23 In the High Court, the plurality (Gaudron, Gummow & Hayne JJ) founded their conclusions on very similar approaches, including explicit approval of the last passage quoted from Priestley JA's reasons: see 195 CLR 454 [52]. It should be noted that, in litigation which concerned the powers of the upper House, their Honours noted as one aspect of responsible government "that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government": at 195 CLR 453 [45]. But I do not read that description of parliamentary practice in New

South Wales as denying the appropriateness of the Tasmanian Houses deciding to extend the facility of Question Time in the Assembly to cover all portfolios. No such issue was ventilated in *Egan v Willis*.

24 Importantly, the High Court noted how the content of powers reasonably necessary could be supplied by what was actually done, in practice (at 195 CLR 454 [50]:-

> *What is "reasonably necessary" at any time for the "proper exercise" of the "functions" of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.*

25 In my opinion, the approach taken in *Egan v Willis* reflects a judicial concern that the judicial arm of government not trespass into a field properly reserved for Houses of Parliament. While the judges must patrol the boundaries of that field, as the rule of law requires, it is for Members of the Houses, from time to time and by their collective will, within the law, to shape their practices and proceedings to the vital governmental functions they have been elected to perform. It is understandable that judges should feel constrained to observe the activities of legislators within that field, and not to adjudicate except where those activities go outside that field.

26 The field in question concerns the various, and changeable, ways in which a parliamentary chamber may perform its function in responsible government of scrutinizing the working of the Executive. Question Time is one of the current ways the Tasmanian (and all other Australian, and Westminster-model) parliaments conventionally perform part of that scrutiny. I doubt whether any judge would regard it as appropriate to express a view of Question Time at odds with the evident

legislators' estimation of it as an "imperative" aspect of contemporary responsible government in an Australian parliamentary democracy like Tasmania.

27 Rather, I expect that a court would regard Question Time as currently an essential part, according to contemporary parliamentary practice, of the vital accountability discussed by Gleeson CJ in *Egan v Willis*. In Tasmania, in relation to the parliamentary privilege issue, dealt with in answer to question 3 below, Gibson J in the *R v Turnbull* [1958] Tas SR 80 at 84 described the position then in relation to "the responsible Ministers of the Crown":-

> *They are responsible to Parliament, and so have to answer to Parliament for their exercise of the administrative functions entrusted to the Cabinet by the enactments of Parliament.*

28 That is not to say that Question Time dates from time immemorial – its history is of a rudimentary and fragile character towards the end of the 18th century and uncertain but finally considerable development around the middle of the 19th century – given much impetus by the 1832 Reform Act. Accordingly, it is crucial in answering the question of power to stress that practices can change, as sec 17 of the Constitution may even be seen to encourage, in Tasmania. The first instance of what becomes a new convention is not, by being first, by definition unlawful – otherwise, persistence in error would be the means to change the content of the law.

29 Indeed, in Tasmania as in some other Australian jurisdictions, the relatively rare political event of a Treasurer sitting in the upper House has produced a practice of the two Houses appropriately resolving for the Treasurer to deliver the Budget Speech in the Assembly, notwithstanding he is a Council Member. This, with great respect, strikes me as entirely a matter for Members of the Houses to judge as to its

reasonable necessity or appropriate adaptation to circumstances, in the general public interest. It is, in my opinion, clearly within power. It is by no means remote, as to its intent and nature, from Council Ministers participating in Assembly Question Time.

30 For these reasons, there should be no doubt that giving effect to the proposal would not be, in any way, inconsistent with the Constitution.

31 *2 If the answer to 1 above is 'yes', what amendments would be necessary to the Constitution Act 1934 (Tas) or other legislative measure?*

32 It is not necessary to answer this question.

33 Nonetheless, the Clerks have properly drawn to attention by way of comparison in sec 52 of the *Constitution Act 1975* (Vic), although its provisions do not specifically relate to Question Time, and may not in fact address that possibility.

34 *3 Would resolutions of the Houses to give effect to the procedure be sufficient to provide absolute immunity to participating members under the Bill of Rights 1688 as a 'proceeding in parliament'?*

Yes.

35 First, in my opinion the *Bill of Rights* has acquired, in Tasmania and in some other Australian jurisdictions – perhaps all of them – that peculiar status of enacted law now regarded as common law. It is, after all, a statute or enactment of the Parliament at Westminster, protective of that Parliament's proceedings. As a matter of ordinary statutory interpretation, let alone territorial operation, let alone existence of relevant subject matter, it did not purport to prescribe the privileges appertaining to the Parliament of Tasmania.

36 However, for the reasons explained by Gibson J in *R v Turnbull* [1958] Tas SR 80, "the freedom of speech and debates or proceedings in Parliament" which Article 9 of the *Bill of Rights* provided "ought not to be impeached or questioned in any court or place out of Parliament" is "the essential attribute of every free legislature, and may be regarded as inherent in the constitution of Parliament" (at 84, citing *Hood Phillips on Constitutional Law*).

37 It seems that, notwithstanding the likely statutory reception and application of the *Bill of Rights* in Van Diemen's Land by reason of the *Australian Courts Act* (Imp) of 1828 (9 Geo IV c 83), it is "axiomatic" and part of "general constitutional principles" that, as a matter of "the common law principles on the reception of law in settled colonies", the content of Article 9 of the *Bill of Rights* is part of the common law concerning the Parliament of Tasmania (along with other Australian legislatures): see per Gaudron, Gummow & Hayne JJ in *Egan v Willis* at 195 CLR 444-445 [22]-[24].

38 The question therefore comes down to the straightforward matter of whether the participation by a Council Minister in Assembly Question Time, pursuant to the proposal, will be "proceedings in Parliament" within the meaning of this doctrine. Unquestionably, it will be.

39 There is, in my opinion, no possible distinction to be observed between the kind of proceedings contemplated by the proposal, and eg the delivery of the Budget Speech in the Assembly by the Treasurer as a Council Minister. There is no distinction to be seen, in my opinion, between proceedings under the proposal and proceedings by which a Council Member might give evidence in the Assembly

pursuant to sec 2 of the 1858 Act. All such occasions and conduct are protected by the privilege enunciated in Article 9 of the *Bill of Rights*, because they are all equally proceedings or aspects of proceedings "in Parliament".

40 In particular, there is in my opinion, given the reasons noted above, no warrant whatever to regard proceedings of one House in which a Member or Members of the other House are participating or present as somehow not "proceedings in Parliament". Without the participation or presence of any Member of the other House, proceedings in one House are definitionally "proceedings in Parliament". When a person who is not a Member of either House gives evidence in a House or before a committee of that House, they are also protected by the privilege because they are speaking in one of the "proceedings in Parliament". How could it not also be so, when a person who is a Member of the other House participates in what is manifestly "proceedings in Parliament"?

41 Furthermore, the importance of Question Time, as explained in answer to question 1 above, underlines the essential identity of proceedings pursuant to the proposal as "proceedings in Parliament".

42 *4 If the answer to 3 above is 'no', what amendments would be necessary to the Parliamentary Privilege Act 1858 (Tas) or other legislative measure?*

It is not necessary to answer this question.

43 For the reasons supplied in answering questions 5 and 6 below, other important aspects of parliamentary privilege could be articulated and regulated, in relation to the proposal, by standing rules and orders adopted by exercise of the power

given (or, perhaps, confirmed) by subsec 17(1) of the Constitution. In my opinion, it would not be wise to alter in any way the clear existence and ample operation of the Article 9 aspect of privilege by any standing rule or order, let alone legislation. There being no risk that Article 9 privilege is unavailable to cover proceedings pursuant to the proposal, there is no sense in courting the danger that some specific enactment might give rise in the future to arguments detracting from that general clarity and amplitude.

44 *5 To what extent would any and what existing privileges of the Legislative Council or the House of Assembly be abridged or eroded in the event Council Ministers are subject to the Standing Orders of the House of Assembly during proceedings pursuant to the proposal?*

No privileges of the House of Assembly would be abridged or eroded in this event. The very important aspect of the privileges of the Legislative Council would be abridged, eroded and effectively set aside were Council Ministers simply placed under the standing orders of the House of Assembly, without qualification. That simple approach should not be followed. A qualified approach would avoid any setting aside of the privileges of the Legislative Council, and would very largely eliminate any abridgement or erosion of those privileges.

45 The privileges, or aspects of parliamentary privilege, which matter in answering this question are principally those to do with the self-protective ordering of proceedings in the Assembly, and the corresponding privileges of the Council. A critical aspect of proceedings in any parliamentary chamber, of course, is the obedience of all Members of the House to lawful orders of the House. As Gleeson CJ put it in *Egan v Willis* at 40 NSWLR 664A-B, "failure to comply with a command, or a request, issuing from a House of Parliament, is a serious matter ... ". (In that case,

of course, there was a "direct remedy available to the House", in relation to its own Member's "refusal to comply with such a requirement [as for the production of State papers]" on the ground that it "was conduct which the Council, within its power, could judge to be contempt" (at 40 NSWLR 672A-B).

46 However, one thing seems both clear and pressing. Except pursuant to the statutory power given by sec 2 of the 1858 Act, as discussed in 11 above, there should be no purported exertion of a privilege or power of the Assembly to compel attendance by a Council Minister in the chamber of the Assembly. Similarly, except pursuant to the statutory authority to punish as for contempt such a Council Minister, pursuant to sec 3 of the 1858 Act as discussed in 12 above, there should be no purported exertion of a privilege or power of the Assembly to discipline a Council Minister for what might be compendiously termed unparliamentary conduct. In my opinion, the rank undesirability of any such unilateral claim of a kind of superiority by the Assembly over the Council or one of its Members would be contrary to centuries of mutual restraint and institutional respect between the Houses of a bicameral legislature.

47 It would also, in my opinion, be unlawful in light of subsec 14(3) and sec 45 of the Constitution, as noted in 8 above.

48 It is to be recalled that there is no such objection to the possible discipline of a Member of one House in the other House pursuant to sec 3 of the 1858 Act, because its provisions operate perfectly equally between the two Houses – each is empowered to punish persons for the specified offences. Care should be taken, however, lest giving effect to the proposal may set up, or even appear to set up, a greater scope for

discipline by the Assembly of those Council Members who are Ministers attending the Assembly for Question Time, pursuant to the proposal, than there is scope for the Council to discipline those of its own Members, itself.

49 In my opinion, a cue to an appropriate way to observe the equality of the Houses and to avoid any inadvertent affectation of "any power or privilege possessed by either House of Parliament" (cf sec 12 of the 1858 Act), can be seen in the *Parliamentary Privilege Act 1957*, which amended the 1858 Act to make certain provisions for a joint committee of both Houses. By subsec 2(1) of the 1957 Act, a joint committee "duly authorised by both Houses" is given the same power as a committee of either House, and by subsec 3(1) acts done in respect of a joint committee may be punished under sec 3 of the 1858 Act – the contempt power.

50 Importantly, and here is the cue for giving effect to the proposal without offending against the privileges of the Council, by subsec 3(2) of the 1957 Act, "No order of the House for the punishment of a person under [sections 3 of the 1957 and 1858 Acts] operates against him until concurred in by the other House". Equality is fully recognized. The power is balanced. The Members of each House have the same weight given to the outcome of their respective deliberations on the questions whether a person has been delinquent, and if so, how he or she should be punished if at all.

51 Next, there is the precedent supplied by the Joint Standing Order 14 of the Parliament of Victoria, which subjects a "Minister sitting in the House of which he or she is not a Member" under sec 52 of the *Constitution Act 1975* (Vic) to "the Standing Orders and practices of that House". Again, equality is observed by this subjection being effected by a joint standing order. There is power in Tasmania to take the same

approach, by the closing words of subsec 17(1) of the Constitution, noted in 10 above – viz "... such standing rules and orders as shall appear to it to be best adapted ... generally for the conduct of all business and proceedings ... of both Houses collectively".

52 The guiding principle should be that a Council Minister attends in the Assembly for Question Time at the will of the Council, and of course with the assent of the Assembly. Thus would equality between the Houses be concretely recognized in giving effect to the proposal. In my opinion, a joint standing order giving effect to the proposal, including by a version of the Victorian approach noted in 48 above, will observe this principle.

53 Further, although not essentially, the cue offered by subsec 3(2) of the 1957 Act discussed in 49 and 50 above, could be followed by a joint standing order stipulating that nothing in the nature of discipline of a Council Minister with respect to his or her participation in Assembly Question Time, pursuant to the proposal, should be administered without the concurrence of the Council.

54 (It need hardly be added, however, that the Assembly will of course have the statutory power granted by sec 3 of the 1858 Act, in the unthinkable event, which I trust is purely theoretical, of a Council Minister committing one of the offences specified in it while attending Assembly Question Time pursuant to the proposal. That possibility does nothing to affect adversely the privileges of the Council.)

55 Finally, in my opinion proper observance of "the manner heretofore accustomed" (cf subsec 2(2) of the 1858 Act) should see the proposal carried out by

complementary resolutions of the two Houses by which the Assembly requests the Council to give leave to Council Ministers to attend the Assembly so as to respond to questions seeking information, of the kind covered by Standing Order 85 of the House of Assembly, and by which the Council agrees to the request and gives leave for its Minister Members to do so.

56 I assume that the occasion does not now exist, and will likely never exist, whereby a Council Minister refuses to attend the Assembly pursuant to the proposal, were it effectuated. However, were this extreme case to occur, in my opinion it would be a matter for the Council, and not the Assembly, to consider whether its Minister Member's obstruction of the Council's resolved co-operation with the Assembly should be adjudged a sufficient delinquency so as to warrant disciplinary sanction. In my opinion, furthermore, it would follow by parity of reasoning with that expressed in *Egan v Willis* that the Council would have the power to do so, were it so minded.

57 On the other hand, unless the case also happened to fall within subsec 2(2) of the 1858 Act – which I very much doubt were the occasion Assembly Question Time – so as to attract the power to punish under sec 3 of the 1858 Act, in my opinion the Assembly will not have power, unilaterally, to discipline a Council Minister who does not attend Assembly Question Time pursuant to the co-operative arrangements made to give effect to the proposal. Ultimately, in my opinion, the source and nature of the power to control including by punishment the conduct of a Member is to be identified as that person's membership of one House: a House controls (only) its own.

58 *6 Does the House of Assembly have the power to discipline or take coercive action against Members of the Legislative Council participating in Question Time and if so, what are the limits of the discipline or coercion that can be applied?*

This depends on the approach taken to the matters discussed in answer to question 5 above.

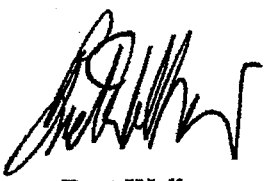
59 If joint standing orders were made along the lines discussed in 51 and 52 above, the power of discipline or coercion could be given to the Assembly. However, if the suggestion discussed in 49 and 53 above were taken up, that power in the Assembly would not be unilateral.

60 There is also the statutory power given to each House, and thus available to the Assembly, under sec 3 of the 1858 Act, as noted and discussed in 12, 13, 48 and 54 above.

61 Otherwise, I have discussed the theoretical case of a Council Minister refusing to participate in Assembly Question Time, and the possibility of resultant discipline or coercion, in 56 above.

62 Generally, I note the limit on the Assembly's power of discipline suggested in 57 above.

FIFTH FLOOR,
ST JAMES' HALL.
17 December 2008



Bret Walker

Annexure 3

1. **Advice dated 12 December by Solicitor-General of Tasmania, Mr Leigh Sealy SC.**

TASMANIA

SOLICITOR-GENERAL OF TASMANIA
GPO BOX 825, HOBART 7001
TELEPHONE: (03) 6233 3408
FAX: (03) 6233 2510
EMAIL: solicitor.general@justice.tas.gov.au

MY REF: 32619 GLS
YOUR REF:

12 December 2008

ADVICE

PARTICIPATION BY MINISTERS OF THE CROWN WHO ARE LEGISLATIVE COUNCILLORS IN QUESTION TIME IN THE HOUSE OF ASSEMBLY

To: Honourable Lara Giddings MP
Attorney General
Minister for Justice
10/15 Murray Street
HOBART

1 By a Brief under cover of a letter from the Attorney-General dated 21 November 2008 I am asked to advise in relation to six specific questions. For the purposes of those questions and of the answers which follow;

"the Assembly" means the House of Assembly of the Parliament of Tasmania,

"the Council" means the Legislative Council of the Parliament of Tasmania,

"Legislative Council Minister" means a Member of the Council who also holds office as a Minister of the Crown in right of the State of Tasmania,

"the Procedure" means the attendance of a Legislative Council Minister in the Assembly during question time for the purpose of answering questions without notice asked by Members of the Assembly.

2 Before addressing the specific questions which are required to be answered it is helpful to review the constitutional and parliamentary history of Tasmania so as to gain an appreciation of some fundamental concepts, particularly the scope and operation of what is somewhat compendiously referred to as "parliamentary privilege".

A Short Constitutional History of Tasmania

3 From 1803 until 1823 Van Diemen's Land was a dependency of the colony of New South Wales and came within the legislative jurisdiction of the Governor of New South Wales who, while he was accountable to his superiors in England, otherwise possessed autocratic power within the colony.

4 Between 1803 and 1810, Lieutenant-Governors answerable to the Governor of New South Wales were stationed at Hobart Town and Port Dalrymple (later known as Launceston) and from 1810 there was a single Lieutenant-Governor at Hobart Town.

5 In 1823, the *New South Wales Act 1823*[1] ("the 1823 Act") conferred upon New South Wales the status of a full colony and established a Legislative Council to consist of not less than five nor more than seven residents of the colony to be appointed by the Crown. The Governor, acting with the advice of the Council, was given power to make laws and ordinances for the *"peace, welfare and good government"* of the colony but the Governor alone had the power to initiate legislation.

6 Section 44 of the 1823 Act empowered the Crown, by Order in Council, to separate Van Diemen's Land from New South Wales and to establish in Van Diemen's Land a legislative and administrative structure similar to that of New South Wales. The necessary Imperial Order in Council was not made until 14 June 1825 and did not take effect until 3 December 1825.

7 In 1828 the Imperial Parliament passed the *Australian Courts Act* [2] which extended to both New South Wales and Van Diemen's Land and which (among other things) made provision for slightly larger Legislative Councils.

8 The constitutional histories of New South Wales and Van Diemen's Land parted ways with the passage in 1842 of the *Australian Constitutions Act (No.1)*[3]. That Act conferred a form of representative government upon New South Wales but not upon Van Diemen's Land, which at that time remained a penal colony.

9 However, in 1850 the *Australian Constitutions Act (No. 2)*[4] empowered the existing Legislative Council of Van Diemen's Land to establish a new, enlarged, partly-elected Legislative Council which was, in its turn, empowered to alter the Constitution so as to substitute for itself an elected bicameral legislature. In accordance with these provisions, the newly constituted Legislative Council enacted a new Constitution[5] on 31 October

---

1 4 Geo IV, c.96 (Imp.)
2 9 Geo. IV, c. 83 (Imp.)
3 5 & 6 Vict. c. 76 Imp.)
4 13 & 14 Vict., c. 59 (Imp.)
5 18 Vict., No. 17 (Tas.)

1854. The Act, known as the *Constitution Act 1856*, duly received the Royal Assent in June 1856.

10 Meanwhile, following the cessation in 1853 of the transportation of convicts to the colony, Van Diemen's Land had been renamed Tasmania as from 1 January 1856.

11 The *Constitution Act 1856* established two elected Houses; a 30-member House of Assembly and 15-member Legislative Council, the franchise for both Houses being based upon property and educational qualifications.

12 Importantly for present purposes, the Parliament of Tasmania thus established was and remains entirely a creature of statute. Accordingly, unlike the Imperial Parliament at Westminster, which had been established by ancient usage and long custom, the Tasmanian Parliament has no "inherent" powers or privileges (the so-called *Lex et consuetudo Parliamenti* or "law and custom of Parliament") other than those powers and privileges conferred upon it by the legislation which created it together with such other powers and privileges as are reasonably necessary or incidental to the discharge of its functions as a plenary colonial (or, since federation, State) legislature.

13 That proposition was authoritatively established by the decision of the Privy Council in Fenton v Hampton (1858) 11 Moo PC 347;14 ER 727. The respondent Hampton was the Comptroller-General of Convicts for Van Diemen's Land. A Select Committee of the Legislative Council of Van Diemen's Land (which at the relevant time remained a single chamber) was set up to inquire into alleged abuses in the Convict Department and had summonsed Hampton to appear before it. Hampton failed to appear before the Select Committee and also refused to appear before the bar of the Legislative Council to explain his failure to appear before the Select Committee. Thereupon the Council resolved that Hampton was guilty of contempt and the Speaker of the Council (Fenton) issued his warrant for Hampton to be arrested and held in the custody of the Serjeant-at-Arms during the pleasure of the Council. The warrant was duly executed and following his subsequent release from custody, Hampton commenced an action for trespass against both Fenton and the Serjeant-at-Arms. Both the Supreme Court of Van Diemen's Land (Fleming C.J.) and on appeal, the Privy Council, held that the Legislative Council of Van Diemen's Land had no inherent power to punish a contempt *"committed away from the House of Assembly"*. Speaking for the Privy Council the Lord Chief Baron Pollock said;

> "[I]f the Legislative Council of Van Diemen's Land cannot claim the power they have exercised on the occasion before us, as inherently belonging to the Supreme legislative authority which they undoubtedly possess, they cannot claim it under [the *Australian Constitutions Act (No.2)*] as part of the Common Law of England (including the *Lex et consuetudo Parliamenti*), transferred to the Colony by 9 Geo. IV., c. 83, sect. 24. The *'Lex et consuetudo Parliamenti'* apply exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a Colony by the introduction of the Common Law there."

14 Following the Privy Council's decision in Fenton v Hampton in February 1858, and, no doubt, because of it, the Tasmanian Parliament passed the *Parliamentary Privilege Act 1858*. That Act received the Royal Assent on 29 October 1858 and, among other things, empowered each House of the (by then bicameral) Parliament to order the attendance of witnesses and the production of documents and to punish contempt whether committed within or outside the Parliament. Presumably, in order to preserve such privileges as the Tasmanian Parliament had either at Common Law or as a necessary incident of its powers and functions, section 12 of the Act also provided that;

> "Nothing in this Act contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect any power or privilege possessed by either House of Parliament before the passing of this Act in any manner whatsoever."

15 Fenton v Hampton was concerned with the power of the Tasmanian Parliament to punish a contempt committed outside of the Parliament and so did not directly concern the power of the Tasmanian Parliament to regulate its own proceedings, to deal with those who obstructed its business or to punish for contempt committed within the Parliament. Much less was the decision concerned with the privileges of the individual members of the Tasmanian Parliament. That issue did not fall to be considered until comparatively recently.

16 In 1958 the then Treasurer in the Tasmanian Government, Dr Reginald "Spot" Turnbull, was charged with Official Corruption contrary to sections 83 and 266 of the *Criminal Code*. On his trial[6] the Crown sought to lead evidence of (among other things) statements alleged to have been made by Dr Turnbull in the Assembly in his capacity as Treasurer. Dr Turnbull objected that this evidence was inadmissible by reason of parliamentary privilege.

17 In dealing with this contention the trial judge (Gibson J.) said (citations omitted);

> "In Great Britain Parliamentary privilege is part of the law and custom of Parliament.
>
> ...
>
> The object of such privilege is stated by Sir William Blackstone in the following words:
> 'Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown.'
>
> The *lex et consuetudo Parliamenti* are not, however, extended to subordinate legislatures created by the Imperial Parliament unless this is provided by the relevant statute (see *Commonwealth Constitution*, s. 41 and the report of proceedings on a royal commission before Lowe J. and another royal commission before Townley J.) But such local legislatures, constituted as they are by legislation, or, in some cases, by letters patent from the Crown, have every power

---

6 In fact it was a retrial, the jury in the first trial having failed to reach a verdict.

> reasonably necessary for the proper exercise of their functions and duties. It is a matter of construction of the constituent instrument and the maxim *Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest* [7] applies.
>
> ...
>
> Is it reasonably necessary then that the members of the Parliament of Tasmania should be protected from the use of statements made by them in Parliament in civil or criminal proceedings? The answer must be given, I think, in the light of the history of parliamentary institutions.
>
> ...
>
> I accept as accurate the statement of *Hood Phillips*[8] that 'Freedom of speech, which was first demanded by the Speaker in 1541, is the essential attribute of every free legislature, and may be regarded as inherent in the constitution of Parliament."

18 Quite apart from any privilege of free speech which might be reasonably necessary for the proper exercise of the functions and duties of Members of the Tasmanian Parliament, section 24 of the *Australian Courts Act 1828* provided (among other things) that:

> "All laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent or order in council which may be issued in pursuance hereof), shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies."

19 One of the statutes in force within the realm of England at the time of the passing of the *Australian Courts Act 1828* and which therefore applied (and continues to apply) in Tasmania by "paramount force" was the Act *1 Will. & Mary sess. 2, c. 2 (Imp.)* (commonly known as *Bill of Rights 1688*) Article 9 of which provides;

> "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."

20 On its face, Article 9 of the *Bill of Rights* refers to the Imperial Parliament at Westminster. Certainly, it does not, in terms, make any reference to the Parliament of Tasmania. However, the view that has been consistently taken is that in any jurisdiction in which the *Bill of Rights* has become part of the local law, the reference in Article 9 to "Parliament" should be understood as a reference to the Parliament of that jurisdiction.[9]

21 It will be noticed that the effect of Article 9 is not only that "the freedom of speech" in Parliament ought not (i.e., shall not) be "impeached or questioned" in any court but that "debates or proceedings" in Parliament are also similarly immune.

---

7 "When the law gives a man anything it gives him also that without which the thing itself cannot exist"

8 Hood Philips, Constitutional Law, p 130

9 See generally Egan v Willis (1998) 195 CLR 425 at 445 per Gaudron, Gummow & Hayne JJ.

22 On one view, this means that nothing said or done in the course of debates or proceedings in Parliament is justiciable in a court of law - or any other place out of Parliament.

23 The far-reaching implications of this deceptively brief provision may not always be immediately apparent. Its ambit has, perhaps not surprisingly, been the subject of numerous decided cases which illuminate the historical struggle and, at times, uneasy relationship, between the legislative and judicial branches of government. That struggle was largely (but by no means wholly) settled by the decision of the court of Queen's Bench in Stockdale v Hansard (1839) 9 Ad & E 1;112 ER 1112. The court rejected the proposition, advanced on behalf of the House of Commons, that a court may never examine what has happened in the Parliament. The court's conclusion was neatly summarised more than a hundred years later in the High Court of Australia by Dixon CJ in R v Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 162;

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

24 The distinction embodied in this proposition (between the identification of the *existence* of a privilege on the one hand and the *manner of its exercise* on the other) can be elusive but it necessarily focuses attention upon the enforceability (and hence, the efficacy) of legislation which purports to regulate the proceedings of either the Council or the Assembly and the incidence and enforcement of the privileges of those Houses.

25 By way of example, the *Parliamentary Privilege Act 1957* was passed by the Tasmanian Parliament with the intention of making provision with respect to the proceedings of joint committees of the Council and the Assembly. The Act provides that a joint committee of both Houses of Parliament duly authorised by both Houses has all the powers of a committee of either House duly authorised by the House and persons are required to obey its orders accordingly. The Act also provides that an act done in respect of a joint committee of both Houses may be punished as if the joint committee were a committee of the House which initiated the appointment of the committee provided that no order for the punishment of a person operates against that person until concurred in by the other House.[10]

26 Suppose then a Member of the Council misconducts himself or herself before a joint committee initiated by the Assembly and that the Assembly resolves to punish that Member by excluding the Member from all further sittings of the joint committee. Suppose, too, that the Council refuses to concur. Could the joint committee continue to exclude the unruly Member of the Council? Could the unruly Member thereupon seek a declaration from the Supreme

---

10 See *Parliamentary Privilege Act 1957 (Tas.)* sections 2 and 3

Court that he or she had been excluded from sittings of the joint committee contrary to the provisions of the *Parliamentary Privilege Act 1957*?

27 The answer to the first question just posed is very probably "yes" because the joint committee would necessarily have power to prevent the obstruction of its business including the power to remove unruly persons whether Members, witnesses or strangers.[11] (Whether relations between the Houses might in that event become strained is another matter altogether.)

28 The answer to the second question is rather more doubtful for, in order to make the declaration sought, the Court would be required to consider "debates or proceedings in Parliament" – something which Article 9 of the *Bill of Rights* says it may not do. It might perhaps be argued that the unruly member is not seeking to enforce a parliamentary privilege but is seeking to enforce (or at least invoke) the law of the land – namely, a provision of the *Parliamentary Privilege Act 1957*. But even so, the determination of the issues involves more than the mere identification of the existence of a parliamentary privilege (i.e., the privilege of the joint committee to control its own proceedings); it involves a consideration of "the occasion and the manner of its exercise."

The Questions

29 With the foregoing in mind, it is now appropriate to address each of the questions that have been posed.

30 For the sake of clarity and uniformity, I have taken the liberty of altering or slightly reformulating some questions. Having done so, I advise as follows.

1. Would resolutions of the Houses to give effect to the Procedure be sufficient to provide absolute immunity from civil liability to participating Members under the *Bill of Rights 1688* as a "proceeding in parliament"?

31 The short answer to this question is "yes".

---

11 See Erskine May, Parliamentary Practice, 23rd Edition, Lexis Nexis 2004. The learned authors say that "A Member present at a committee who is not of the committee or attending in accordance with Lords SO No. 66 must be considered as standing, in most respects, on the same footing as a member of the public. SO No 126 of the House of Commons provides that if a select committee or a sub-committee considers that the presence at a meeting or part of a meeting held in private of a Member who has not been nominated to the committee would obstruct the business of the committee , it may direct him to withdraw: and the Serjeant at Arms acts on such orders as he may receive from the chairman in pursuance of such a direction."

32 As formulated the question assumes two things. First, that the *Bill of Rights 1688*) remains in force in Tasmania and applies to the Parliament of Tasmania (as distinct from applying only to the Imperial Parliament at Westminster) and secondly, that the effect of the *Bill of Rights* is to confer "absolute immunity" from civil liability upon Members of the Tasmanian Parliament in respect of the proceedings of the Council and the Assembly. Both of these propositions are dealt with above. For the reasons given, the first of these propositions is, in my opinion, undoubtedly correct and, subject to the qualification introduced by the decision in Stockdale v Hansard (and the many cases which have followed it), so is the second.

33 The idea of allowing Ministers of the Crown who are Members of one House to attend before the other House of a bicameral parliament for the purpose of answering questions is by no means a new one. The Tasmanian lawyer and politician, Andrew Inglis Clarke, who is widely acknowledged as the architect of the Commonwealth *Constitution*, proposed the inclusion of provisions to give effect to such an arrangement in his original draft of the Commonwealth *Constitution*. However, those provisions were rejected by the Constitutional Convention of 1897-1898.[12]

34 In Tasmania, several attempts have been made over the years to pass legislation to give effect to arrangements which were broadly the same as the Procedure presently under discussion.[13] All were rejected by the Council.

35 It is not entirely clear whether it was thought that legislation was necessary to give effect to the Procedure (rather than to proceed by way of agreement between the Houses) or if it was merely thought preferable to seek to enshrine the Procedure in legislation so as to make it more difficult for one or other of the Houses to later withdraw from the arrangement.

36 The text of the 1924 Bill includes the words *"It shall be lawful for any Minister of the Crown to sit in the House of Parliament of which he is not a Member..."*. The use of the word *"lawful"* might suggest that it was thought that, in the absence of legislation, it would be unlawful for a Minister to do so. If that is so then I respectfully disagree. Similar words do not appear in any of the other Tasmanian Bills so it may be that the form of words employed in the 1924 Bill was adopted only for added emphasis.

37 An arrangement very similar to the Procedure was also recommended for introduction into the Commonwealth Parliament by the House of Representatives Standing Orders Committee in March 1974 and again in 1980 by the House Standing Committee on Procedure. Both of these proposals

---

12 See Drinkwater, To Speak or Not to Speak: Ministerial Accountability in The Senate and the House of Representatives, Address to the Australasian Study of Parliament Group, 19 September 1998

13 See the *Constitution Amendment Bill 1907*, the *Parliamentary Privilege Bill 1924*, the *Constitution Bill 1937*, the *Constitution (Ministers' Rights) Bill 1939* and the *Constitution Bill 1947*.

envisaged agreement between the House of Representatives and the Senate together with the making of complementary Standing Orders in each House.[14] Both proposals failed for varying reasons.

38 It is likely that the proposals in the Federal Parliament sought to rely upon agreement between the Houses because the "legislative" alternative would have involved an amendment to the Commonwealth *Constitution* and therefore a referendum.

39 Nevertheless, a passage in *Odgers' Australian Senate Practice*[15] not only provides support for the view that an arrangement like the Procedure can be instituted by agreement between the Houses, it also points out what is likely to be the major topic of debate surrounding such an arrangement. The learned author says:

> "If both Houses were agreeable, an arrangement could no doubt be made to enable Ministers to answer questions in both Houses. It could be given effect either by resolution in each House or by Joint Standing Orders. There would be certain problems, such as the extent to which a Minister of one House may be subject to the rules of the other House but agreement could possibly be reached."(emphasis added)

40 If the Procedure were to be adopted by agreement between the Council and the Assembly, there is no doubt that the resulting proceedings in both Houses would continue to be "proceedings in Parliament" within the meaning of Article 9 of the *Bill of Rights* and so attract the immunity conferred by that provision – in precisely the same way that proceedings of a Joint Select Committee of both Houses are proceedings in Parliament.[16]

41 This conclusion is a corollary of the principle that one of the essential privileges of Parliament and of each House of Parliament is the right to control its own proceedings. Put another way, and perhaps subject only to the qualification introduced by Stockdale v Hansard, it is for the Parliament alone to determine its own procedures.[17]

---

14 For a rather more detailed account see Drinkwater, Op Cit.

15 Sixth Ed, 1991

16 Section 2 of the *Parliamentary Privilege Act 1957* makes specific provision in this regard but in my opinion that provision is strictly unnecessary although it does perhaps serve to put the issue beyond doubt.

17 See also s. *17 of the Constitution Act 1934 (Tas)* which expressly empowers both the Council and the Assembly to "...prepare and adopt such standing rules and orders as shall appear to it to be best adapted for the orderly conduct of the business of such House; for the mode in which such House shall confer, correspond and communicate with the other House...and generally for the conduct of all business and proceedings of such House and of both Houses collectively."

42 The learned authors of *Erskine May*[18] put the matter this way:

> "While taking part in the proceedings of a House, members, officers and strangers are protected by the same sanction as that by which freedom of speech is protected, namely, that they cannot be called to account for their actions by any authority other than the House itself." (emphasis added)

43 Perhaps the more difficult practical question is the one raised in the passage from *Odgers* set out above – namely, to what extent is a Legislative Council Minister to be subject to the rules and privileges of the Assembly when attending in the Assembly to answer questions?

44 Self-evidently, that is a matter for the Council and the Assembly. I would observe however that, at least for the purposes of sittings of joint select committees, the two Houses have been able to reach an agreement on a similar problem which agreement is reflected in section 3 of the *Parliamentary Privilege Act 1957*.

2. If the answer to question 1 is "no", what amendments would be necessary to the *Parliamentary Privilege Act 1858 (Tas)* or other legislative measure [so as to provide absolute immunity to participating Members]?

45 Not required to be answered.

3 To what extent would any and if so which existing privileges of the Council or of the Assembly be abridged or eroded in the event that Legislative Council Ministers were, only for the purposes of the Procedure, to be made subject to the Standing Orders of the Assembly?

46 The answer to this question will depend upon the terms of any agreement reached between the Council and the Assembly (or possibly the terms of any legislation enacted) for the implementation of the Procedure.

47 Although it seems to me to be unlikely in the extreme that the two Houses would agree to implement the Procedure without also agreeing on procedural issues - such as how misbehaviour by a Legislative Council Minister or misbehaviour or discourtesy by a Member of the Assembly towards a Legislative Council Minister, should be dealt with, I shall endeavour to answer the question on the assumption that no such agreement has been reached.

---

18 Op. cit. at p. 87

48 In the first place, there seems little doubt that the Speaker of the Assembly would have to be able to exercise sufficient authority over a Legislative Council Minister so as to retain control of proceedings of the Assembly. Accordingly, the Speaker would need to have, and in my view has, at least the same measure of authority over a Legislative Council Minister as the Speaker has over a witness attending before the Assembly.[19]

49 Ideally, the Speaker would have (as nearly as may be) the same authority over a Legislative Council Minister while taking part in proceedings of the Assembly as he or she has over a Member of the Assembly.[20] However, the assertion of such authority seems to me necessarily to imply some degree of infringement of the privileges of the Legislative Council Minister in his capacity as a Member of the Council and of the privileges of the Council itself.

50 The Report of the House of Representatives Standing Orders Committee of 18 March 1974 [21] (referred to earlier) proposed that a Minister from one House of the Federal Parliament when attending the other House:

> "shall in all relevant matters be subject to the standing orders and practices of the House in which he is attending, but he shall not vote, be counted for quorum purposes, attempt to move any motion or act in any way to initiate any business whatsoever."

51 This, obviously enough, represents one approach to the problem. However it also, equally obviously, may result in the surrender by the Council of some of it privileges – at least to some degree.

52 Carney[22] summarises the privileges of parliament as follows:

> "The *powers* to: determine the qualifications of its members; regulate and discipline its members; control its own proceedings; conduct inquiries; and punish contempts.
>
> The *immunities* of its members from: arrest in civil causes, from jury service, from compulsory attendance before a court or tribunal, and most significantly, the immunity for statements made and action taken in the course of parliamentary debates and proceedings recognized by Art 9 of the *Bill of Rights 1689* (sic)"

53 Potentially at least, any implementation of the Procedure will involve some diminution of the privilege of the Council to regulate and discipline its own members who are Legislative Council Ministers and of the immunity of

---

19 Erskine May, loc cit.; House of Assembly Standing Order 395

20 See for example House of Assembly Standing Orders 182 to 184, although "suspension" of a Legislative Council Minister might be thought to be both problematic and counter-productive in some instances.

21 The Government Printer of Australia, Canberra, 1975

22 The Constitutional Systems of the Australian States and Territories, Cambridge University Press, 2006 at p. 98

Legislative Council Ministers from compulsory attendance before a court or tribunal (in this case the Assembly[23]).

54 However that may be, it is clear that both the Council and the Assembly have (subject to the approval of the Governor) ample power to either individually or collectively make standing rules or orders governing the Procedure and *"generally for the conduct of all business and proceedings."*[24]

4 Does the Assembly have the power to discipline or take coercive action against a Legislative Council Minister participating in the Procedure and if so, what are the limits of the discipline or coercion that can be applied?

55 This matter has been dealt with in the course of answering question 3 and there is little that can usefully be added.

56 The Assembly would necessarily have sufficient power to discipline a Legislative Council Minister so as to maintain control of its own proceedings and such other powers as are conferred upon it by statute[25] or by agreement between the Houses. However, for the reasons already discussed[26], the enforcement in a court of law of any statutory powers relating to proceedings in parliament may be problematic.

57 One supposes that, in the absence of any agreement between the Houses, the outer limit of the right of the Assembly to take coercive action against a Legislative Council Minister attending before the Assembly to answer questions would be somewhere short of the power that the Assembly has to suspend (as distinct from exclude or remove) one of its own members. However, in all other respects the power would be at least as extensive as the power the Assembly has in respect of a witness appearing before it. Those powers include the power to arrest, remove and punish for contempt.[27] The Assembly also has a power to imprison but the exercise of that power in respect of a Legislative Council Minister would almost certainly constitute an infringement of the privileges of both the Legislative Council Minister and of the Council itself.

5 Is the Procedure, to any extent, inconsistent with the *Constitution Act 1934 (Tas)* and if so, in what way?

58 No.

---

23 There is authority for the proposition that both the House of Commons and the House of Lords of the United Kingdom Parliament are both courts of law but it is doubtful whether the same can be said of the Council or the Assembly.

24 *Constitution Act 1934* (Tas), s. 17

25 i.e., the *Parliamentary Privilege Acts; Constitution Act 1934 (Tas)* , s. 17

26 See paragraphs 23 to 28 above.

27 See Parliamentary Privilege Act 1858 (Tas)

6 **If the answer to the immediately preceding question is "yes" what amendments would be necessary to the *Constitution Act 1934 (Tas)* or other legislation to remove such inconsistency?**

59 Not required to be answered.

60 I return the Brief herewith.

Dated 12 December 2008

LEIGH SEALY S.C.
SOLICITOR-GENERAL
Solicitor-General's Chambers, Hobart

Attachment

Annexure 4

1. **Joint advice dated 6 February 2009 by Clerk of the Legislative Council, Mr David Pearce; and Clerk of the House of Assembly, Mr Peter Alcock.**

6 February 2009

The Honourable Doug Parkinson MLC
Chair
Joint Select Committee –
Working Arrangements of the Parliament
Parliament House
HOBART 7000

Dear Mr Parkinson

QUESTION TIME – ADVICE

We write in relation to the matter of participation by Ministers of the Crown who are Members of the Legislative Council in Question Time in the House of Assembly.

The matter was referred by Resolution of both Houses to your Committee for consideration of the procedural, legal and related issues surrounding such a proposal.

In order to satisfy ourselves in relation to the legal and constitutional issues an opinion was obtained from Mr Bret Walker SC in response to a Brief provided to him.

Mr Walker's opinion has been previously separately provided to your Committee. We acknowledge also the opinion provided by the Solicitor-General and made available to us by your Committee.

The important legal and constitutional questions raised in the brief have, in our view, been adequately addressed by Mr Walker. As a consequence there is no need for any legislative amendment to the *Constitution Act 1934* or the Privileges Legislation which currently applies in Tasmania.

Our advice is that Resolutions, agreed between the two Houses will be sufficient to give effect to the proposal for Legislative Council Members who are Ministers to attend Question Time in the House of Assembly.

We fully support the view that the proposed proceedings would in no way be inconsistent with the *Constitution Act 1934* of Tasmania.

Importantly, we agree with the opinions that Resolutions of the Houses to give effect to the proposed procedure will be sufficient to provide absolute immunity to participating Members under the *Bill of Rights 1688* as a "proceeding in parliament".

Accordingly, we are of the view that Members of the Legislative Council participating in Question Time in the House of Assembly would be protected by Parliamentary Privilege and immune from legal action.

There have been five attempts in legislation for Ministers of one House to be able to appear in another House in Tasmania – four attempts to amend the *Constitution Act* and one to amend the *Parliamentary Privilege Act*. They all were passed by the Assembly and all were defeated in the Council. The only other State which has provided for Ministers from one House to participate in the proceedings of another is Victoria. It is a constitutional provision which has never been used in that State.

Given that the proposal is not dependent on Legislative change, it can be resolved by the Houses by way of a Joint Resolution, but certain procedural issues will still need to be addressed. As such a Resolution will need to specify under what conditions the Members of the Legislative Council would participate in proceedings.

Such matters would include the extent of the authority of the Speaker and whether the House of Assembly would have the power to hold a Member of the Legislative Council in contempt for something done, for example, misleading the House or for misbehaviour during the proceedings.

It is our view that these aspects can be adequately covered in any Resolution between the Houses.

We would recommend that the Standing Orders of the House of Assembly have application. However, in order to not further diminish the very important privileges of the Legislative Council we would recommend a qualified approach.

A Member of the Legislative Council attending Question Time in the House of Assembly would have the same status as a witness giving evidence to a Joint Committee as set out in the *Parliamentary Privilege Act 1957*. Should the Assembly resolve to impose a sanction on a Member of the Legislative Council, it can only be done with the agreement of the Legislative Council, save for the fact that the House of Assembly shall always have exclusive control over who can enter and/or remain in that House. That is to say, a Member of the Legislative Council could be ordered to withdraw by the Speaker or by vote of the House.

We would recommend the same approach if House of Assembly Members were to participate in Legislative Council proceedings.

As Clerks we would want to observe and maintain the equality of the Houses and, to the extent that is possible under this procedure, the privilege of exclusive cognisance of the proceedings of each House.

We would therefore recommend that any Resolution contain a provision of a kind contained in subsection 3(2) of the *Parliamentary Privilege Act 1957* which provides:

> *"No order of the House for the punishment of a person under this section operates against him until concurred in by the other House."*

As indicated in the Walker legal opinion this would recognise fully the aspect of equality and exclusive cognisance of one House to sanction its Members free from interference from the other House.

The *Constitution Act 1934* at section 14(3) provides that, *'No person shall be capable of being a Member of both Houses at the one time'*. The spirit of this section is preserved by giving Members of the Legislative Council, participating in the Assembly's Question Time, a similar status and protection to that of witnesses as set out in the *Parliamentary Privilege Act 1957*.

A Joint Resolution should therefore stipulate that nothing in the nature of discipline of a Council Member for offences constituting a contempt, with respect to their participation in Question Time, be administered without the concurrence of the Legislative Council.

The provision in the Joint Resolution which subjects a Member of the Legislative Council to the Standing Orders and procedures of the other House is qualified by the requirement of concurrence by the Legislative Council in matters dealing with the punishment of its Members.

The matter of the time at which Members from the Legislative Council could attend the Assembly for Question Time will require the Committee's consideration. The Length of Question time may also be a matter which the Committee may wish to consider.

Due to matters of formal parliamentary business in the Assembly at the commencement of each day's sitting, including the giving of Notices of Motion, it is not uncommon for Question Time to commence at 10.15 o'clock am for a period of one hour.

The Legislative Council usually sits on Wednesday and Thursday at 11.00 o'clock am.

A Member's first obligation is to the House of which they are a Member and accordingly the Legislative Council will have first call on those Members.

In summary we advise that, subject to the matter of the timing of Question Time as indicated above;-

(1) The proposal can be implemented by Resolutions between the two Houses without the need to change existing statutory provisions;

(2) That the proposal be limited to the period up to the prorogation of the two Houses and the dissolution of the House of Assembly prior to the next general election of that House;

(3) That the Standing Orders and practices of the House of Assembly apply with qualification;

(4) That no order of the House of Assembly for the punishment of a Member of the Legislative Council for an offence constituting a contempt, shall operate against him or her until concurred in by the Legislative Council;

(5) That the Speaker of the House of Assembly have sufficient authority over a Member of the Legislative Council so as to retain control of proceedings of the Assembly; and

(6) That a Member of the Legislative Council attending in the Assembly be not eligible to vote, be counted for the purposes of a quorum, attempt to move any motion or act in any way to initiate any business whatsoever.

Should the Committee deem it necessary, each of us would be pleased to attend any future meeting of the Committee where this matter is to be considered.

A Draft Resolution is attached for the Committee's consideration. We have no objection to this advice being made public.

D T PEARCE
Clerk of the Legislative Council

P R ALCOCK
Clerk of the House of Assembly

Attachment: Draft Resolution

DRAFT RESOLUTION

Resolved,

That the Legislative Council and the House of Assembly agree to the following provisions relating to the participation by Members of the Legislative Council, who are Ministers of the Crown, in Question Time in the House of Assembly –

1. That the Assembly seek the attendance of Members of the Legislative Council by separate message requesting that Leave be given to Council Ministers to attend the Assembly so as to respond specifically to Questions without Notice seeking information of the kind covered by the Standing Orders of the House of Assembly.

2. That the Standing Orders and practices of the House of Assembly have application, with qualification in relation to the requirement for any punishment for offences which constitute a contempt of the Assembly, committed by a Member of the Legislative Council, be not enforced until concurred with by the Legislative Council.

3. That the Speaker of the House of Assembly have sufficient authority over a Member of the Legislative Council participating in Question time so as to retain control of proceedings and maintain the decorum of the House.

4. That a Member of the Legislative Council attending in the Assembly be not eligible to vote, be counted for the purposes of a quorum, attempt to make any motion or act in a way to initiate any business whatsoever.

5. That the Member of the Legislative Council attending the Assembly be not subject to Questions beyond the time of 11.00 o'clock am on any sitting day on which sittings of the Legislative Council are to commence.

6. That this Resolution expire upon the prorogation of the Houses of Parliament and the dissolution of the House of Assembly prior to the next general election of that House.