



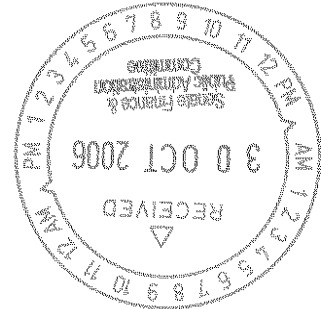
AUSTRALIAN SENATE

CLERK OF THE SENATE
hl.pres.15176

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9 October 2006

Senator the Hon Paul Calvert
President of the Senate
Parliament House
CANBERRA ACT 2600



Mr President

**PARLIAMENTARY PRIVILEGE – PRODUCTION OF DOCUMENTS
TO A COMMITTEE OF THE TASMANIAN LEGISLATIVE COUNCIL**

You asked in your note of today's date for advice on a view apparently held by the Tasmanian Solicitor-General that the presentation of a document to a committee of the Tasmanian Legislative Council may not be protected by parliamentary privilege.

It is as clear as any conclusion in the area of parliamentary privilege can be, that the act of presenting a document to a committee of the Legislative Council is protected by parliamentary privilege and therefore cannot be questioned in proceedings before a court or tribunal of any kind.

The principle given statutory expression in article 9 of the Bill of Rights 1688, whereby proceedings in Parliament may not be impeached or questioned in any court or other place, applies to the Tasmanian Houses and their committees. This has been confirmed in judgments which have never been questioned.

The giving of evidence to a parliamentary committee, including by presenting a document to a committee, is clearly part of proceedings in Parliament in all jurisdictions in which Article 9 applies. It is equally clear that, in all those jurisdictions, a person cannot be sued or prosecuted because of their participation in parliamentary proceedings.

The Parliamentary Privilege Act 1858 as amended of Tasmania provides in sections 1 and 3 that a House and a committee empowered to do so may require persons to produce documents, and non-compliance with such a requirement may be summarily punished by a House. I am advised that the committee in question has been so empowered by the Legislative Council. By a common law principle, long ago explicitly applied to parliamentary committees, a person who complies with a direction to give evidence to a body with the lawful power to compel compliance may not be held liable in legal proceedings for giving that evidence.

In addition, the Defamation Act 2005 of Tasmania provides for a defence of absolute privilege to an action for defamation in respect of evidence provided to a parliamentary committee. Section 27 of the Act refers to a publication in the course of proceedings of a

parliamentary body, which explicitly includes the submission of a document to a committee. That statutory provision merely confirms, in relation to defamation law, one effect of the parliamentary privilege attaching to the submission of a document to a parliamentary committee.

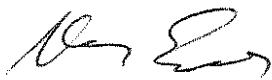
The *general publication* of a document in the course of the proceedings of a committee is also protected, but it is a committee, not the person who presents a document to it, which is responsible for any such publication.

As the basis of the view attributed to the Solicitor-General has not been made public, it is difficult to take the matter any further. I cannot imagine any grounds on which any reasonable doubt could be held about the privilege attracted by the presentation to the committee of the document in question.

You mention a notion that Legislative Council committees were not properly established in the past. In the absence of any further information, I cannot make any sense of this point.

It has also been suggested that the Solicitor-General may have referred to a recent judgment in Queensland in a defamation case, but that judgment has nothing to do with the point in question.

Please let me know if I can be of any further assistance in relation to this matter.

A handwritten signature in cursive script, appearing to read 'Harry Evans', written in dark ink.

(Harry Evans)



PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

- 9 OCT 2006

The Hon. D. G. Wing, MLC
President of the Legislative Council
Parliament House
HOBART TAS 7000

Dear Mr President

I have been greatly disturbed by the media reports of advice the Tasmanian Solicitor-General has apparently provided to the Premier of Tasmania regarding whether or not a document sought by a parliamentary committee should be provided to the committee.

Parliamentary privilege is, you will agree, one of the keystones of our Westminster system, and for it to be questioned by a senior law officer in any State is very concerning. As a consequence, I sought advice from the Clerk of the Senate, who is a highly respected international authority on parliamentary privilege.

He has advised that it is as clear as any conclusion in the area of parliamentary privilege can be, that the act of presenting a document to a committee of the Legislative Council is protected by parliamentary privilege and therefore cannot be questioned in proceedings before a court or tribunal of any kind.

The principle given statutory expression in article 9 of the Bill of Rights 1688, whereby proceedings in Parliament may not be impeached or questioned in any court or other place, applies to the Tasmanian Houses and their committees. This has been confirmed in judgments which have never been questioned.

The giving of evidence to a parliamentary committee, including by presenting a document to a committee, is clearly part of proceedings in Parliament in all jurisdictions in which Article 9 applies. It is equally clear that, in all those jurisdictions, a person cannot be sued or prosecuted because of their participation in parliamentary proceedings.

The *Parliamentary Privilege Act 1858* (Tas.) as amended provides in sections 1 and 3 that a House and a committee empowered to do so may require persons to produce documents, and non-compliance with such a requirement may be summarily punished by a House. I understand that the committee in question has been so empowered by the Legislative Council. By a common law principle, long ago explicitly applied to parliamentary committees, a person who complies with a direction to give evidence to a body with the lawful power to compel compliance may not be held liable in legal proceedings for giving that evidence.

In addition, the *Defamation Act 2005* (Tas.) provides for a defence of absolute privilege to an action for defamation in respect of evidence provided to a parliamentary committee. Section 27 of the Act refers to a publication in the course of proceedings of a parliamentary body, which explicitly includes the submission of a document to a committee. That statutory provision merely confirms, in relation to defamation law, one effect of the parliamentary privilege attaching to the submission of a document to a parliamentary committee.

The *general publication* of a document in the course of the proceedings of a committee is also protected, but it is a committee, not the person who presents a document to it, which is responsible for any such publication.

As the basis of the view attributed to the Solicitor-General has not been made public, it is difficult to take the matter any further. The Clerk of the Senate advises me that he cannot imagine any grounds on which any reasonable doubt could be held about the privilege attracted by the presentation to the committee of the document in question.

The press has reported a notion that the Solicitor-General believes that Legislative Council committees were somehow not properly established in 1825. I do not know what is meant in this respect. In any event, I would have thought that any alleged flaw in their establishment would long ago have been corrected – including by self-government in 1856 and subsequent enactments. My understanding is that all committees in your Chamber are freshly appointed after prorogation or, in this case, by an explicit resolution of the Council. I cannot believe that the Solicitor-General is suggesting all such actions of the Legislative Council are somehow flawed or without authority.

It has also been suggested that the Solicitor-General may have referred to a recent judgment in Queensland in a defamation case, but that judgment has nothing to do with the point in question.

I felt it important to retail to you the Clerk of the Senate's advice. I will send a copy of this letter to the Chairman of the Select Committee into the

Accreditation of Building Practitioners, the Hon. Paul Harriss, MLC, for his information.

Yours sincerely

A handwritten signature in cursive script that reads "Paul Calvert". The signature is written in black ink and is positioned below the typed name.

(Paul Calvert)



AUSTRALIAN SENATE

CLERK OF THE SENATE
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13 October 2006

Senator the Hon Paul Calvert
President of the Senate
Parliament House
CANBERRA ACT 2600

Mr President

**PARLIAMENTARY PRIVILEGE – PRODUCTION OF DOCUMENTS
TO A COMMITTEE OF THE TASMANIAN LEGISLATIVE COUNCIL (2)**

Further to my note of 9 October 2006, I have noted a report in yesterday's *Australian* to the effect that the Tasmanian Compliance Corporation is threatening to sue the Tasmanian Premier and the Legislative Council committee for the provision of the audit report on the corporation to the committee. Obviously, parliamentary privilege would prevent such a suit.

The press report suggests, however, that what the corporation may actually be threatening is to sue the auditor, KPMG, for its preparation of the audit report.

While the act of presenting a document to a parliamentary committee is protected by parliamentary privilege, and, if the committee publishes the document, every subsequent publication of that document is also protected by parliamentary privilege, the protection of parliamentary privilege does not extend retrospectively, as it were, to the preparation of a document which was not prepared for the purpose of proceedings in parliament. This principle was made clear by a recent judgment in the ACT Supreme Court.

It is therefore theoretically possible for the corporation to sue KPMG for the preparation of the report. As the report was an audit report and was apparently prepared for the purpose of advising government on the proper conduct of public administration, a different privilege would almost certainly protect KPMG against any such suit. Legal advisors to KPMG would be able to give advice on that point.

In my note of 9 October I referred to a Queensland case which the Solicitor-General was said to have referred to, but indicated that that case had nothing to do with the parliamentary privilege point. In that case, the Queensland court (in a judgment regarded as erroneous by the Queensland Parliament) declined to strike out a reference in a pleading to the republication in the course of parliamentary proceedings of a document the subject of a defamation action. The judgment appeared to give some comfort to the also erroneous notion that a plaintiff in a defamation action could claim subsequent publication in parliamentary proceedings as an aggravation of an original publication, but the court did not hold to that

effect. If that is what the Solicitor-General and the corporation are getting at, the judgment is an extremely weak reed for them to rely upon. As indicated in the note of 9 October, it does not affect the parliamentary privilege protecting the provision of the report to the committee.

Please let me know if I can be of any further assistance in relation to this matter.

A handwritten signature in black ink, appearing to read 'Harry Evans', with a stylized, cursive script.

(Harry Evans)



AUSTRALIAN SENATE

CLERK OF THE SENATE
hl.pres.15193

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18 October 2006

Senator the Hon Paul Calvert
President of the Senate
Parliament House
CANBERRA ACT 2600

Mr President

**PARLIAMENTARY PRIVILEGE – PRODUCTION OF DOCUMENTS
TO A COMMITTEE OF THE TASMANIAN LEGISLATIVE COUNCIL (3)**

According to a report in today's Launceston *Examiner* of the meeting of the Legislative Council in Launceston yesterday, the Tasmanian government is relying upon a judgment in a New Zealand case, *Buchanan v Jennings*, for its claim that the presentation of a document to the Legislative Council may not be protected by parliamentary privilege.

That judgment concerned the question of whether, in a defamation action for statements made outside the protected parliamentary forum, related statements in the parliamentary forum may be referred to to elucidate the meaning of the unprotected statements. This has absolutely nothing to do with the protection attaching to the presentation of a document to a House or a committee, or the receipt and publication of such a document by a House or a committee. A person who repeats part of the content of a tabled document outside the parliamentary forum is not protected by parliamentary privilege, but may have some other form of privilege. This has always been the situation in all comparable jurisdictions. This does not mean that the Premier or the Legislative Council or its committee can be in any way liable for the tabling and receipt of the document.

The transcript of the proceedings in the Legislative Council yesterday is not yet available, and probably will not be available for some time. It may throw some further light on the basis of the claimed doubts about parliamentary privilege, but nothing available so far indicates any firm ground for the Solicitor-General's advice.

(Harry Evans)



AUSTRALIAN SENATE

CLERK OF THE SENATE
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25 October 2006

Senator the Hon Paul Calvert
President of the Senate
Parliament House
CANBERRA ACT 2600

Mr President

**PARLIAMENTARY PRIVILEGE – PRODUCTION OF DOCUMENTS
TO A COMMITTEE OF THE TASMANIAN LEGISLATIVE COUNCIL (4)**

The transcripts of the proceedings in the Houses of the Tasmanian Parliament at the sittings in Launceston on 17, 18 and 19 October 2006 are now available. I have therefore read the transcripts to see if the debates on the matter of the KPMG report on the Tasmanian Compliance Corporation throw any light on the Solicitor-General's advice on parliamentary privilege. Of particular significance in this regard are the remarks of the Premier, Mr Lennon.

The statements of the Premier still leave the basis of the Solicitor-General's advice very obscure. At one stage the Premier said: "I therefore advise that I would be risking large amounts of taxpayers' money should I make the report public." This sentence, and some other remarks, convey that the Premier thought that he, or the Tasmanian government, or the Tasmanian Parliament could be sued if he tabled the report in either House or presented it to the Legislative Council committee. As has been previously indicated, this is clearly not so. At other places in his recorded remarks, he appeared to accept that the act of tabling a document in the parliamentary forum is protected by parliamentary privilege.

In so far as anything can be drawn from the debate, the following points emerge.

First, the Solicitor-General's advice seemed to be that members who repeat the content of a tabled document outside the protected parliamentary forum would not be protected by parliamentary privilege. As I indicated in my note no. (3) of 18 October 2006, this is no new discovery. No partial republication outside the parliamentary forum of matter published in the course of parliamentary proceedings has ever been protected by parliamentary privilege. That does not mean that publication in the course of the parliamentary proceedings is unprotected. It is not a reason against tabling information of public interest.

Second, the Solicitor-General apparently referred to a judgment in the Supreme Court of the Northern Territory in 1971 in which it was held that the old Legislative Council of the Northern Territory, established under the superseded *Northern Territory (Administration) Act 1910*, did not possess general inquiry powers. How this finding can be applied to the

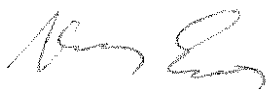
Parliament of the State of Tasmania, with its statutory inquiry powers, remains a mystery. Having referred to that judgment, the Premier then stated: "I am not relying on the case; I never have. I gave the report to the Legislative Council as soon as it was properly requested." The report was not given to the Legislative Council, but to the committee of the Legislative Council. Leaving that point aside, we are left to wonder what the relevance of the old Northern Territory judgment is supposed to be.

The Leader of the Government in the Legislative Council, Mr Parkinson, referred to "a wealth of uncertainty surrounding the law on the powers of committees and Houses of Parliament to subpoena persons and papers", and went on to say: "I do not know, but I presume it is this sort of thing that Mr Bale [the Solicitor-General] referred to in his advice." This passage is no less obscure. It was accompanied by an apparent reference to the *Egan* judgments in New South Wales and some doubt about the power under the common law doctrine prevailing in that state of a House to require the production of "documents of a private nature". This raises a completely different question of whether the KPMG report could possibly be a document "of a private nature". Even if the power to subpoena "private" documents is doubtful in New South Wales (and that is a leap too far on the *Egan* judgments), the application of the supposed doubt to Tasmania, where the law is different, remains to be established.

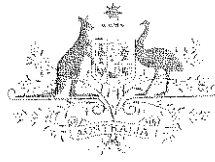
I know that some Crown Solicitors' Offices (as they are still called in some states) are greatly impressed with the doctrine that "the river cannot rise higher than its source", and are obsessed with puzzles about whether state parliaments have properly "inherited" powers from the "Imperial Parliament". This doctrinal meandering is evident in the Northern Territory case. The courts have signalled, however, that they are now more likely to follow the alternative approach of asking questions about the powers of a legislature in a body politic.

In any event, the alleged doubts about the inquiry powers were rendered academic in this case by the Premier's decision to produce the report to the committee.

I have also seen a suggestion that the Solicitor-General's advice was given orally and was not in writing. If that is the case, we are a further step removed from ever knowing the basis of it. Unless and until the advice is provided in writing and made public it will probably not be possible to make any further assessment of it.



(Harry Evans)



PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

25 OCT 2006

The Hon. Don Wing, MLC
President of the Legislative Council
Parliament House
HOBART TAS 7000

Dear Mr President *Don,*

Having now had the opportunity to read the *Hansard* for the Launceston sittings, the Clerk of the Senate has provided me the following further note about the production of documents to a committee of the Legislative Council.

The transcripts of the proceedings in the Houses of the Tasmanian Parliament at the sittings in Launceston on 17, 18 and 19 October 2006 are now available. I have therefore read the transcripts to see if the debates on the matter of the KPMG report on the Tasmanian Compliance Corporation throw any light on the Solicitor-General's advice on parliamentary privilege. Of particular significance in this regard are the remarks of the Premier, Mr Lennon.

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I have also seen a suggestion that the Solicitor-General's advice was given orally and was not in writing. If that is the case, we are a further step removed from ever knowing the basis of it. Unless and until the advice is provided in writing and made public it will probably not be possible to make any further assessment of it.

I trust this information is useful to you in your consideration of this matter.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Paul".

(Paul Calvert)