SUBMISSION TO THE

UNITED KINGDOM PARLIAMENT

GREEN PAPER ON PARLIAMENTARY PRIVILEGE

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1 INTRODUCTION

1.1 The Legislative Council of the Parliament of Western Australia welcomes the opportunity to make a submission on the United Kingdom Parliament *Green Paper on Parliamentary Privilege*. The Green Paper is a significant document and any subsequent legislative reform will have an enormous impact on parliamentary privilege not only in the United Kingdom, but throughout those parliaments of the world that are based on the Westminster model.

1.2 Over the last decade or so, the Legislative Council has faced a number of issues relating to parliamentary privilege, including:

a) the imprisonment of a non-Member for disobeying an order of the House;

b) the appearance of a non-Member before the bar of the House to apologise to the House for a breach of privilege/contempt of Parliament;

c) the successful prosecution in the District Court of a non-Member witness for the *Criminal Code* offence of giving false evidence to a parliamentary committee;

d) the imposition of a $1 500 fine on a senior public servant for failing to deliver documents in accordance with a summons issued by a parliamentary committee;

e) legislation that conferred on an official corruption 'watchdog' agency (the Corruption and Crime Commission of Western Australia) all the powers and privileges of a parliamentary committee when investigating Members of Parliament for misconduct;

f) references to confidential proceedings of parliamentary committees in the public hearings of the Corruption and Crime Commission;

g) the use by a parliamentary committee of the Corruption and Crime Commission's transcripts of secretly recorded telecommunications;

h) threats of legal injunctions against parliamentary proceedings by legal counsel representing witnesses before parliamentary committees;

i) the use of non-Member counsel to cross-examine witnesses before a select committee of privilege investigating possible unauthorised disclosures by Members of a parliamentary committee;

j) an unsuccessful motion to expel two Members of the Legislative Council;

k) the reference to the Director of Public Prosecutions of a number of possible instances of false evidence being given to a select committee of privilege by both Member and non-Member witnesses for consideration as to whether prosecutions should be undertaken for an offence under the *Criminal Code*;

l) the service of a witness summons and an order for the production of documents by a private law firm upon a Member within the precincts of Parliament House during Question Time; and

m) a select committee established to investigate the appropriateness of powers and penalties for breaches of parliamentary privilege and contempts of Parliament.

1.3 In the past 12 months alone, the Legislative Council has been confronted by four separate items of existing or proposed legislation that have purported to either regulate proceedings of the Parliament, exclude the powers of the Parliament entirely in certain circumstances, or expressly 'clarify' Parliament's power to obtain information. In short, the practical effect of this legislation has been:

- in the case of existing law, to prevent a committee of the Legislative Council from obtaining basic information from the Auditor General about his audit processes; and

- in the case of proposed laws:

i) to propose that the Parliament and its committees be required to take into account, like courts and tribunals, a specified set of factors before ordering a journalist to answer questions relating to their confidential sources;

ii) to propose that the Parliament's committees, like courts and tribunals, be prevented from disclosing any information about the true identities of undercover law enforcement operatives; and

iii) to expressly state that a Minister may provide information relating to the business of the Bank of Western Australia to the Parliament in response to a question or order.

1.4 Such legislation appears to represent both a lack of understanding of parliamentary privilege in Western Australia and a desire to regulate the Parliament and its committees as if they were investigatory and decision-making bodies of the Government.

1.5 Given this recent history, the Legislative Council is following the progress of the Green Paper with interest.

2 BACKGROUND TO PARLIAMENTARY PRIVILEGE IN WESTERN AUSTRALIA

2.1 In order to put into context the below responses of the Legislative Council to the Green Paper, the following is a brief overview of parliamentary privilege in Western Australia.

2.2 It is important to note that the Legislative Council does not look to either the Australian Senate or House of Representatives as being authoritative on questions of procedure or power, because the Council's formation and links to the United Kingdom House of Commons preceded the formation of both Australian Commonwealth Houses of Parliament.

2.3 Western Australia was granted responsible government in 1890. Section 36 of the *Constitution Act 1889* (WA) provides for the privileges of the two Houses of the Western Australian Parliament to be defined by any Act. Section 1 of the *Parliamentary Privileges Act 1891* (WA) provides that all of the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989 shall apply to each House, unless the *Parliamentary Privileges Act 1891* (WA) provides otherwise.

2.4 The choice to 'peg' the Western Australian Parliament's link with the House of Commons to the date of 1 January 1989 was explained in a report of the Western Australian Legislative Assembly Procedure and Privileges Committee as follows:

> *A better option for the Western Australian Parliament is to 'peg' the linkage with the House of Commons to 1 January 1989, the publication year of the twenty-first edition of Erskine May's Treatise on the Laws, Privileges, Proceedings and Usage of Parliament (Parliamentary Practice) which is also the next edition published after the Australia Act 1986. This edition predates the undesirable changes introduced by the Defamation Act 1996 (UK) and also those recommended by the UK Joint Committee Inquiry into parliamentary privilege, yet still enabling the Western Australian Parliament to continue to refer to an authoritative procedural text of relatively recent publication date when determining parliamentary privilege. It will then be left to the Western Australian Parliament to determine which, if any, subsequent changes to the privilege it wants to adopt.*[1]

[1] Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Parliamentary Privilege and its Linkage to the UK House of Commons*, May 13 2004, p6.

2.5 In addition to a general conferral of all of the House of Commons' powers and privileges on the Houses of the Western Australian Parliament as at a certain date, the *Parliamentary Privileges Act 1891* (WA) also confers the following summary powers with respect to contempts:

> ***8. Houses empowered to punish summarily for certain contempts***
> *Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person —*
>
> *(a) disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid;*
>
> *(b) refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid;*
>
> *(c) assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House;*
>
> *(d) sending to a member any threatening letter on account of his behaviour in Parliament;*
>
> *(e) sending a challenge to fight a member;*
>
> *(f) offering a bribe to, or attempting to bribe a member;*
>
> *(g) creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.*

2.6 The Houses of Parliament may deal with these matters themselves, or opt to direct the Attorney General to prosecute in the Supreme Court (where a punishment of up to two years imprisonment and or up to a $200 fine may be imposed): s 14.

2.7 The *Parliamentary Privileges Act 1891* (WA) expressly authorises the two Houses and their committees to order the attendance of any person as a witness or to produce any documents: s 4. The Act sets out the procedure for issuing a summons pursuant to such an order: s 5. Witnesses are able to refuse to answer questions or produce documents only on the ground that *"the same is of a private nature and does not affect the subject of inquiry"*, and such refusal shall be considered by the relevant House: s 7.

2.8 In addition to these provisions, the *Criminal Code* (WA) provides for a number of offences related to the Parliament:

- *Interference with the legislature*: s 55;
- *Disturbing Parliament*: s 56;
- *False evidence before Parliament*: s 57;
- *Threatening witness before Parliament*: s 58;
- *Witnesses refusing to attend or give evidence before Parliament*: s 59;
- *Member of Parliament receiving bribes*: s 60;
- *Bribery of member of Parliament* s 61.

2.9 In 2009 a select committee of the Legislative Council made a number of recommendations for legislative reform regarding parliamentary privilege in Western Australia.[2] The recommendations included that:

a) sections 55, 56, 57, 58 and 59 of the *Criminal Code* be repealed and that such acts be dealt with solely by the Houses of Parliament as contempts;

b) the power of the Western Australian Parliament to imprison be abolished, save that the Parliament should retain power to detain temporarily persons misconducting themselves within either House or elsewhere within the precincts of Parliament;

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[2] *Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament*, Legislative Council, Parliament of Western Australia (reported 7 May 2009).

c) the *Parliamentary Privileges Act 1891* be amended to provide that the Western Australian Parliament may impose a fine for any amount it believes appropriate in relation to any breach of privilege or contempt of Parliament;

d) the power of the Western Australian Parliament to expel a Member be abolished.

2.10 The Government has yet to introduce a Bill to implement these recommendations.

Specific Responses to Questionnaire

3 CHAPTER 1 — OVERVIEW AND GENERAL APPROACH

Q1: Do you agree that the case has not been made for a comprehensive codification of parliamentary privilege?

3.1 Yes.

3.2 From the Western Australian experience, the minimalist *Parliamentary Privileges Act 1891* (WA) that provides a few practical provisions (such as setting out the process for issuing summonses for the attendance of witnesses and the production of documents), a summary power to fine for certain contempts, and a general statement adopting all of the *"privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989"*, has proven effective for most purposes.

3.3 The two main drawbacks of comprehensive codification that we can see are:

a) Ensuring that it is truly 'comprehensive', and that a power or immunity that may become crucial at a later stage has not been accidentally omitted; and

b) The risk of increased court involvement in defining parliamentary privilege. Codification of parliamentary privilege would open up a range of new matters to be determined by judicial interpretation of the statutory wording. The political arena is a controversial, high stakes, field of human endeavour in which not every participant can be satisfied with the outcomes. A parliamentary committee's recommendations and any subsequent legislative or administrative action can potentially have significant financial repercussions for participants in that committee's inquiry. If the door is opened to them to interpret legislation relating to parliamentary privilege, the courts are likely to become much more involved in parliamentary proceedings as disaffected parties make use of all avenues of appeal (including the seeking of legal injunctions and judicial review of decisions) to dispute the actions of a House of Parliament or its committees. Parliamentary privilege, lying as it currently does for the most part outside legislation and judicial decisions, generally has significant protection against potentially constant and disruptive legal action by and against the participants in parliamentary proceedings.

3.4 At the end of the day, it can never be predicted exactly how a court will decide a given case. There have been numerous cases in the past 200 years or so where there has been a surprising judicial determination that has impacted on the previously accepted understanding as to the scope of parliamentary privilege. It is far more preferable for any significant changes to parliamentary privilege to be brought about by resolution of the Parliament itself.

3.5 Although there is a strong argument that certain words and phrases could benefit from being defined in statute, and that certain administrative and legal processes such as the issuing and enforcement of witness and document summonses by parliamentary committees should be expressly provided for in legislation, on the whole the very real risk of a series of 'unhelpful' legal decisions that could seriously narrow the scope of parliamentary privilege probably outweighs the potential benefits.

3.6 The dangers of eroding long held privileges, either deliberately or unwittingly, is something that the Legislative Council is currently dealing with. Presently before the Legislative Council is the Criminal Investigation (Covert Powers) Bill 2011. That Bill seeks to make it an offence to disclose the identity of a covert law enforcement operative, including if such disclosure is made in the course of parliamentary committee proceedings. The inclusion of parliamentary committee proceedings in the Bill, which implements a model national uniform law, is a provision unique to Western Australia. The rationale for the Bill appears to have been an incident from several years ago where a voluntary police witness before a committee requested that his identity be kept confidential **after** the relevant committee had already reported and disclosed his name. The provision is especially unusual in that it only applies to committee proceedings – not to Members identifying covert operatives in debate in the House. Indeed, in 2010 Mr John Quigley MLA, Shadow Attorney General, used parliamentary privilege to name an undercover police officer in the Legislative Assembly that had been involved in a wrongful prosecution. Such a disclosure would not be covered by the Bill.

4 CHAPTER 2 — FREEDOM OF SPEECH: GENERAL ISSUES

Q2: Do you think that *"proceedings in Parliament"* should be defined in legislation?

4.1 No, although there would be obvious advantages if it were possible to draft a suitably broad definition.

4.2 It is well accepted that what is said and what physically happens in a House and its committees whilst they are in session is covered by absolute privilege. What remains unclear are which activities of Members and parliamentary staff that are ancillary to those sittings are also protected.

4.3 Over the past two hundred years a series of court judgments have progressively, but unevenly, narrowed the scope of proceedings in Parliament. As noted in the Green Paper, court decisions such as those excluding registers of Members interests from *"proceedings in Parliament"* raise doubts over exactly what does fall within the definition.

4.4 Section 16(2) of the Australian Federal Parliament's *Parliamentary Privileges Act 1987* (Cth) has been acknowledged as establishing a useful starting point for a legislative definition of proceedings in Parliament. Section 16(2) provides:

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** *means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:*

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

4.5 Indeed, courts throughout Australia and New Zealand have taken to referencing this definition even in jurisdictions that have no equivalent statutory definition. As such, at least from the Western Australian viewpoint, there would probably be little benefit in enacting a similar definition when the Commonwealth Parliament's statutory definition will probably be given significant weight by a court at any rate.

4.6 There is also the argument that by leaving proceedings in Parliament undefined, changes in the work demands of Members and technological developments can possibly be accommodated. For instance, the use of iPads is becoming increasingly popular in committee meetings and our Parliament is moving steadily towards being 'paperless'. It is possible that iPad use and the conduct of meetings via electronic communications may change the nature of proceedings in Parliament and the kinds of official records maintained. Would such technological changes be captured by a rigid statutory definition like that of the Commonwealth Parliament?

4.7 The role of a Member of Parliament has changed so significantly in the past 100 years or so that many functions associated with a Member's work (such as discussions with, and instructions to, their electorate and research officers on preparing parliamentary questions and drafting amendments to bills) could possibly be regarded as properly part of the proceedings of Parliament. Similarly, caucus and party room meetings of Members immediately before a sitting of Parliament could also be viewed as being an important part of a modern Member's workload. Such activities are not presently regarded as proceedings in Parliament, but there may come a time when the

Parliament may see advantages in extending absolute privilege to such activities (along with perhaps Members' correspondence to constituents and Ministers).

4.8 Given the changing work demands of Members and technological advances in the work of Parliament, we submit that it may be wiser to keep the phrase *"proceedings in Parliament"* undefined.

Q3: Do you agree with the recommendation of the Joint Committee on Parliamentary Privilege that the current protection of qualified privilege for Members' correspondence is sufficient?

4.9 Yes.

4.10 It is acknowledged that Member's electorate office work on behalf of constituents has become an increasingly larger percentage of a Member's workload in the last century or so. We also live in an increasingly litigious society, and Members of Parliament remain exposed to legal action for a significant percentage of their work performed in their electorate offices.

4.11 Nevertheless, to extend absolute privilege to Members' correspondence would be taking a significant step away from what has traditionally been considered a *'proceeding in Parliament"*. As the Legislative Council submitted to the 1998-99 Joint Committee on Parliamentary Privilege, for an activity to be characterized as a *"proceeding in Parliament"* it must be something of which the House is actually seised. For instance, a petition in circulation cannot be characterised as a proceeding in Parliament as the promoter, for any number of reasons, may decide not to have the petition presented. A question from a member may not be lodged. Arguably, it is not a *"proceeding in Parliament"* until the member takes the necessary steps to put it in the system. Until that is done, a member is free to do what he/she wants with the question without reference to any parliamentary authority. Once lodged, the question assumes the character of a parliamentary question whose form and content and progress are determined, not by the Member, but by the rules applicable to parliamentary questions. As we submitted in 1998-99:

> *One must ask why privilege should be extended beyond traditional boundaries. If it is intended that MP s' communications with other MP s or constituents or anybody else should be subject to some form of secrecy protection then privilege is not a solution. Parliamentary privilege is not concerned with secrecy - aspects of it prohibit premature publication which is not the same as secrecy. If an extension would prevent the threat of litigation that might otherwise arise, the public policy issues presented by such an extension are profound. Does it, for example, enable an MP or a constituent to publish material defamatory of a third person with impunity? Is that directed towards the proper discharge of an MP's constitutional functions? In*

WA members of both Houses maintain electorate offices where they deal with all manner of issues brought to them by constituents. To clothe those, and related communications with third parties, with absolute immunity misconceives the nature of parliamentary proceedings and the reasons for their associated immunities. Neither can it be said that extending absolute immunity in this way assists the standards of prudence, probity and responsibility expected of an MP.

4.12 As such, we do not believe that there is a strong enough argument at present to justify the extension of absolute privilege to Members' correspondence. There would also not appear to be a pressing need for a statutory qualified privilege to apply in such circumstances.

Q4: Do you think that *"place out of Parliament"* should be defined in legislation?

4.13 No.

4.14 The word 'place' is sufficiently broad to indicate an intention for the protection to apply in any forum established by law where a person may be adversely affected by any decision made, and not just in courts or tribunals in the traditional sense.

4.15 Whilst the wording of the *Bill of Rights 1689* has been accepted as applying to court-like bodies, there are numerous investigatory and decision-making bodies in different forms and structures that could broadly fall into this category. Any legislative definition would need to be broad and non-exhaustive and subsequently would be unlikely to add anything to the existing understanding of the word 'place'.

Q5: Do you think that the situations when the courts can use proceedings in Parliament should be set out in legislation?

4.16 Yes.

4.17 There have been a number of undesirable court decisions that have permitted the use of parliamentary proceedings in legal proceedings beyond the mere establishing of facts. The case of *Jennings v Buchanan* (New Zealand) [2004] UKPC 36, in particular, applied a surprising interpretation of the use of parliamentary proceedings to establish fact.

4.18 It is preferable that legislation should simply provide that proceedings in Parliament can never be used in courts, tribunals or in any other forum where a person may be adversely affected by a decision, unless the Parliament has otherwise expressly authorised such use in legislation. Such authorisation may be in the form of provisions such as s 19 of the *Interpretation Act 1984*, which permit the use of parliamentary proceedings as an aid to interpreting the provisions of a written law, or provisions establishing criminal offences against the Parliament where parliamentary

proceedings will form part of the evidence (such as the *Criminal Code* (WA) offences of giving false evidence to Parliament or bribery of a Member).

4.19 Although not recommended, it may also be considered of benefit to expressly allow courts to continue to use proceedings in Parliament simply to establish the mere fact that someone was present at Parliament at a certain time and date or that a specific parliamentary proceeding took place on a certain date.

4.20 We would therefore support the clarification in legislation of the situations when courts may use the proceedings of Parliament, and believe that such a clarification could be a stand-alone provision that need not necessitate a major codification of parliamentary privilege.

5 CHAPTER 3— FREEDOM OF SPEECH AND CRIMINALITY

Q6: Do you believe that the protection of privilege should be disapplied in cases of alleged criminality, to enable the use of proceedings in Parliament as evidence?

5.1 Yes, but only in a few limited cases.

5.2 The chilling effect on freedom of speech of a general disapplication of privilege for all criminal offences would be significant.

5.3 The only criminal proceedings that should be able to access the proceedings of Parliament as evidence should be for those crimes directly relating to Parliament (such as bribery of a Member of Parliament, giving false evidence to a parliamentary committee, corruption involving a Member of Parliament, disrupting or interfering in Parliament, etc), and the authorisation to use the records of Parliament in such cases should be expressly provided for in legislation.

5.4 As such offences directly affecting the Parliament would be relatively few, we are of the view that express provision for the use of parliamentary proceedings could be made for such offences without creating the proposed general disapplication provision with a Schedule of exceptions maintained by a Minister through subsidiary legislation.

Q7: If so, do you believe that this disapplication should apply to all cases of alleged criminality unless specifically excepted, or should disapplication be restricted to certain specific offences such as bribery?

5.5 Disapplication of privilege should apply only for a few specific crimes against the Parliament, such as giving false evidence to Parliament, threatening a Member of Parliament or a witness before a parliamentary committee, corruption by a Member of Parliament or bribing a Member of Parliament.

Q8: Do you agree that if the protection of privilege were disapplied in criminal cases, exceptions would need to be made?

5.6 Yes.

Q9: If so, are the offences specified in the draft Schedule the correct ones? If not, which offences should be included or excluded?

5.7 The offences specified in the draft Schedule are a practical starting point, particularly with respect to offences relating to divulging confidential government information.

5.8 It would, however, seem that a greater range of offences could be added to the Schedule.

5.9 A wide variety of matters may become the subject of debate by Members of Parliament in the House. For instance, private commercial business practices may be the subject of debate, and some Members may feel vulnerable to disclosing certain personal experiences that may be relevant to the debate for fear their comments may open them up to investigation for corporate crimes.

5.10 It is for this reason that we would feel more comfortable with a small list of criminal offences where privilege is expressly disapplied, rather than enacting a general disapplication of privilege to criminal proceedings and then attempting to reign in the disapplication by maintaining a Schedule with an extensive list of offences that are excluded from the disapplication.

Q10: Should the protection of privilege be disapplied where a person incites specific acts of violence or terrorism in proceedings in Parliament?

5.11 No.

5.12 We would prefer an approach that treats any incitement during proceedings in Parliament to a specific act of violence or terrorism as a *"speech offence"*, and therefore protected by the privilege of freedom of speech. There is a very real risk that disapplying privilege for such verbal incitements may have a chilling effect on debate, and that in practice it may also prove difficult to define what exactly constitutes such incitement.

5.13 Such acts are more appropriately dealt with procedurally and as an abuse of parliamentary processes. The situation could be best handled by expunging such statements from the record of parliamentary proceedings, and by using Parliament's own powers to punish abuses of privilege by Members.

Q11: Do you agree that the offence of misconduct in public office should be on the list of exceptions?

5.14 Yes.

5.15 Misconduct by Members of Parliament is best dealt with by Parliament's own processes for dealing with internal disciplinary matters.

5.16 It is also crucially important for the effective scrutiny of the Government by Parliament that Members of Parliament are able to provide full and frank testimony to the Parliament and its committees of privilege about their actions in relation to Parliament or the inner workings of government. Members of Parliament would be unable to provide full disclosure if they felt that they needed to withhold relevant information on the basis that in revealing their own actions they may be at the risk of criminal prosecution.

Q12: Do you believe that, if the protection of privilege were disapplied in certain circumstances, a safeguard would be desirable before proceedings in Parliament could be used in evidence by the prosecution in specific cases?

5.17 Yes.

Q13: If so, do you support the approach in the draft clauses?

5.18 No.

5.19 There is some doubt as to whether public officers such as the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions would have a sufficient understanding of parliamentary privilege and the practical implications for the Parliament to give informed consent to the use of parliamentary proceedings as evidence in a prosecution.

5.20 It would be more preferable if the decision whether to use parliamentary proceedings as evidence in a prosecution were made by an official that was also a current or former Member of Parliament.

Q14: Do you believe the protection of privilege should in certain circumstances be disapplied for non-members as well as for Members?

5.21 Yes, but only for a very few criminal offences that relate directly to the Parliament, such as bribery of a Member and giving false evidence to a committee.

5.22 Parliamentary committees inquire into an extremely broad range of matters, including unauthorised activities within government agencies, improper private commercial activities and criminal law reform. Committees may be denied access to vital evidence if a potential witness felt that they could not give evidence, or even approach

a committee with certain information, if such communication could result in them facing criminal sanctions.

Q15: If so, do you believe this should be:

(a) in all the same situations as for Members; or

(b) only when a non-member is being tried on the same facts as a Member?

5.23 It should be in the same situations as for Members, but such situations should be limited to offences directly related to the Parliament, such as bribery of a Member or giving false evidence to a committee.

6 CHAPTER 4 — FREEDOM OF SPEECH AND CIVIL LAW

Q16: The Government does not think that any legislative change to restrict freedom of speech in proceedings in Parliament in respect of court injunctions is desirable or necessary. Do you agree?

6.1 Yes.

6.2 Members of Parliament should be able to speak freely on any matter they wish relevant to the motion or proposed legislation before the House, subject to the application of the normal *sub judice* rules and possible disciplinary action by the House itself for abuse of privilege.

Q17: Do you think that section 13 of the *Defamation Act 1996* should be repealed?

6.3 Yes.

6.4 There was initially considerable concern expressed in Western Australia when s 13 of the *Defamation Act 1996* (UK) was introduced. The concept of 'waiving' parliamentary privilege for an individual Member of Parliament raises the possibility of such a waiver being recklessly used for purely political reasons. The following was noted in our House's submission to the UK Parliament's 1998-99 Joint Committee on Parliamentary Privilege:

> *Section 13 of that Act permits waiver by a member or non-member who is a party in defamation proceedings to the protection of any privilege of Parliament that might otherwise apply. On being informed by an officer of the House of Commons at their annual conference of this change in UK law, several presiding officers and clerks from State parliaments went rather pale. The reason for their consternation is that some States, my own included, tie their privileges to those "held, possessed, exercized and enjoyed . . . for the time being" by the House of Commons. Needless to say, the effects wrought*

by s 13 on WA's parliamentary privilege have not been broadcast in the hope that s 13's statutory existence may soon be terminated.

6.5 Of course, as noted above, the *Parliamentary Privileges Act 1891* (WA) has since been amended to 'peg' our State Parliament's adoption of the UK House of Commons' powers and privileges to 1 January 1989 – in part, to avoid the issues raised by s 13. Nevertheless, s 13 is such an unusual, and arguably undesirable, provision that its repeal is still preferable.

6.6 The Legislative Council has adopted a right of reply process for persons adversely referred to in debate in the House. We would recommend such a right of reply process rather than the waiver of a Member's privilege to enable participation in defamation proceedings.

Q18: If so, do you think that section 13 of the Defamation Act 1996 should be replaced with a power for each House to waive privilege, and do you have views on how that should operate?

6.7 No.

6.8 To avoid the potential for the waiver being used for purely political purposes, it is preferable that privilege should not be able to be waived for any reason.

Q19: Is a general power for each House to waive the protection of privilege to permit inquiries to consider evidence given in proceedings desirable?

6.9 No.

6.10 Such a power would open up privilege to the possibility of being waived for short term, purely political, reasons.

6.11 The Legislative Council has, on a number of occasions, released private committee evidence to royal commissions and government inquiries for the purpose of properly informing those inquiries. However, on each occasion, strict processes were put in place to ensure that the private evidence was not disclosed by the inquiries and that parliamentary privilege continued to be observed in relation to that evidence.

7 CHAPTER 5 — APPLICATION OF LEGISLATION TO PARLIAMENT

Q20: In light of the Chaytor judgment, do you believe there is a need for legislation to clarify the extent of Parliament's privilege to organise its internal affairs?

7.1 No.

7.2 We agree that drafting appropriate legislation would prove difficult, and would necessitate a legislative definition of *"proceeding in Parliament"*. This remains an

area which, although unclear, is not a particularly problematical area as most parliaments have tended to adopt an approach of complying with any general laws that apply to public and private organisations. Most activities relating directly to the proceedings of Parliament remain readily identifiable, despite some unusual and inconsistent court decisions on the periphery.

8 CHAPTER 6 — REGULATION OF MEMBERS

Q21: Would you support legislation that clarified that the privileged status of proceedings of the Committee on Standards in the House of Commons would not be affected by the granting of full voting rights to lay members?

8.1 Yes.

8.2 This would be a sensible legislative provision that would enable the Parliament to make use of external expertise and also provide an opportunity for the general public to become more involved in the work of the Parliament and to assist in establishing the appropriate standards of behaviour for Members.

8.3 In 2007 the Legislative Council appointed a select committee of privilege to investigate an unauthorised disclosure from a committee. The select committee used a senior criminal barrister during the hearings to ask questions on behalf of the select committee's Chairman. It would have been valuable for such a select committee of privilege to have included a senior barrister as a voting member. Similarly, the ability to include statutory office-holders that report to the Parliament, such as the Auditor General, on certain committees for specific inquiries could significantly value-add to committee reports.

Q22: Do you agree that, other than for lay members of the Committee on Standards in the House of Commons, there is no reason to legislate in any legislation on privilege regarding the regulation of Members of either House?

8.4 Yes.

8.5 The regulation of Members, short of dealing with actual criminal conduct affecting the operations of the Parliament, is a matter that should remain solely within the jurisdiction of the Parliament and should not be open to the possibility of appeals to the courts.

8.6 The Legislative Council currently has a power to suspend and expel its Members; although there is currently a proposal before the House that the *Parliamentary Privileges Act 1891* (WA) be amended to remove the power of the Houses of the Parliament of Western Australia to expel their Members.

Q23: Is there a need to address select committees' power to summon witnesses, documents and records?

9.1 Yes.

9.2 It would be preferable for the procedural and enforcement process to be clearly established in statute.

9.3 The Legislative Council's power to issue summonses requiring the attendance of persons or the production of documents is set out in the *Parliamentary Privileges Act 1891* (WA). This Act provides the procedures to be followed by committees in issuing summonses, and also when a recipient of a summons refuses to attend or produce the ordered documents. The Act also provides the House with a power to fine and, if the fine is not paid, imprison any person who fails to comply with both a summons issued by a committee and the subsequent order of the House to comply. These provisions have proven effective and have been relied upon to both fine and imprison persons within the past 15 years.

9.4 The Legislative Council, however, has noted a trend in recent years for some public sector agencies to decline to appear voluntarily before a committee, and to insist upon the issuing of a summons. Although there has been no recent failure to comply with a summons, the insistence on the issuing of summonses by public sector witnesses has frustrated some committees operating under short reporting deadlines.

Q24: Should the House of Commons be given a statutory power to fine non-members? If so, what steps should be taken to ensure this power was only used in line with the principles of natural justice?

9.5 Yes.

9.6 The Houses of the Parliament of Western Australia have the power to deal summarily with contempts and impose fines for certain specified offences under the *Parliamentary Privileges Act 1891* (WA).

9.7 The most efficient way to investigate a possible contempt and to recommend an appropriate penalty whilst observing the principles of natural justice is through a committee of privilege. Witnesses before such a committee could be given access to all relevant evidence and an opportunity to make submissions throughout the inquiry. The House would then debate the findings and recommended penalty. In practice, such debates are rarely lengthy or particularly contentious – except where, as the Legislative Council experienced in 2007, the debate involves a motion to expel a Member.

9.8 Witnesses before all committees of the Legislative Council have the following entitlements set out in Standing Orders:

> *Any person examined before a Committee is entitled to –*
> *(a) access to relevant documents before and during examination;*
> *(b) benefit of counsel;*
> *(c) request that the evidence be deemed private or in camera;*
> *(d) be informed prior to the examination of the right of objection* [for irrelevant and personal questions] *provided by section 7 of the Parliamentary Privileges Act 1891;*
> *(e) a reasonable opportunity to rebut allegations of criminal, improper or unethical conduct made against the witness if the allegations are relevant to the Committee's inquiry;*
> *(f) a reasonable opportunity to correct errors of transcription in a transcript of evidence;*
> *(g) an opportunity to provide supplementary or new evidence; and*
> *(h) any additional entitlements as determined by the Council.*

9.9 It is also important to allow non-members to have access to their own legal advisors at all stages of the process and the ability to make submissions on both the alleged contempt and then later, if required, on the appropriate amount of any imposed fine. The ability to appoint lay Members to committees of privilege, particularly those with extensive legal experience, would also be valuable to ensure procedural fairness is afforded to witnesses.

9.10 We do not believe that the provision of natural justice requires that a court of law, or court-like processes, be used. There are many tribunals and other investigatory bodies that impose penalties whilst observing natural justice that do not employ the full adversarial process and rules of evidence that bind the courts.

Q25: Should a statutory definition of contempt of Parliament be introduced that would be enforceable by the courts? If so, should it be defined by reference to general principles or to specific acts?

9.11 No.

9.12 In the 1998-99 Joint Committee on Parliamentary Privilege inquiry, the Legislative Council submitted the following:

> *I find it difficult to accept the argument that a committee of Privilege is inherently biased - the "judge, jury and executioner:" argument. The House in the exercize of its privilege jurisdiction is no more biased than the superior court judge who jails a person for contempt until such time as the person is willing to purge that contempt, or the same judge who jails a journalist for refusing to reveal sources of information. I have yet to read of a serious proposition arguing that judicial contempt ought to be dealt with otherwise than by the courts. Conversely, it is urged that Parliament should transfer the totality of its privilege jurisdiction to the courts on the ground that Parliament*

is incapable of exercizing its powers justly; Parliament is inherently biased and capricious.

9.13 A half a dozen or so privilege inquiries in the past dozen years in Western Australia have demonstrated that such inquiries can be unbiased and effective in establishing facts and attributing guilt in contempt matters.

9.14 Investigation and punishment of contempts of Parliament should remain an internal matter of the Parliament and should remain undefined and flexible, although some guiding principles and examples of common contempts could be set out in Standing Orders (as is the case in the Legislative Council). As noted in the Green Paper with the mobile phone hacking example, changes in technology and the work of Members of Parliament over time could result in serious interferences with the Parliament that were never contemplated in the past.

9.15 The Legislative Council has in 2012 incorporated within its Standing Orders a threshold test for contempts and a non-exhaustive list of common contempts. This is based on the Australian Senate's practice.

9.16 Having said that, it is noted that the *Parliamentary Privileges Act 1891*(WA) enables the courts to also deal with a number of specific minor offences against the Parliament that are contempts. In practice, however, the courts are not utilised as it is considered preferable in a joint contempt jurisdiction for the Houses to handle such matters themselves.

9.17 There is also the question as to who would conduct the investigation into the contempt prior to proceeding to the court, and whether that investigator and the courts would regard such offences as sufficiently serious. In 2000 the Corruption and Crime Commission of Western Australia, without any reference to the Legislative Council, investigated and charged a senior public servant with the *Criminal Code* (WA) offence of giving false evidence to a committee of the Legislative Council. The Director of Public Prosecutions subsequently withdrew the charges on the basis that the Legislative Council itself had taken no action for this contempt, and so there was no public interest in proceeding.

Q26: Do you think a criminal offence should be introduced of failing to comply with an order of a select committee? If so, how should the issues identified in this paper be addressed?

9.18 Yes, but only as an offence that can be dealt with summarily by each House of Parliament itself and punished by way of a fine (or imprisonment should a fine not be paid).

9.19 We have such a provision in Western Australia. Section 8 of the *Parliamentary Privileges Act 1891* (WA) states:

8. Houses empowered to punish summarily for certain contempts

Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person —

(a) disobedience to any order of either House or of any Committee duly authorised in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid;

(b) refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid;

(c) assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House;

(d) sending to a member any threatening letter on account of his behaviour in Parliament;

(e) sending a challenge to fight a member;

(f) offering a bribe to, or attempting to bribe a member;

(g) creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.

9.20 In 1999 a senior Western Australian public servant was fined $1 500 by the Legislative Council under s 8(a) of the *Parliamentary Privileges Act 1891* (WA) for a failure to produce documents under summons of the Estimates and Financial Operations Committee.

9.21 The House of Parliament directly affected by a failure to comply with its order is in the best position to determine the degree to which its work has been interfered with by the contempt. The House is also in a more flexible position than a court to take into account the various arguments in mitigation or explanations that may be put up by the person in breach of the order. For instance, in the case of the public servant fined in Western Australia in 1999, the public servant had argued in his defence that he was

directed by his Minister not to comply with the House's order. The House took that factor into account, but found that the public servant had intentionally failed to advise the House of the Minister's direction prior to failing to comply with the order and that the public servant's behaviour towards the House generally had been poor.

9.22 A 2009 select committee of the Legislative Council recommended that most of the offences relating to Parliament (such as false evidence before a committee, or threatening committee witnesses) be removed from the *Criminal Code* and the jurisdiction of the courts, and be dealt with internally by the Houses of Parliament as contempts punishable by fines.

10 CHAPTER 8 — REPORTING OF PARLIAMENTARY PROCEEDINGS

Q27: Do you support the changes to the law which would be made by clauses 1 and 2?

10.1 Yes.

10.2 The proposed changes appear to be a sensible clarification of the law.

10.3 The *Parliamentary Papers Act 1891* (WA) is in similar terms to the *Parliamentary Papers Act 1840* (UK).

10.4 The uniform defamation laws of 2005 addressed a specific concern regarding publication of parliamentary proceedings on the internet. Apart from that reform, there has not been any significant issue in recent times in Western Australia with respect to reporting the proceedings of Parliament.

Q28: Do you believe other changes should be made to the law on reporting of parliamentary proceedings? If so, what changes do you believe should be made?

10.5 No.

10.6 As an observation, the Parliament of Western Australia often receives queries from the operators of blogs or political commentary websites that wish to use transcripts of *Hansard* on their website. We advise them that there are no copyright issues involved, but that they republish *Hansard* at their own risk and that publishing extracts out of context may be viewed as malicious. Such websites would also be covered to some extent by the implied freedom of political comment identified by the High Court of Australia in the Australian *Constitution*. We do not believe that any further law reform is necessary to protect the operators of such websites.

11 CHAPTER 9 — MISCELLANEOUS ISSUES

Q29: Is there a continuing case for Members' freedom from arrest in civil matters?

11.1 No.

11.2 There is no reason in modern times for Members to continue to enjoy this privilege.

Q30: Is there a continuing case for Members' exemption from attending court as a witness?

11.3 Yes.

11.4 Modern civil and criminal trials can last months or years and conflict with sittings of the Parliament. The primary obligation of Members when the House is sitting is to be in attendance at the House.

11.5 A few years ago the Legislative Council requested the State Solicitor to write to a District Court judge to invoke the privilege against appearing as a witness at a civil trial on behalf a Member of the Legislative Council. The civil case related to the Member's former role as a Minister and the date of the trial conflicted with a sitting of the House. The Member subsequently fulfilled his duty as a witness at the trial on a day when the House was not sitting.

11.6 I note also that in Western Australia Members of Parliament and senior officers of the Parliament are not eligible for jury duty.

Q31: Do you agree with the Joint Committee that the serving of court documents in person within the precincts of the Palace on a sitting day should continue to be viewed as a contempt?

11.7 Yes.

11.8 This particular contempt continues to be relevant. It acknowledges the importance of a sitting of Parliament and that such a sitting should not be interrupted by processes connected with the judicial branch of government.

11.9 The Parliament of Western Australia sits approximately 60 to 70 days per year. This leaves ample days in a year to serve court processes on Members in their electorate offices or at home. We agree that the postal service of court documents should not be regarded as a contempt.

11.10 On 24 March 2010, Hon Jon Ford MLC raised the following matter of privilege in the Legislative Council:

> *This evening during question time, at about twenty past five, I was informed by one of the parliamentary staff that there was a woman in parliamentary reception who had some papers for me to sign and I was asked to go there, to which I complied. When I arrived at reception there was a young woman there who did not identify herself personally, but identified herself as being a member of the staff of Freehills law firm and that she intended to serve on me a "Witness Summons to Produce a Record or Thing".*

I informed the server that, in fact, she could not do that and it was a breach of privilege to which she argued the point. I said, "I don't care about that. You can't serve it on me. However, if you want to come after Parliament is finished tonight or before 10 o'clock tomorrow morning, I'll make myself available." She said that she had been advised by her supervisor that she could serve it on my staff. To that end, I told her that my staff were actually in Newman, so she could help herself. She said that she understood that she could actually give the summons to a member of my staff and that they could serve it on me. I told her that I did not know about that, but I would see her at 10 o'clock tomorrow. I made the point that I was not trying to be obstructionist and that there were actual rules of privilege to be followed. At that stage my staff member, Mr Dennis Liddelow, was called to reception and he was served with the document, which he presented to me.

11.11 The Legislative Council's Procedure and Privileges Committee found that staff of the law firm had been in contempt of the Parliament. The law firm subsequently acknowledged its fault and apologised to the House and no penalty was imposed for the contempt.

Q32: Is there a continuing case for Parliament to retain a power to find individuals guilty of contempt on the basis of insulting or disrespectful language?

11.12 No.

11.13 We agree that in modern times such behaviour should not be regarded as a contempt of Parliament. As mentioned in the Green Paper, individual Members have the option of pursuing actions in defamation. In Australia the High Court has identified an implied freedom of political comment in the Australian *Constitution* which would appear to protect most non-defamatory criticism of the Parliament and the Government.

Q33: Is there a continuing case for the remaining privileges of peerage?

11.14 No.

11.15 The House of Lords is quite unique amongst upper houses of Westminster-style parliaments. Other upper houses operate without great difficulty in the absence of additional privileges.

MALCOLM PEACOCK
Clerk of the Legislative Council