



*Parliament House,
Hobart*

4 May 2016

Hon Ivan Dean MLC
Chair
Parliamentary Standing Committee of Public Accounts
Parliament House
HOBART TAS 7000

Dear Chair,

Thank you for your letter of 11 April last and for the opportunity to make a submission to the inquiry of the Committee into the *Public Accounts Committee Act 1970* (the Act). I am pleased to provide the following options for discussion and for the consideration of the Committee.

Option 1

With the exception of the proposed amendment to section 7 which is detailed below, Option 1 is simply a 'tidying up' of the Act to contemporise the practices of the Committee and to provide some degree of consistency in the manner the work of the Committee is managed and conducted *vis a vis* the work of other Parliamentary Committees.

1. Section 3 – Subsection (1), leave out "Governor" and insert instead "Presiding Officer of the House of Parliament of which the member is a Member of Parliament". This amendment would provide a contemporary alternative to the cumbersome and outmoded provision currently existing in the Act.

I question the necessity of subsection (2), given that the Committee is constituted by Members of Parliament, it stands to reason that if a Member vacates their seat they consequently invalidate their membership of the Committee.

2. Section 5 – Repeal as this provision is, I expect, more honoured in the breach than the observance. Given the arrangements for the administration of all Parliamentary Committee is dealt with by the Clerks of both Houses in consideration of resourcing capabilities, such an amendment will ensure consistency of practice across Committees.
3. Section 7 – Repeal subsection (2) as first, this provision prescribes a status upon a witness to this Committee and a concomitant obligation upon the Committee itself in respect of its treatment of such a witness, which given the legal technicalities such provision entails and without access to legal advice, the Committee may not properly be able to exercise.

The statute setting out the protections and privileges of a witness in a Supreme Court action is the Evidence Act 2001 (the "Evidence Act"). The Deputy Clerk of the House of Assembly, has summarised the relevant prescriptions of the Evidence Act which are annexed hereto.

By virtue of section 7(2) of the Public Accounts Committee Act the word "court" should be read as "Committee", wherever appearing in these sections. As you will see, the provisions prescribe the expectation that the Committee is aware of and is able to apply these rules of evidence and consequently would never seek to adduce testimony contrary to such rules. Moreover, the Committee is expected to be proactive in advising witnesses of the protections and immunities afforded them under the Evidence Act. Whilst I have not personally served the Committee in any official capacity in my twenty-seven years with the House of Assembly, I am unaware of that any such practice occurs. I am aware that the Committee has at least on one occasion sought advice from senior legal counsel as to the legality of an intended course of inquiry.

Second, this provision provides a witness with the capacity to refuse to answer a question, a privilege not afforded to witnesses to other Parliamentary Committees except the Integrity. Once again, for the sake of equity of treatment of witnesses and uniformity of practice across all Parliamentary Committees, the Committee should consider what advantages, if any, there are to the inquiry process of the maintenance of this provision.

4. Section 9 – Repeal as a Parliamentary Committee may order the payment of expenses to witnesses without the need for statutory authority.
5. Section 11 – Repeal as this section is entirely unnecessary as an 'office of profit' must be an office to which appointment is made by the executive government¹, which clearly is not the case with appointments to Parliamentary Committees which are made by the Houses.
6. Gender neutralise any relevant provisions.

Option 2

An alternative to the relatively superficial amendments proposed in Option 1, this Option proposes a more substantive amendment to the Act to provide:-

- that the Committee is established;
- how it shall be constituted, quorum etc;
- permit the Committee to sit during a prorogation²; and
- for the Committee to determine the scope of its functions within broad statutory prescription.

This option provides statutory certainty that the Committee is established every Parliament and how it should be constituted. It also enables the Committee to operate during a period of prorogation of the Parliament.

This approach is, incidentally, similar in scope to a broader consideration of the entire Parliamentary Committee system undertaken by the Legislative Council in 2010.³

¹ Ibid.

² This would not be permissible under 'Option 1'. However, this is not a significant consideration as annual prorogations have fallen out of favour in the last two decades.

Option 2 is to amend the Act as follows:-

1. Section 1A – Repeal definitions consequent on amendments detailed below.
2. Section 3 – Repeal as per Option 1 above.
3. Section 5 – Repeal as per Option 1 above.
4. Section 6 – Repeal and insert the following new section:-

"6 (1) The Committee must inquire into, consider and report to the Parliament on any matter referred to the Committee by either House.

(2) The Committee may inquire into, consider and report to the Parliament on any matter connected to the financial administration of the State."

This amendment broadens the latitude of inquiry further than the current prescription and arguably puts beyond argument any scope for a legal challenge that the Committee may be acting *ultra vires* the Act.

5. Section 7 – Repeal and insert the following new section:-

"7 Unless otherwise provided for in this Act, the Rules for Select Committees of the Legislative Council shall be followed as far as they can be applied."

This amendment, again, is designed to provide uniformity of practice across all Parliamentary Committees. As this Committee will for the foreseeable future be administered by Officers of the Legislative Council, it is appropriate to utilise the practice of that House.

6. Section 9 – Amend as per Option 1 above.
7. Section 11 – Amend as per Option 1 above.
8. In order to address any concern at the risk arising from the justiciability of the activity of the Committee, consideration should be given to insert a new section, similar to that provided in the *South Australian Parliamentary Committees Act 1991* as follows:-

"Immunity from judicial review

The proceedings of this Committee or any report or recommendation of, or document published by, this Committee may not give rise to any cause of action or be made the subject of, or in any way be called into question in, any proceedings before a court."

9. Gender neutralise any relevant provisions.

Option 3

Regrettably, as the proceedings on the original Bill occurred prior to the existence of the Parliamentary Reporting Service, I have been unable to inform myself as to the motivation behind the introduction of this legislation. Absent that, one can only speculate as to the reasons it was felt necessary at that time to resort to a statutory measure⁴ when a parliamentary solution would have continued to have provided the appropriate environment in which a Committee such as the Public Accounts Committee could and should operate. This is still the case and I respectfully recommend to you that the review should consider this most fundamental question, that is, the need for the Act itself.

³ *Vide Committees of the Tasmanian Parliament Discussion Paper, Paper No. 10 of 2010.*

⁴ I note the Subordinate Legislation Committee Act commenced the previous year. To have committees established by statute may simply have been pursued as a fashionable 'innovation'.

In comparison to a Committee established by resolution, the Act provides no advantages, only disadvantages. First, notwithstanding the very wide latitude prescribed in section 6 of the Act, statutory prescription and the interpretation thereof, necessarily restricts any flexibility in the exercise by the Committee of its role and functions and more importantly, as any statute is justiciable, it exposes the operations of the Committee to the possibility of legal challenge and judicial interpretation. In circumstances which raise any doubt, the Committee needs to seek interpretative advice from legal counsel, resulting in possible delay in proceedings and of course, any such opinion is itself then open to counter-opinion and possible dispute. Committees established by resolution and the proceedings of the same, receive the absolute protection afforded by Article 9 of the *Bill of Rights 1688*⁵ which proscribes any legal action against them and additionally, any judicial adjudication upon any such proceedings. A further disadvantage of a statute founded Committee is of course that any changes or improvements identified by the Committee to assist its operation requires legislative amendment.

Option 1 is the repeal of the Act and the adoption by the Legislative Council and the House of Assembly of a Standing Order in terms similar to the following example:-

"Public Accounts Committee

XXX (1) At the commencement of the first Session of each Parliament this House shall appoint three Members to serve on a Joint Committee (to be known as the Public Accounts Committee) to inquire into, consider and report to the Parliament on any matter:-

- (a) referred to the Committee by either House; or
- (b) connected to the financial administration of the State; and
- (c) any matter referred to the Committee by the Auditor-General.

(2) A person shall not be appointed, or continue, as a member of the Committee if they become -

- (a) a Minister of the Crown;
- (b) the President of the Legislative Council⁶;
- (c) the Speaker of the House of Assembly⁷; or
- (e) the Government Leader or Deputy Government Leader in the Legislative Council⁸.

(3) The Committee shall have power to sit during any adjournment of Parliament.

(4) Three Members irrespective of the House to which they belong, shall form a Quorum of each of the said Committees, provided that the Quorum shall not consist exclusively of Members of one House only.

(5) Unless otherwise provided for in this Standing Order, the Rules for Select Committees shall be followed as far as they can be applied."

Yours sincerely,



Shane Donnelly
CLERK OF THE HOUSE

⁵ Bill of Rights (1 William and Mary) - Statute of the Parliament of the United Kingdom. This statute is sometimes cited as Bill of Rights 1689 which is the 'New Style' dating. It states that, "The freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament."

⁶ Would not be included in Assembly SO.

⁷ Would not be included in Council SO.

⁸ Would not be included in Assembly SO.

Annexure

Relevant Protections and Privileges under the Evidence Act

1. Client Legal Privilege (ss117 – 126)

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between two or more lawyers acting for the client; or
- (c) the contents of a confidential document, whether delivered or not, prepared by the client, lawyer or another person –

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.⁹

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of -

- (a) a confidential communication between the client and another person, or between a lawyer acting for a client and another person, that was made; or
- (b) the contents of a confidential document, whether delivered or not, that was prepared –

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding, including the proceeding before the court, or an anticipated or pending Australian or overseas proceeding, in which the client is, or may be, or was or might have been, a party.¹⁰

2. Professional Confidential Relationship Privilege (ss126A – 126F)

The court may direct that evidence not be adduced in a proceeding if the court finds that adducing the evidence would disclose –

- (a) a protected confidence; or
- (b) the contents of a document recording a protected confidence; or
- (c) protected identity information.¹¹

A 'protected confidence' means a communication made by a person to another person:

- (a) in the course of a relationship in which the confidant was acting in a professional capacity; and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.¹²

⁹ Evidence Act section 117

¹⁰ Evidence Act section 118

¹¹ Evidence Act section 125B(1)

¹² Evidence Act section 126A

3. Religious Confession (s127)

A person who is a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.¹³

4. Medical Communications (s127A)

A medical practitioner, without the consent of his or her patient, must not divulge in any civil proceedings any communication made to him or her in a professional capacity by the patient that was necessary to prescribe or act for the patient unless the sanity of the patient is the matter in dispute.¹⁴

A person who has possession, custody or control of any record of such communication between a medical practitioner and patient must not divulge that information in any civil proceeding unless the sanity of the patient is the matter in dispute.¹⁵

5. Communication to Counsellor (s127B)

A counselling communication must not be disclosed in any proceedings unless the victim has consented to the disclosure.¹⁶

A 'counselling communication' means a communication made before, on or after the commencement of the Act in circumstances that give rise to a reasonable expectation of confidentiality if the communication is made:

- (a) by a victim of a sexual offence to a counsellor in the course of counselling or treatment of the victim by the counsellor for any emotional or psychological harm suffered in connection with the offence; or
- (b) to, or in relation to, that victim for the purposes of counselling or treatment.¹⁷

6. Privilege in Respect of Self-Incrimination in Other Proceedings (s128)

A witness may object to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness –

- (a) has committed an offence against or arising under an Australian law or the law of a foreign country; or
- (b) is liable or a civil penalty.¹⁸

If the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence or evidence on a particular matter.¹⁹

¹³ Evidence Act section 127

¹⁴ Evidence Act section 127A(1)

¹⁵ Evidence Act section 127A(2)

¹⁶ Evidence Act section 127B(3)

¹⁷ Evidence Act section 127B(1)

¹⁸ Evidence Act section 128(1)

¹⁹ Evidence Act section 128(2) and (3)

7. Exclusion of Evidence of Reasons for Judicial Decisions (s129)

Evidence of the reasons for a decision made by a person who is –

- (a) a judge in an Australian or overseas proceeding; or
- (b) an arbitrator in respect of a dispute submitted to the person, or to the person and one or more other persons, for arbitration –

or the deliberation of a person so acting in relation to such a decision, must not be given by the person who, in relation to the proceeding or arbitration, was under the direction or control of that person.²⁰

8. Exclusion of Evidence of Matters of State (s130)

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.²¹

9. Exclusion of Evidence of Settlement Negotiations (s131)

Evidence is not to be adduced of –

- (a) a communication made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
- (b) a document, whether delivered or not, prepared in connection with an attempt to negotiate a settlement of a dispute.²²

There are a number of exemptions from this section listed in subsection (2), for example where the persons in dispute consent to the evidence being adduced.²³

Duty of Court to Inform of Rights to Make Applications and Objections (s132)

The Evidence Act requires that the court notify a witness or party if there appear to be grounds for making an application or objection based on any of the above grounds and to ensure that the witness or party is aware of the effect of the relevant provisions of the Act.

Section 132 provides that "If it appears to a court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself...that the witness or party is aware of the effect of that provision."

In the context of the Public Accounts Committee, this would require the Committee to ensure that a witness was made aware of the effect of the relevant provisions if it appeared that there were grounds for that person to make an objection to giving any evidence based on any of the grounds set out above.

²⁰ Evidence Act section 129(1)

²¹ Evidence Act section 130(1)

²² Evidence Act section 131(1)

²³ Evidence Act section 131(2)