MEMORANDUM OF ADVICE:

Re: Draft Parliamentary Service and Other Acts Amendment Bill 2011 – Matters relating to the Committee of the Legislative Assembly

We are asked to advise, as a matter of urgency, about proposed laws that would transfer the Speaker’s administrative function of managing the Parliamentary Service to a committee of which the Speaker is not a member.

The specific questions we are asked, and the short answers to those questions, are as follows:

Would it be (1) unconstitutional, (2) a breach of the doctrine of the separation of powers or (3) a breach of any other law, doctrine or rule – for the Parliament to pass a law that vests in a parliamentary committee (the Committee of the Legislative Assembly) the power to oversee the Parliament’s budget, facilities management for parliamentary committees, maintenance for the parliamentary buildings and policies for the management of the parliament that (1) does not have as a member (or Chair) the Speaker, (2) includes Ministers of the Crown with the ability to nominate alternates and (3) while comprising an equal number of government and non-government members provides government members with an effective majority when voting as a bloc given that the Leader of the House as Chair will have a deliberate vote and in the event of a tie a casting vote.

(1) We do not see any constitutional grounds for challenging the proposed laws.
(2) The proposal is not in breach of the doctrine of the separation of powers. Rather, it is an acceptable variation that does not weaken or diminish the ability of Parliament to perform its primary role, that of making laws. Even if the proposal did amount to a breach, there are no legal consequences.

(3) The proposed laws do not conform with the Westminster convention that the Speaker performs the administrative role of head of the parliamentary services. However, this does not give rise to any legal consequences. We have not examined the existing standing orders or rules of the Assembly to identify any breaches. We assume that if the standing orders and rules are inconsistent with the proposal, that parliament will ensure the orders and rules are changed when the proposed laws commence operation. Otherwise, we do not consider that the proposed laws breach any other law, doctrine or rule.

Background

The new laws emanate from the recommendations of the all party Committee System Review Committee, which was established by the Parliament in 2010 to review Queensland's parliamentary committee system. Its recommendations, contained in its report of December 2010 Review of the Queensland Parliamentary Committee System, included the following recommendations:

"Recommendation
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The Committee recommends that a Committee of the Legislative Assembly be established under the Parliament of Queensland Act 2001.

Recommendation
9..............................................................................................................15

The Committee recommends that the Parliament of Queensland Act 2001 be amended to provide for the establishment of the Committee of the Legislative Assembly with the current functions of the Standing Orders Committee and the Integrity, Ethics and Parliamentary Privileges Committee, without the oversight function under the Integrity Act 2009 (which is to be carried out by the Finance and Administration Committee).
Recommendation  

10. The Committee recommends that the Parliamentary Service Act 1988 be reviewed. The Committee of the Legislative Committee should determine the budget and resources of committees and make submissions to government to ensure the committees of the Parliament are sufficiently resourced.

Recommendation  

11. The Committee recommends that this committee should oversee the establishment of the committee facilities (recommended by this Committee) in the parliamentary precinct.

Recommendation  

12. The Committee recommends that the responsibility for the management of construction and maintenance of the Parliamentary buildings and electorate offices (along with the relevant budget) be transferred to the Department of Public Works.

Recommendation  

13. The Committee recommends that the membership of the Committee of the Legislative Assembly be:
   - Leader of the House (chair)
   - Premier (or nominee)
   - Deputy Premier (or nominee)
   - Leader of Opposition Business
   - Leader of the Opposition (or nominee)
   - Deputy Leader of the Opposition (or nominee).


We observe at the outset that, significantly, the proposal to establish the Committee of the Legislative Assembly ("the CLA"), and for such Committee not to include the Speaker as a member, reflects a recommendation of a committee of the Parliament itself, established by the Parliament to "conduct an inquiry and report on how the Parliamentary oversight of legislation could be enhanced and how the existing Parliamentary Committee system could be strengthened to enhance accountability." (Terms of Reference, Appendix A to the Report); and in order to be implemented, the changes require Parliament to pass appropriate legislation. Furthermore, Parliament will be free to amend or repeal such laws at anytime in the future.
The Parliament of Queensland (Reform and Modernisation) Amendment Bill will establish the CLA as a statutory committee. The Bill has been introduced to the House and debate on it is currently adjourned.

A second Bill, the Parliamentary Service and Other Acts Amendment Bill 2011, will amend the Parliamentary Service Act 1988 to transfer the Speaker’s current administrative responsibilities to the CLA.

It has been suggested that the proposal is “an insult to the doctrine of the separation of powers” and an “assault on democracy in Queensland.” (Letter from Hon Ian Callinan and Suri Ratnapala, amongst others, published in the Courier Mail on 20 April 2011, page 32).

In order to answer the questions posed, it is first necessary to identify how the proposed laws impact on the traditional role of the Speaker.

**The traditional role of the Speaker in House of Commons**

Under the Westminster model of parliamentary practice, the Speaker’s functions fall into two main categories: spokesperson for the House and presiding over debates\(^1\).

In the House of Commons, an important feature of the Office of Speaker is that the holder is genuinely impartial. Once elected, the Speaker sheds his or her previous political affiliation and resigns from his or her party. The Speaker must also be seen to be impartial and isolates himself or herself from parliamentary life. Whilst Speakers must be elected by their constituency, by convention the Speaker is usually not opposed in his or her electorate. Another well-established convention is the continuity of the speakership. According to this convention, after each general election the former Speaker is re-elected, even if there is a change in government, provided that the former Speaker retains their seat. Usually, the Speaker does not have to contest their seat against any other candidates\(^2\).

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2 See also Laundy, Philip *The Office of the Speaker* (Quiller Press, London, 1984) 64-68
The Speaker of the House of Commons is administrative head of the House. This role includes exercising control (jointly with the President of the Senate) over the parliamentary buildings, the library, staff, catering and other amenities.3

**Role of the Speaker in Australia**

The Australian Federal and State Assemblies inherited the procedures of the British House of Commons4. As in the House of Commons, the primary role of the Speaker is to preside over the House to maintain order and ensure its effective functioning.

In Queensland, the *Parliament of Queensland Act* 2001 provides that the Speaker is to preside at all meetings of the Legislative Assembly. There is an exception if the standing rules and orders provide otherwise5. By convention, the Speaker acts as the representative of the House.

However, unlike the Speaker of the House of Commons, Australian Speakers are required to contest their seats and there is little likelihood of being re-elected if there is a change in Government. In practice, it is very difficult for a political partisan to discharge the duties of Speaker with fairness and impartiality and therefore the position does not occupy the "high plane of dignity which it occupies at Westminster"6.

In short, the Australian model of speakership does not follow the two fundamental Westminster conventions: impartiality and continuity7.

The reality in Australia is that the Speaker is a political appointment8 of the Executive. Whilst the Speaker’s party usually support his or her decisions, there are examples where the government has not supported the authority of its own Speaker9.

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3 *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 192: The Office of the Speaker 62-3, 156
4 *The Office of the Speaker* 159
5 See *Parliament of Queensland Act* 2001 s 14(2). The Speaker also has functions under the *Parliament of Queensland Act* with respect to the proxy voting of Members (s 19), ordering a person to attend before the assembly by issuing a summons (ss 25-36) and issuing a warrant for contempt (s 41).
6 *The Office of the Speaker* 143 and 156
7 *The Office of the Speaker* 151. In New South Wales, s 31(1) of the *Constitution Act* 1902 states that the speaker is recognized as the independent and impartial representative of the House. Anne Twomey in *The Constitution of New South Wales* (The Federation Press, 2004) comments at 478 that it is uncertain what consequences flow from this.
8 *The Office of the Speaker* 147
In Queensland, as in other Australian jurisdictions, it has been posited that the Executive has dominated and controlled Parliament and therefore its accountability to Parliament has been very limited\textsuperscript{10}. Philip Laundy\textsuperscript{11} says of Australian Speakers:

The proceedings in some of the State assemblies can be very disorderly at times and in some jurisdictions the conduct of the Speaker is frequently assailed. Some Speakers are more openly partisan than others, but with the best will in the world it is difficult to maintain an appearance of impartiality while remaining closely involved in the hurly-burly of politics. In some State Parliaments the Speaker can expect to be criticised by the government if he affords too much latitude to the opposition. The Legislative Assembly of Queensland is one which is very tightly controlled by the government and its practices provide the opposition with little scope.

Administrative role of the Speaker in Australia

The administrative role of the Speaker with respect to the parliamentary service is similar to that of a minister to a department\textsuperscript{12}. As in the House of Commons, in every jurisdiction in Australia the Speaker has responsibility for the administration of the parliamentary services, which is usually exercised through a committee structure. In Queensland, the Speaker’s administrative functions are currently provided for in the Parliamentary Services Act 1988.

It is immediately obvious then that the proposed laws do not follow this tradition. The question remains whether the proposed laws breach the doctrine of separation of powers, or are unconstitutional, or breach any other law, doctrine or rule. Before answering these questions, we will consider the proposed legislation in more detail.

Parliament of Queensland (Reform and Modernisation) Amendment Bill 2011 ("the Reform Bill") and the Parliamentary Service and Other Acts Amendment Bill 2011 ("the Service Bill")

The role of the Speaker will be significantly altered by these Bills through a two-step process.

\textsuperscript{9} Two examples are given in The Office of the Speaker at 152
\textsuperscript{11} The Office of the Speaker 161, 151. See also Brown, Neil, ‘Reform of the Parliament’, [1991] Quadrant 15 at 16
\textsuperscript{12} ‘The Speaker of the House of Representatives’ (Commonwealth of Australia, 2\textsuperscript{nd} ed, 2008) at p 15
Firstly, the Reform Bill significantly amends the Parliament of Queensland Act 2001. Relevantly, these amendments include the establishment of the Committee of the Legislative Assembly, of which the Speaker is not ordinarily a member. However, when the CLA is dealing with a matter relating to the standing rules and orders, the Speaker is declared to be a member\textsuperscript{13}. This provision is important to maintaining the independence of the role of the Speaker, who, as presiding officer, enforces the standing rules and orders of the House.

Secondly, the Service Bill\textsuperscript{14} will transfer the Speaker's current administrative functions under the Parliamentary Service Act with respect to the parliamentary service to the CLA and some aspects to the Clerk.

The most controversial aspect of the proposal is that the Speaker will not be the Chair of the CLA or even a member. Putting this to the side for the time being, the remaining changes that we are instructed to consider are:

- The vesting of the CLA with the power to oversee the Parliament’s budget, facilities management for parliamentary committees, maintenance for the parliamentary buildings and policies for the management of the parliament.
- including in the committee Ministers of the Crown with the ability to nominate alternates.
- while comprising an equal number of government and non-government members provides government members with an effective majority when voting as a bloc given that the Leader of the House as Chair will have a deliberate vote and in the event of a tie a casting vote.

These attributes of the CLA are not in themselves controversial. For example, the former Parliamentary Service Commission, which was previously established under the Parliamentary Services Act, from 1988 to 1995, had similar attributes. They are also similar to those of the British House of Commons Commission, which is responsible for the

\textsuperscript{13} Reform Bill, cl 7
\textsuperscript{14} Version 02A, 9 May 2011, 10.14 am
administration and services of the House, including maintenance of the Parliamentary Estate, appointing staff of the House and allocating functions to House departments\textsuperscript{15}.

The main difference between the CLA and these two Commissions is that Ministers of the Crown are included in the membership of the CLA but not in either of the two Commissions. However, we note from the Report (at pages 13-14) that the Board of Internal Economy, "the administration body" for the Canadian House of Commons, includes two Ministers and the leader of the Opposition. Accordingly, we do not think that this difference is a significant one.

Finally, we note that the financial independence of Parliament remains protected by s 20 of the Constitution of Queensland, which ensures a separate appropriation for the Legislative Assembly and parliamentary service\textsuperscript{16}.

**Diminished role of the Speaker under the Reform Bill and the Service Bill**

The most controversial aspect of the proposal is that the Speaker is not a member of the CLA, except when it deals with a matter relating to the standing rules and orders. The remainder of our advice will focus on this aspect.

The current administrative functions of the Speaker with respect to the parliamentary service under the Parliamentary Service Act\textsuperscript{17} are to be replaced with the following provisions under the Service Bill:

5  **CLA to decide policies about Parliamentary accommodation and services**

The CLA is responsible for deciding policies about—

(a) accommodation and services in the parliamentary precinct; and

(b) accommodation and services supplied elsewhere by the Legislative Assembly for its members.


\textsuperscript{16} When Federal Parliament gained control over its budget with the passage of the Appropriation (Parliamentary Departments) Bill, the former Speaker of the Commonwealth House of Representatives, Sir Billy Sneddon, described this as the most significant of the reforms he achieved as Speaker. See: Pender, Jim, 'Billy Sneddon and the Reform of Parliament', (1996) Vol 11 No 1 Legislative Studies 68 at 71

\textsuperscript{17} See Parliamentary Service Act 1988, ss 5 & 6
6 CLA’s role for parliamentary service

(1) The general role of the CLA in relation to the parliamentary service is to—
   (a) decide major policies to guide the operation and management of the parliamentary service; and
   (b) prepare budgets; and
   (c) decide the size and organisation of the parliamentary service and the services to be supplied by the parliamentary service; and
   (d) supervise the management and delivery of services by the parliamentary service.

(2) The CLA must ensure that the remuneration, conditions of employment and other benefits given to the Clerk are comparable to those of State officers and employees who have similar duties.

(3) The CLA must ensure the Speaker is given the necessary administrative and other support to enable the Speaker to perform the Speaker’s functions efficiently and effectively.

(4) The CLA must consult with the Speaker before deciding a matter affecting the Speaker or the proceedings of the Legislative Assembly.

(5) The Clerk and the parliamentary service officers and employees must follow the reasonable directions of the Speaker relating to the operation of the Legislative Assembly and the Speaker’s functions relating to the Legislative Assembly.

Further, the Service Bill will remove the Speaker’s roles with respect to staff of the parliamentary service\(^\text{18}\), the Speaker’s power to make rules\(^\text{19}\), and the Speaker’s control and direction of the Clerk of the Parliament\(^\text{20}\).

Clearly, the fact that the Speaker in not the chairperson of the CLA or even a member is contrary to Westminster convention. However, this of itself does not create any legal consequences. Furthermore, it is also relevant that the following aspects of the proposal support the independence of the Speaker:

- Under the Reform Bill, the Speaker is a member of the CLA when it deals with a matter relating to the standing rules and orders.

\(^{18}\) The Speaker currently has the following functions under the *Parliamentary Services Act*: appointment of officers (s 26), employment conditions (s 27, 28, 29, 31), vacancies (s32), probation (s 35), retirement and resignation (s 37, 38) and discipline (ss 39, 40, 41, 42, 43, 44).

\(^{19}\) The Speaker currently has power to make rules under s 55 of the *Parliamentary Services Act*.

\(^{20}\) The Clerk of the Parliament is currently subject to the control and direction of the Speaker under s 20 of the *Parliamentary Services Act*. 
The functions of the CLA and the Clerk will not limit the Speaker’s functions under the *Parliament of Queensland Act 2001* or the standing rules and orders\(^\text{21}\). The Speaker will, however, retain his powers in relation to behaviour in the parliamentary precinct under s.50 of the *Parliamentary Services Act*\(^\text{22}\). The Service Bill ensures that the role of the Speaker cannot be undermined through failing to adequately resource it. Also, that the Speaker must be consulted with before deciding a matter affecting the Speaker or the Legislative Assembly chamber\(^\text{23}\).

The Service Bill creates a new Office of the Speaker, and provides that the Speaker may appoint officers and employees to this office\(^\text{24}\). This measure further ensures the adequate resourcing of the Speaker.

Whilst the Service Bill will give control of the parliamentary precinct and parliamentary accommodation outside the parliamentary precinct, subject to the CLA, to the Clerk, the Clerk’s power is expressly subject to the exercise of the Speaker’s powers to control behaviour in the parliamentary precinct under s 50 of the *Parliamentary Service Act*\(^\text{25}\).

The Speaker’s protection from liability under s 52 of the *Parliamentary Service Act* is not altered.

Further, the reintroduction of a multi-party committee (the CLA) increases the role of the opposition in the administration of parliament, and is a move back toward Westminster convention that tends to lessen the grip of the Executive.

It has not been suggested that, and we cannot see how, the diminished role of the Speaker under the proposal would be “unconstitutional”, or breach any law. We have not examined the existing standing orders or rules of the Assembly to identify any breaches. We assume that if the standing orders and rules are inconsistent with the proposal, that parliament will ensure the orders and rules are changed\(^\text{26}\) when the Reform Bill and Service Bill commence operation. The remaining question is then whether the proposal is in breach of the doctrine of the separation of powers.

\(^{21}\) Service Bill, s 4A(2)(b) and (c)
\(^{22}\) Service Bill, s 4A(2)(a)
\(^{23}\) Service Bill, ss 6(3) and 6(4)
\(^{24}\) Service Bill, s 26
\(^{25}\) Service Bill, s 20A
\(^{26}\) The Assembly is responsible for making orders and rules: *Parliament of Queensland Act 2001* s 11
Doctrine of the separation of powers

The “doctrine of the separation of powers” does not have a universally accepted meaning. The learned authors of de Smith and Brazier *Constitutional and Administrative Law* 6th ed (1989) at 19-20 have this to say about the doctrine:

The doctrine of the separation of powers, like the rule of law, has usually been discussed as one which *ought* to be embodied in a system of government. But whereas commentators are almost unanimous that the rule of law (whatever it may mean) is splendid, the virtues of the separation of powers do not evoke so enthusiastic a chorus. Perhaps this is partly because the doctrine has acquired a harder core of generally accepted meaning, and because some constitutions survive adequately without relying on it for sustenance.

This is not to say that the quintessence of the separation of powers is easy to distil. The doctrine has emerged in several forms at different periods and in different contexts (for the fullest recent analysis, see M.J.C Vile, *Constitutionalism and the Separation of Powers* (1967)). It is traceable back to Aristotle; it was developed by Locke; it is best-known formulation, by the French political philosopher Montesquieu, was based on an analysis of the English constitution of the early eighteenth century, but an idealized rather than a real English constitution; the disciples of Montesquieu, particularly numerous in the North American colonies, added their own refinements; and today the doctrine survives in a number of curious manifestations. No writer of repute would claim that it is a central feature of the modern British constitution. However, a brief survey of the doctrine brings out more clearly some features of the British system of government.

The doctrine, as propounded by Montesquieu and his followers, may be stated briefly as follows.

1. There are three main classes of governmental functions; the legislative, the executive and the judicial.
2. There are (or should be) three main organs of government in a State: the Legislature, the Executive and the Judiciary.
3. To concentrate more than one class of function in any one person or organ of government is a threat to individual liberty. For example, the Executive should not be allowed to make laws or adjudicate on alleged breaches of the law; it should be confined to the executive functions of making and applying policy and general administration.

Even if one accepts the first two propositions, one is not obliged to accept the third. The concentrate a large quantity of power in the hands of one person, in the absence of proper safeguards, is surely more dangerous than to combine a few powers analytically different in quality in the same hands, if adequate safeguards exist. And a rigorous segregation of functions may be highly inconvenient. In many countries subscribing to versions of the separation of powers doctrine, rule-making powers have been vested in the Executive because it is manifestly impractical to repose such powers exclusively in the Legislature. The third proposition stated above is therefore both extreme and doctrinaire, and is not taken literally by all proponents of the theory.
See also: Hanks, P *Constitutional Law in Australia* 2nd ed. (1996), at 464.

In essence:

“In English constitutional history the doctrine means little more than that effective government requires that there should be a Parliament elected by the people to make the laws, an executive responsible to Parliament to execute them, and an independent judiciary to interpret and enforce them. It requires that in a broad sense the legislative, executive and judicial functions of government should be kept separate and distinct.” (*The Queen v Kirby; Ex parte Boilermakers’ Society of Australia* (1955-56) 94 CLR 254, at 301; see also on appeal (1957) 95 CLR 529, at 539-40).

The doctrine of separation of powers “defines the appropriate relationship between the three branches of government in order to protect their respective functions”. It is, therefore, “the political keystone of the constitutional systems in Australia”\(^{27}\). The doctrine may be adopted to varying degrees by any system of government by way of political practice, convention or legal principle\(^ {28}\). Therefore, the doctrine in its application “is riddled with exceptions and variations”\(^ {29}\).

At the Commonwealth level:

“The Commonwealth Constitution provides for a system of separation of Commonwealth powers (*New South Wales v Commonwealth* (*Wheat Case*) (1915) 20 CLR 54, Isaacs J at 88, 90; *R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers’ Case)* (1956) 94 CLR 254; *Attorney-General (Cth) v The Queensland (Boilermakers’ Case)* [1957] AC 288; [1957] 2 WLR 607; [1957] 2 All ER 45; (1957) 95 CLR 529 (PC). *The Constitution* vests the legislative, executive and judicial powers of the Commonwealth in three different institutions of government (*Constitution*, ss 1, 61,71). The doctrine of the separation of powers requires that no one of these institutions should exercise the powers or functions of either of the others (*Waymarn Southard* 23 US 1 (1825), Marshall CJ (for the Court) at 7, Hamilton A, Madison J and Jay J, *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federation Convention September 17, 1787 (J & A McLean, 1788)*. In the Australian constitutional system, however, the separation is not absolute; the degree of separation and the consequences of such separation are different

\(^{27}\) Carney, Gerard *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 114

\(^{28}\) Carney, Gerard, *Separation of Powers in the Westminster System*, 13 September 1993, p 1

in relation to the three functions (Sawer G., “The Separation of Powers in Australian Federalism” (1961) 35 ALJ 177 at 178.)" (The Laws of Australia online, para [19.1.830]).

In the leading case of *Boilermakers* (1955-56) 94 CLR 254, at 278-279, the majority of the High Court had this of particular relevance to say about the doctrine:

But enough has been said to show how absurd it is to speak as if the division of powers meant that the three organs of government were invested with separate powers which in all respects were mutually exclusive. The true position has been well stated in a brief paragraph by Professor Willoughby in his *Constitutional Law of the United States*, 2nd ed. (1929), pp. 1619, 1620, 1062: “Thus, it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions. From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given. Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested.” This principle and the conceptions of English Law and tradition and British constitutional practice may explain what to some has appeared a contradiction of the view that the distribution of powers possessed a legal significance. That is to say it may explain the fact that it is settled constitutional doctrine of the Commonwealth that the legislature, by a law otherwise within its competence, may empower the executive government to make statutory rules and orders possessing the binding forces of law.

It will be seen from the quotation above that:

- The High Court accepted that there is no strict separation of powers even under the Commonwealth Constitution, in that the powers exercised by the three branches of government are not mutually exclusive;
- Where a power is not “peculiarly and distinctly” legislative, executive or judicial, it is open to the legislature to choose which branch will exercise the power.

As noted, the pure form of the doctrine requires the powers and personnel of each branch of government to remain completely separate. However, the Westminster system departs from
the pure form in a fundamental way, as an essential feature of it is the doctrine of responsible government. Under this doctrine, the Executive branch is directed by ministers who are members of the legislature. This occurs in Queensland by convention\textsuperscript{20}.

The delegation of law-making power by Parliament to the Executive has been held not to amount to a breach of the doctrine of the separation of powers at the Commonwealth level (\textit{Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan} (1931) 46 CLR 73; see also \textit{Boilermakers} (1955-56) 94 CLR 254, at 279) and not to amount to an impermissible abdication of legislative power at the State level (\textit{Cobb & Co Ltd v Kropp} [1967] 1 AC 141; see also Carney, \textit{The Constitutional Systems of the Australian States and Territories} 114-5 and Clarke, J. Keyzer, P. Stellios, J (eds) \textit{Hanks' Australian Constitutional Law Materials and Commentary} Lexis Nexis Butterworths, 8\textsuperscript{th} ed, 2009, 113); \textit{a fortiori}, the delegation by Parliament of functions and powers to a Parliamentary committee (albeit one arguably dominated by the Executive) which are incidental to Parliament’s main law-making function/power, cannot amount to a breach of the doctrine.

In coming to this view we also rely upon the argument that (even if the CLA is regarded as a body controlled by the Executive) the functions and powers being conferred on the CLA are not “peculiarly and distinctly” legislative; therefore, it would be open for the legislature to choose to confer such functions and powers upon the Executive (\textit{Boilermakers} (1955-56) 94 CLR 254, at 278-279).

We also note for completeness that the application of the doctrine of the separation of powers in Queensland must be considered in the context of the following points.

- Queensland has adopted a unicameral system, in which the legislature is generally recognised as more tightly controlled by the Executive than in a bicameral parliament\textsuperscript{31}; and
- The Westminster conventions of impartiality and continuance of the Speaker were not adopted in practice in Queensland\textsuperscript{32}.


\textsuperscript{31} There have been calls for the re-introduction of a bicameral system to check the power of the Executive: Alvey, John, ‘The Lack of Separation of Powers in Queensland’ [Oct-Dec 2006] Public Administration Today 64 at 68 and Preston, Noel, ‘Parliament rediscovered? Parliament under minority government in Queensland’, (1997) Vol 11 No 2 Legislative Studies 88 at 95
It is important to note that these factors taken individually or together are not considered to breach the doctrine. Yet their practical effect in increasing the Executive’s power at the expense of the legislature is arguably far greater than the effect of not including the Speaker on the CLA.

We note that even if the proposal was in breach of the doctrine, there are no legal consequences, as the doctrine is not legally enforceable at the State level with regard to the separation of legislative and executive power. No Commonwealth, State or Territory law has ever been successfully challenged for infringing the separation of legislative and executive power.

Accordingly, the answers to your questions are as follows:

Would it be (1) unconstitutional, (2) a breach of the doctrine of the separation of powers or (3) a breach of any other law, doctrine or rule – for the Parliament to pass a law that vests in a parliamentary committee (i.e. the CLA) the power to oversee the Parliament’s budget, facilities management for parliamentary committees, maintenance for the parliamentary buildings and policies for the management of the parliament that (1) does not have as a member (or Chair) the Speaker, (2) includes Ministers of the Crown with the ability to nominate alternates and (3) while comprising an equal number of government and non-government members provides government members with an effective majority when voting as a bloc given that the Leader of the House as Chair will have a deliberate vote and in the event of a tie a casting vote.

(1) We do not see any constitutional grounds for challenging the proposed laws.

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23 It has been argued that in order to check the power of the Executive, the first thing is to have an independent speaker. See: Brown, Neil, ‘Reform of the Parliament’, [1991] Quadrant 15 at 15
24 Carney The Constitutional Systems of the Australian States and Territories 116
25 Carney The Constitutional Systems of the Australian States and Territories 115; see also Clyne v East (1967) 68 SR (NSW) 385; BLF v Minister for Industrial Relations (1986) 7 NSWLR 372; Gilbertson v South Australia (1976) 15 SASR 66; J.D. & W.G. Nicholas v Western Australia [1972] WAR 168; South Australia v Totani (2010) 85 ALJR 19, at [66].
(2) The proposal does not breach the doctrine of the separation of powers. Rather, it is an acceptable variation that does not weaken or diminish the ability of Parliament to perform its primary law-making function. Even if the proposal was outside the accepted limits of the doctrine, there are no legal consequences.

(3) The proposed laws arguably breach the Westminster convention that the Speaker performs the administrative role of head of the parliamentary services. However, this does not give rise to any legal consequences. We have not examined the existing standing orders or rules of the Assembly to identify any breaches. We assume that if the standing orders and rules are inconsistent with the proposal, that parliament will ensure the orders and rules are changed when the Reform Bill and Service Bill commence operation. Otherwise, we do not consider that the proposed laws breach any other law, doctrine or rule.

We advise accordingly.

With compliments,

[Signature]

WALTER SOFRONOFF QC
Solicitor-General

[Signature]

STEVE MARTON
Crown Counsel

9 May 2011

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