PUBLIC

THE LEGISLATIVE COUNCIL SELECT COMMTTEE ON THE PRODUCTION OF DOCUMENTS MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON MONDAY 30 SEPTEMBER 2019.

Mr RHYS EDWARDS, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Forrest) - Thank you, Mr Edwards, for your submission and for coming in today. I know you have presented to parliamentary committees before and know the drill, but I will just say these proceedings are being broadcast today as well as recorded for the purposes of the *Hansard*, which will be part of the public report and on our website. Your comments are covered by parliamentary privilege while you are before the committee but not outside it. We welcome your participation in this inquiry into the production of documents. We appreciate the submission you've made and I know the members have all read it, so we invite you to speak to it unless you have any questions you want to ask before we start.

Mr EDWARDS - I will make some brief introductory comments and I am happy to then go through parts of my submission in more detail if you would like and take questions about particular aspects of it that interest the committee.

First of all, thank you very much for the opportunity to make a submission. I think it is a really important topic, one I've spent a lot a time thinking about over many years in the public sector and for quite some time having left the public sector and watching the debates, not just in parliament here in Tasmania but parliaments in this country and around the world grappling with some of these issues. I am glad that our parliament has, in the form of this committee, decided to look at this question because I think there is still a whole range of unresolved issues in custom and practice that have grown up over time that are probably not helpful to the ultimate aim of the accountability of ministers to the parliament and parliament to the people of Tasmania.

I particularly wanted to make a submission because, having seen the range of people who have made submissions, there is a lot of learned advice on constitutional issues around this. A range of people with very good constitutional pedigrees have made submissions, and you've been taking advice from other parliaments and other public sectors as well. I thought it would useful to have a submission from someone make from the public service who understood how that worked, but particularly how Cabinet and the Department of Premier and Cabinet work, someone who has a pragmatic point of view about how this impacts on the good workings of government, particularly Cabinet, because it is a very important decisionmaking forum for the elected government of the day, and you need to ensure Cabinet deliberations can occur in an environment that encourages the most open information to be made available.

That does, I think, put some practical limits around many of the legal opinions that would come to you about the absolute right you have for the production of documents, even though perhaps governments of all persuasions have been resisting acknowledging that absolute right. Nonetheless, even if that exists - and it is clear to me and other submitters that it does - there is still a question of the practical approach of allowing the Cabinet of the day to have a forum in which it can take advice that is basically confidential.

That is by way of some opening remarks. Again, I am happy to go through any elements of my submission and talk more generally about the issues it raises.

CHAIR - Thanks, Rhys. In terms of your comments regarding parliamentary privilege or the power the parliament has, we have had some submissions say it is not absolute and things like that. However, it seems the general consensus is that the parliament has the power to call for documents, papers and other things and to summons other people as well. I think in many respects we are proceeding from a point that power is there. From your perspective I would be really interested to know more about the operation in a practical sense. In New South Wales and Victoria we spoke to people about how governments do things a little differently within their cabinets. There have been questions about what a cabinet document actually is; there are some views that it is only a document that reveals the deliberations of the cabinet, not information that comes to the cabinet to inform that decisionmaking, and some have a much broader definition.

From your perspective, in terms of supporting cabinet, which I assume was part of your role as head of department, can you talk us through a bit more about how that process works and what you consider would be a cabinet document that may rightly deserve privilege?

Mr EDWARDS - The Department of Premier and Cabinet, of which I was secretary for six years, has as part of its mechanics a cabinet office that is involved in the process part of cabinet, coordinating the collection of cabinet submissions. Cabinet submissions are either minutes or papers for Cabinet to note, so minutes are decision-making papers. This is all in the Cabinet Handbook, which no doubt you have access to. Not many people read the Cabinet Handbook.

CHAIR - We don't have the Cabinet Handbook.

Mr EDWARDS - There is an electronic link to it on the DPAC website.

CHAIR - Is there? Okay, we will look that up. Thank you.

Mr EDWARDS - That describes the form of cabinet documents. A cabinet document that is in a form where a decision is required is called a cabinet minute. A template is also available on that website which shows you the bits you have to fill in. Cabinet minutes are documents of the minister who is bringing them to Cabinet. Largely they are prepared by the public service under direction by the minister, or sometimes they are generated by the department that advises the minister that they need to take something to Cabinet. They are the documents of the minister, so in essence they can have any form they like, but almost all jurisdictions have them standardised in a particular form.

Then there are other documents for Cabinet appointments that go up that have a particular template as well but again, those things don't necessarily follow the same process. So there is a mechanics side to it but, by and large, you would say the documents that are of interest to parliaments from time to time are cabinet minutes where information has been provided to Cabinet to make a decision.

There are parts of it that are about the deliberation. Normally there would be a part where there is a set of recommendations so clearly those recommendations are the part that get the focus of the debate - should we do this or something else? - and there are often options in a cabinet minute. Again, that would be part of that deliberative process - there are three options here, you should take option A, or the minister advises Cabinet to take option A.

I think all those things are the parts of the document that are that deliberative process of Cabinet and you would not necessarily want that to be provided to parliament, regardless of this question of whether you have the absolute right to request it or not. Fundamentally it is a space where cabinets can have deliberations, the purpose of which is to lead to the most effective decisionmaking by Cabinet as possible, so they need to have the widest array of information, they need to test a whole range of views, and within the confines of the Cabinet room they need to have an open and honest debate about issues and then arrive at the best collective decision.

Whether that power should be limited in practice, if not in theory, on a whole class of documents - that is, anything that says a cabinet minute versus just the information in that minute that's of a deliberative nature - I think is a really interesting question. Obviously, from a practical point of view, it's much easier to say that a cabinet minute is the deliberative document and therefore that's a class of documents the parliament wouldn't request.

CHAIR - On that point, if a report had been done by an external party and provided information that would then lead to further development in the minutes and the deliberative process within Cabinet, what status would you have for the document that is prepared, not by the department necessarily - it could be prepared by an external body such as a consultancy firm - where does that all fit into it?

Mr EDWARDS - My view is that cabinet documents quite often have a whole range of appendices of information. The core of the arguments in them may have been based on other documents like consultant reports and things. In my view just the mere mention of those, or the fact they were used by officers in aiding the drafting of the cabinet document, doesn't necessarily mean that the cabinet class of confidentiality applies to those documents. Largely, those documents are factual in nature, so unless they contain explicit commentary around the deliberations of ministers or cabinet members, I'm not quite sure on what grounds you would say they ought not be produced. Obviously from time to time cabinets have cast a quite wide net around things that are cabinet documents, including anything that's come to cabinet or anything a minster may have said that has been used in the production ultimately of advice that went to Cabinet. I think that is widening the class of documents in an unhelpful way.

CHAIR - You commented in your submission about the executive branch and how it needs to be effective in its performance of its functions and support the ability of the public service to provide frank and fearless advice in relation to policy matters and needs to maintain appropriate accountability to the electors of Tasmania through parliamentary representatives. This is the tension we discussed with a number of other witnesses on the mainland who have been using, or trying to use, a mechanism to break a deadlock, not so much over cabinet documents but documents more broadly. In your view, where do you strike that balance between when people start to become concerned that advice they may be providing to cabinet may be made public and, if so, do you think it would limit or constrain them in any way from providing frank and fearless advice, or is that a bit of a red herring?

Mr EDWARDS - I don't think it's a red herring. In fact, in my experience, positive pro-transparency reforms like RTI have actually, in some circumstances, had a stultifying effect because people make a decision based on, 'How is this going to look if I write it down if ultimately it becomes publicly available through a process like RTI?' It wasn't the intent of the act but if you talk to any jurisdiction, you will find the same kind of feedback, and I think that's unfortunate. I think it's a bit to do with the widespread use of RTI by media organisations and others to trawl for information.

A lot of the genesis of RTI was about individuals finding out for themselves what information government held about them or people whose interactions with government were hampered by the fact that they couldn't find out the requisite information they needed because government refused to disclose it, but the widespread abuse of it - in my day most newspapers had departments with people whose job it was to help generate stories through RTI requests - meant that public servants were saying, 'I'd better write this in a way that should it become ultimately public it's not going to cause concern.' Ultimately the great value in these processes is if something really important or difficult happens and you need to go back through all the files, you've got candid advice that comes out of those processes. If that advice itself is written with an eye to subsequent committees of inquiry, I think that is really unfortunate.

CHAIR - It could be counterproductive, is that what you're saying?

Mr EDWARDS - Yes, I think it has been, and if you talk to other jurisdictions you would find the same thing. Just by putting in those kinds of processes the response of the organisations have been, 'We'd better think carefully about how we write subsequent information because it may become publicly available.'

Mr WILLIE - Rhys, I am interested in the term 'write it down'. Are you suggesting that the public service is managing issues in a verbal way because they are worried about RTI or disclosure of documents?

Mr EDWARDS - I don't know about that. I've been out of public service for five-and-a-half years now, but my observation would be that knowing processes like RTI now exist - and all the public servants I've ever talked to are really supportive of transparent processes - they would know that ultimately this stuff may well become public so they need to have a mind to how they write it. I'm not sure there is a way around it, because you wouldn't not want the kind of process you have under right to information, but having put them in, the perverse effect of that is that people now are much more mindful about how things are written down and that ultimately, if this comes into the public, how that will need to be expressed. I think your original question was how about you balance that tension.

CHAIR - Yes. In whatever number of years it is before cabinet documents can be released, if you look back at a decision and the advice provided to support a decision is pretty innocuous - I don't know how many years later - surely there must be some desire to make sure that Cabinet has the information it needs in the form it needs to make a decision. That is a bit about that tension, isn't it?

Mr EDWARDS - Yes. In my view there needs to be a class of documents that is not easily accessible through either RTI or parliamentary processes. Those documents are the ones that show the deliberative information provided to Cabinet to make decisions. Those documents are minutes. You can find a way to kind of extend the scope of that, as you have seen, to say that also includes the three reports we commissioned that formed the basis to provide this advice and because they were commissioned in this process those reports are therefore excluded from being provided.

CHAIR - So they claim executive privilege over those as well?

Mr EDWARDS - Yes. That's possible if those documents themselves contain some information about the deliberative nature of the discussion in Cabinet.

CHAIR - But how could they if they were done at the front end?

Mr EDWARDS - It seems unlikely, doesn't it? Quite often these documents, from what I can gather, seem quite factual in nature. I think perhaps one way around it is for government to provide a reason for that, so they can't just claim cabinet-in-confidence or some sort of executive privilege, they need to articulate the reason this document shouldn't be provided. I make some observations about commercial-in-confidence issues as well in my submission, and I think it's the same thing. You can't have this broad claim that, 'You can't have that because of this reason'.

CHAIR - Which we haven't been seeing in this parliament. When documents have been refused, we haven't seen any explanation of any value. They will claim a certain privilege but give no explanation as to why that privilege should be claimed.

Mr WILLIE - And that privilege claim may change.

CHAIR - It does change; that's happened as well.

Mr WILLIE - From RTI to cabinet-in-confidence or commercial-in-confidence.

CHAIR - Yes, or to public interest immunity or whatever, and we've seen that. I don't know if you want to comment on that.

Mr EDWARDS - Only to say I think it is reasonable that in refusing a request, particularly of parliament - because RTI has its own processes and I'm not an expert on it by any means - or parliamentary committees, I think you are obliged to provide a proper, sound and well-articulated reasoning that extends to more than just one word.

Mr WILLIE - You are talking about an unintended consequence of the Right to Information Act. If a parliamentary process is developed, do you see any unintended consequences that could happen? Is there anything we need to mindful of as a smaller jurisdiction with public servants providing frank advice to government which may become public and have an impact on them?

Mr EDWARDS - I hadn't thought about that latter part. The problem with unintended consequences is that if they were foreseen at the time, you might have been able to do them differently. I think as long as there is at the highest level of decisionmaking of governments - that is, cabinet level - a capacity for them to have confidential discussions aided by the appropriate deliberative information n cabinet minutes, I don't see there is too much difficulty. This is without putting any limits on your absolute right to have documents produced for you. I think there needs to be in the parliament a sense of judgment and balance in these things. You also want to preserve a space for government to make the best decisions possible. You want government to be able to function well. It is only very rarely, from time to time, when questions about administration come to the parliament, subject to scrutiny where issues need to be investigated where the issue at heart is about documentation that may or may not have been provided to Cabinet. These issues are reasonably rare, which is good. I think as long as parliament and the committees of parliament use that judgment sensibly, that is healthy.

I haven't seen anything to date that sounds like overreach in any attempt of committees trying to find information. If it's not forthcoming, at the moment it's even hard to work out why it isn't, because those explanations are not there. There just seems to be this general view that you can rely

on a cabinet public-interest argument because they are cabinet documents. That seems to be saying that anything that goes to Cabinet falls within that class or else some sort of commercial-in-confidence argument, also again without any rationale about why.

CHAIR - If it were kept in confidence by the members, what is the issue with commercial-in-confidence?

Mr EDWARDS - Equally, it is very unlikely that a whole document is commercial-in-confidence. This is the thing I see quite a lot - 'What aspects of this are commercial-in-confidence?'

Sensitive pricing information of a private company, maybe yes, but a whole range of other issues wouldn't be. You might even say, 'Here's a document with the bit we believe to be commercial-in-confidence redacted'. It still doesn't negate the fact that you might say, 'If you are providing it in confidence to the committee, you can provide us with the whole document and we'll make sure that's managed'. Then it is just a case of making sure the various committees have their own processes in place to protect that information.

Mr WILLIE - Do you have any comment on the second part of that question about Tasmania being a particularly small place and the implications for public servants in that environment providing frank advice to government?

Mr EDWARDS - I'm not sure the small nature is any different from the dilemmas elsewhere. Maybe senior public servants are more visible here in Tasmania than they might be in Victoria, but at the end of the day almost - I would say - every public servant I've worked with would seize that duty to provide frank and fearless advice as being central to their role, particularly in the policy areas and a very important part of what it means to be a public servant.

What they want to understand, though, is that in providing that advice, particularly in the most important areas, there are processes like Cabinet where that can be done with the highest level of confidentiality and that deliberative information remains within government.

It was also the same in some of the earlier changes of RTI, which were about making sure that one of the reasons for not complying with an RTI request was that it was deliberative information of government. It shows government in the midst of thinking about its opinions or taking competing advice. Ultimately that information, out in the public, doesn't necessarily help anything. It is really that these conversations are happening prior to decisions being made. Once the decisions are made, obviously that is the information that should be of interest to the public.

Ms WEBB - Just to follow up a little. You were speaking about the preference for there to be an articulation of the reasoning behind the claim of privilege, whatever that claim might be. Then of course there's the next step as to who decides whether that's a valid claim. In your submission, you talked about it being very important that the Council itself should reserve the right to determine whether any particular claim will be accepted or put in place processes by which it wishes to be advised as to the legitimacy of any public interest immunity claims or other claims of privilege.

Could you talk a little more about what you might see as a workable or an advisable way that the Council might put a process in place in which to consider, assuming those rationales were provided, how that next step might best occur.

Mr EDWARDS - I am not an expert on those kinds of things. This has been through a lot in parliaments in recent times, particularly in New South Wales in the post-Egan v Chadwick era and in Victoria.

I believe you have that absolute right, so if I believe that, really you are arbiters of whether the information should be released or not or whether the claim of executive privilege has substance. To do that you need to be able to see the information in question. However, you might want a process that provides some advice about government's claim and sometimes the claims that government may make around documents have a particular legal set of issues involved in them. Not surprisingly, in other jurisdictions they've taken the fact that perhaps advice from a senior legal person - someone who is a QC or retired judge or something like that - is useful. If there are claims by government about privilege and they invoke particular legal aspects of that, you've got someone who's well versed in those areas to be able to provide the Council with advice.

Again, with this is sort of mechanism, if I were thinking about this in government, I would probably want to have a discussion with Council about a mechanism that involves another set of eyes on the question at hand, which members should have access to, The question of whether the claim of privilege should be supported should be whether you are able to take advice from someone who can give you an objective set of views.

CHAIR - I see the sequence of events and I want to explore this more. Both New South Wales and Victoria have similar mechanisms but Victoria's hasn't been used. In New South Wales, when an order is made for the production of documents, documents are usually delivered to the Clerk's office - often many; we viewed the Clerk's office to see that. Some of them are public documents right away. They're put into a room where anyone can access them - other members, members of the Lower House , members of the media et cetera. The other ones which have a privilege claimed over are kept in the Clerk's office. In New South Wales, all the members of the Legislative Council look at them. They can't discuss them with anybody else - not even colleagues in the lower House.

Mr EDWARDS - Can they have discussions with each other?

CHAIR - Yes, just with each other.

Mr WILLIE - Some may be excluded because there will be a cabinet document claim, so they are not presented to the Clerk.

CHAIR - There may be, but those that are. This is the one that works.

Victoria has a similar mechanism but in their case, the member who moves the motion for the order is the one who can look at it, which means it is limited to one person. If any of the members of the Legislative Council in New South Wales dispute the claim of privilege for whatever that claim is, they ask the Clerk to write to the President to appoint the arbiter.

In practice, all members don't look at them but they are looked at by at least one member who has an interest and may or may or not decide to pursue full disclosure of those documents. You can't refer to privileged documents in debates; you can't refer to them in a report - the usual requirements around confidentiality.

I think what you are talking about is if the documents are provided to the Clerk in the first instance and the Clerk then sends them to the arbiter without members seeing them Is that another model?

Mr EDWARDS - I think it is. You may have had the opportunity to talk in New South Wales about what drove the idea that it should be provided to all members. I don't have a problem with that model either.

Ms WEBB - Can I mention something that might also be worth considering as you are answering the question, to just finish off the process? The legal arbiter looks and then reports back with advice and then the whole Council has to choose whether to accept that advice and remove the privilege for the document or accept the advice to perhaps have the privilege remain. Therefore it was identified to us that one of the benefits of the whole Legislative Council being able to see the documents is also for that second stage. When the whole Council has to consider the report of the legal arbiter and whether they are going to vote with that or not, being able to go back and reference documents is important at that time too, because then it's not just the one who brought the motion that it's relevant to, it's relevant to the vote of the whole Council.

CHAIR - It's also important to note that New South Wales has never had a leak.

Mr EDWARDS - Yes, which is excellent. Again, my point would be that the mechanics of this need thinking through carefully. New South Wales probably has done a lot of thinking about that to the extent that they have used that process and have the experience of how it actually works in practice as opposed to Victoria. I wouldn't say that I have any great insight into the way that process should work better. In theory, I have no issue about it being available to all members of council. Obviously the wider the distribution, the wider the onus is on members to make sure the information doesn't leak, because that's really the main problem.

CHAIR - The current arbiter in New South Wales is the Honourable Keith Mason at the moment and he's taken quite a collaborative approach, if you like. Usually it's one person who reviews the document who may then make an application to dispute the claim of privilege. The arbiter often, according to him - and we spoke to him - goes back to the person who made the submission, the member, and also to the department or government or minister to say, 'I need some more information to help me make a decision.' You are actually getting quite a cooperative approach in that. I've read through some of his reports which clearly show that there are times when the member then agrees that a certain part of a document must remain confidential. It might reveal an informant's name, for example, and that sort of thing. We can understand the importance of keeping that confidential.

It seems if you just went straight to the arbiter, you might miss a step that the members don't get to see. For one particular one, privilege was claimed over a lot of documents - this is the greyhound racing one I was reading - and once the member who moved the motion had looked at a number of these documents, she agreed that privilege should stay, particularly where they identified informants or other matters.

Mr EDWARDS - I'm not arguing against members of the Council having the ability to access it. In my submission I said there will be others who are more expert than I who can advise you on the kind of process you might want, but something like the New South Wales standing orders seem to provide a mechanism that gives members advice about the nature of the privilege being claimed, which is useful, because it gives you the basis on which to decide the extent you want to use your

absolute powers. I like the idea that whoever is in that arbiter role talks to people in trying to come to a determination. I have always been a fan of intelligent accountability, which means that if you're calling for something you need to understand the implications of what that might mean if some of that information ultimately becomes public. The only way you're going to find that out is if you hear from the ministers or the public servants or others making the claim. That's why I keep saying that before it gets to that kind of process, the more a government can articulate the reasons it believes there is a public interest argument against the provision of this information, the better, because then intelligent Council members can have the opportunity to assess whether they think those arguments are reasonable or not. Ultimately, if you still don't believe or aren't convinced, you have a process where you see the documents for yourselves and get some advice on them. The bit that is missing in the front of our piece is that there is just no discussion about why this thing is claimed.

CHAIR - We're not even getting to the first step.

Mr EDWARDS - That's right. I'm not quite sure why, but that seems to be lacking and in a way I think that sets up a more combative environment for these debates than is necessarily the case.

CHAIR - One thing we talked about in the history of the operation of New South Wales and Victoria, but more so in New South Wales, was the use of parliamentary powers. You mention in your submission that the government and the executive are both responsible to the parliament. Do you think there is perhaps not a great understanding of that? Do we need to do some more work around that in the first instance?

Mr EDWARDS - I think that's an interesting point. I don't know how we do it in terms of the induction of public servants. More and more these days we're getting quite an interchange at the middle and senior levels and you often find people coming in - not so much in Tasmania, but certainly in New South Wales and Victoria - from the private sector at quite senior levels to run large parts of the public sector. One of the dilemmas with that is they don't understand some of the constitutional fundamental principles of the system in which they work. For 95 per cent of their working life, it doesn't make any difference at all because they're in charge of large operational areas and those sorts of things, but every now and again it does come in and it is important to understand the obligations. Maybe for public servants who are dealing with policy issues, parliaments and ministers that kind of educative process and understanding that obligation is useful.

CHAIR - What about ministers and governments generally?

Mr EDWARDS - I've been involved in a range of discussions over years with groups that were thinking about providing training for ministers or even members of parliament who come to the role perhaps not fully formed. None of those have gone anywhere. I don't quite know why. I don't know whether it is a lack of appetite.

CHAIR - It's an interesting question because part of the Integrity Commission's role and the establishment of that was that the Parliamentary Standards Officer was supposed to do a bit more of that.

Mr EDWARDS - I think parliaments from time to time have said there ought to be education programs for local government councillors so they understand the nature of their roles, but they didn't believe that should apply the other way.

Mr WILLIE - There is an induction, I think.

CHAIR - It has improved a bit from when I came in, certainly. There is a bit more information provided now. Just taking that a bit further for members of parliament - the Legislative Council, for example, is a place where this sort of thing is likely to be more contested when a government doesn't have the majority in the upper House. We talked to New South Wales and Victoria about the use of parliamentary powers we have and New South Wales has suspended members, Egan being the classic. We met with Mr Egan and he's an interesting man with some really interesting views on this topic; it was really good to talk to him. We talked to them about their views and their powers in censuring the leader for not producing a document when requested. There have been other opportunities such as slowing down government business or not proceeding with a particular piece of legislation until a document that is being sought is received. This is more in the House than in committee as such. What do you think about use of those powers, Rhys?

Mr EDWARDS - I think that's kind of an unsatisfactory position to get into because it's not really explainable to the public outside. I can understand the rationale - 'We're frustrated so we're going to frustrate your orderly business', or, 'We're so unhappy with you that we're using our highest power, which is to suspend you from the Chamber'. I just think once you get to that point, it seems it's a complete mystery to people outside government why this stuff is happening; they don't really understand it, so ultimately it's probably not helpful. I think it would be better to come to some process that may not make the government of the day happy, but acknowledge that there is a process where these things are resolved as opposed to going to what I think one of your submitters called the 'nuclear option' of suspension. I can't remember - who was the Victorian upper House member who was suspended?

CHAIR - Jennings, wasn't it?

Mr WILLIE - Six months.

Mr EDWARDS - Yes, for six months, which seems an extraordinarily long time. I guess if I were a voter -

CHAIR - The government made a decision there just to sit it out. The government made that call.

Mr WILLIE - It was a political escalation too, because there was a vacancy and they couldn't have a joint sitting to fill the vacancy.

Mr EDWARDS - Again, you start to get into some really unhappy territory. I have looked at this more academically; not thinking it would happen, I said, 'Why doesn't Legislative Council just require the production of this document?' If the minister or the secretary of the department doesn't comply with them, you sanction them. If they're not a member of your House, you try to lock them up downstairs until they produce the documents, if you really want to escalate it. At the moment. you haven't really tested the absolute limit of these powers. Some constitutional lawyers would be very interested in the extent to that.

CHAIR - That's the question. There are questions about whether the parliament should just work it out itself. Egan v Willis and Egan v Chadwick ended up going to the court to clarify the power as much as anything, but you have to read the whole case.

Mr WILLIE - It might never have ended up in the court except it ended up out on the street and it was a trespass.

CHAIR - No, it was an assault; the trespass was Chadwick. In New South Wales, they took this step and then put in place the sessional order first and then made the standing order which it now is.

Mr EDWARDS - But New South Wales doesn't have your power explicitly in legislation so presumably court for them was also about saying, 'What are the implied powers they have constitutionally to do this?' Whereas yours is very explicit, saying, 'You do have the power to do it'. You've never tested what would happen when you try to use that power, particularly in sanctioning someone who doesn't comply with it.

Ms WEBB - One of the things I've wondered - and if you could reflect on it for us - is the degree to which you think it's necessary to have buy-in from the executive, from the government of the day, if a mechanism is to be put in place around this. Say, in the Standing Orders of the Legislative Council, would the absence of any cooperative buy-in and coordination make it very difficult? What level of coordination would there need to be for it to be effective?

Mr EDWARDS - I think it would be very useful to have a level of cooperation, understanding and acknowledgement by any government of the day to have the desire to put in a process to deal with these issues. To date, it's been rather unsatisfactory for all parties concerned in dealing with them. At least a process, whatever it happens to be, that your committee might recommend out of this, is a good way of resolving this issue. The alternative is for the Council to assert its absolute right and then exercise it in some way so ultimately you would have a court case to try to decide the limits of that power.

CHAIR - In your view, would it be better to have a process in place first before you tried those powers, or the other way around?

Mr EDWARDS - I think it would be better to have discussions with a government of the day - let's abstract ourselves from any particular administration - and say -

> We the Council want to put this kind of mechanism in place because we believe this is a proper, transparent and fair way of dealing with these important issues.
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> We want your cooperation in the first instance by providing good articulation of the reasons you're claiming privilege for these documents.
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> We may never need to get to this process if we have a proper understanding of why you're claiming privilege. Then if we're not satisfied with that, we have a transparent process that allows us to make that determination which avoids us using our absolute right which we believe we have.
>
> You might argue that there are limits to this right, but the only way that you will find that out is by us exercising them and you contesting them and ending up potentially in court or with someone languishing in a cell in a basement here or being turfed out of parliament.

A sensible executive government should say, 'Yes, we understand that'. Also, if we take that idea of communication between the Houses seriously, that sensible parliament and sensible executive government should say, 'We understand that'.

CHAIR - This is the motivation behind this committee, obviously.

Ms WEBB - Do you see then that, hypothetically, if the government of the day were quite opposed to the need for such a process to be put in place, that there's a disbenefit for proceeding with putting one in place anyway and then having to test it?

Mr EDWARDS - I think it would make it harder, but if you don't, you're left with the question of what do we do. Do we just continue to make requests as we have done and the requests continue to be refused and we get deadlocked? Maybe the information gets provided eventually down the track in some other form. I didn't see too many in your submissions, but there are a range of people who say this is entirely a political issue.

CHAIR - There are some who say that.

Mr EDWARDS - Really, that's how it needs to be resolved. My problem with that is it sets up a tension. Governments by their nature aren't going to want to provide information they don't want to disclose. They are always going to argue that they shouldn't. Other Chambers or committees may argue that it should. There really isn't an obvious way of resolving that. Then you are saying, 'We are going to use public opinion, potentially, to try to resolve it'. Governments will only provide this information if they believe the public thinks that they should. That seems to be a very messy way of trying to resolve it. It's much better to have some kind of process.

Mr WILLIE - Just before we wrap this up, the committee has heard from a number of witnesses that all this depends on political culture and changing political cultures. Do you think in New South Wales, where 300 requests have now been made, that this works? And this political culture works because there was an escalation and the executive realised that the upper House was prepared to exert its power, and that changed the culture?

Mr EDWARDS - I honestly don't know. I suspect you would have a better idea from your discussions with New South Wales. I haven't directly. This is supposition, so I don't know but you would probably find in the public sector ranks, as opposed to the parliamentary culture, a view that at least we have a mechanism here.

As public servants we provide advice to government; government may continue to assert and claim executive privilege, but at least there's now a mechanism for that to be resolved. By and large it seems to work and people are saying they will use it. They might not all be happy about it, but they will use this way of trying to resolve those issues.

To that extent I think the public sector and people in the senior roles that I've had would say that's good. This is an argument where some of the issues aren't embroiled in a political context only. Public servants, by and large, are highly supportive of measures of accountability to parliament. They would be saying this helps to improve the standing of that accountability and maybe over time that impacts on culture. Perhaps we feel that debates about provision of documents aren't so acrimonious anymore, because we all accept there is this way to resolve them. Again, that is supposition rather than something I know.

Mr WILLIE - Kind of a chicken-and-egg argument, isn't it?

CHAIR - I will just go to Jane and Ivan, who are on the phone. Are there any questions from either of you two?

Ms HOWLETT - I'm good thank you, Ruth.

Mr DEAN - I'm okay, thanks.

Mr EDWARDS - Can I just leave an observation with you as we're nearly close to wrapping up.

At one stage I was involved with a committee where they were taking evidence, but evidence in these committees - notwithstanding statutory declarations to tell the truth - is different from court evidence. At one stage a committee had taken the view that it was taking evidence a bit like a court. They would hear from witnesses and they would try to construct a timeline of 'he said' and 'she said' and 'someone did this' and 'someone did that'. The problem with that is that it is not corroborated evidence when people give it. They may be telling the truth, and they should be telling the truth, but equally people could say things that in court would be inadmissible because they are hearsay, 'I believe such and such was doing *x*'.

It reached to a point where I was very concerned. You can't run those kinds of things like an evidentiary process unless you're going to have some rules about evidence; that's what we have courts for. I wrote a submission to this particular inquiry and I said -

> Look, you have that great power to compel people to provide evidence, and I'm a supporter of the fact that you have an absolute power for production of documents, but you have to use that judiciously.

In the US they have the saying 'death by committee', which is if you lose the control of the Senate, or sometimes in the United States you lose control of the Congress and the Senate. It's death by committee because you just use those things to tighten the screws on executive government and make it unworkable. I'm not saying that would ever happen in the Tasmanian context, but if you believe you have these very great powers, you also have the responsibility to use them wisely. In at least one case in my history, I didn't think others might have a different view but that was being used wisely.

CHAIR - I appreciate those comments. Recently on the Public Accounts Committee we initiated our own inquiry into our own act to look at taking out all the gendered language for a start, which still hasn't happened. A point was also made; the Clerks of both Houses supported the removal of section 7(2) of the Public Accounts Subordinate Legislation Committee Act that says -

> A witness who is summonsed to appear or appears before the Committee has the same protection and privileges as a witness in an action tried in the Supreme Court.

Because I'm not used to performing in the Supreme Court and I don't know if anyone else sitting around this table or sitting around the Table of parliament generally is, it was something that was deemed to be perhaps a little difficult for members of parliament to back up what you were

saying. The Government's response to our committee report was, 'It's fine as it is'. Do you have any comment on that?

Mr EDWARDS - I don't because I don't know enough about it. My observation was in regard to a standard committee inquiry of this House.

CHAIR - The one you were referring to wasn't a joint committee.

Mr EDWARDS -I haven't seen where this issue might have become problematic in the Public Accounts Committee, but generally I think that while you have the same requirement around production of documents, the requirement to answer questions and the requirement to be truthful, the nature of that evidence means you get to hear everything and then make up your mind about it, but you can't assert as fact something just because you heard someone say it, unless it's corroborated, because that's just the nature of evidence. You can say, 'We believe that this happened', or, 'On balance, having heard from everyone, we think this is the case', but you can't assert a matter of fact just on the grounds of one person's evidence or hearsay. My view is if you are into that kind of issue, you are probably in the wrong issue. That's not the mechanism for parliamentary inquiries. We have plenty of other avenues for those kinds of investigations, including courts; that's why they have those evidentiary rules.

CHAIR - Are there any other questions from Mr Dean or Ms Howlett?

Mr DEAN - Other than to say I don't necessarily agree with what Rhys just said there. I think we make findings on what one person has told us and the courts are pretty clear on all of this. If a person is giving evidence and that evidence is not corroborated, it's not necessary that it has to be, it depends on all the circumstances around that at the time as to whether that evidence has been accepted as factual.

CHAIR - Okay, we will take that as a statement, thank you.

In closing, Rhys, it seems that we've two different categories of documents. There's always going to be a question over cabinet information, particularly information that reveals deliberations. I think that most of us accept that should remain confidential for a whole range of reasons we all understand, but when you come to public interest immunity and commercial-in-confidence, it seems from what we've heard in New South Wales and Victoria and some of the things that you've said, that there seems to be very little reason, given the power of the parliament and the responsibility of the executive to the parliament, that parliamentarians shouldn't be able to see these documents provided they are kept confidential when it is a commercially sensitive matter or the public interest demands it. Public interest is not about avoiding a government a bit of embarrassment. To clarify what I'm talking about here, we are talking about things that could harm the public interest in a very real sense. Do you want to make any comment about how we make the differentiation? Some of it may come back to explaining the reason for the claim in the first place.

Mr EDWARDS - Commercial-in-confidence is a good one. I agree that to be able to assess the validity of that claim, it is very useful to have access to the document itself. That provides the view that the Council or committee should themselves, in a confidential way, be able to look to assess that. A claim for commercial-in-confidence, for example, has to be made to the specific potential harm to the commercial interest by disclosing the information. It's not just, 'This is commercial-in-confidence'. The obvious question is: what is commercially confidential about this?

CHAIR - And what harm can it cause?

Mr EDWARDS - Yes. Coming back to your point, it's about that proper articulation at the beginning. I've dealt with a range of requests. I was in the industry department for many years and quite often you're dealing with commercial issues every day there, but most of the information isn't itself commercial-in-confidence. Maybe what the price of something is or what a particular supply arrangement is, but it is not everything to do with the subject matter. It seems to have become a blanket assertion - 'We can't tell you anything about this because it's commercial-in-confidence' - and that strikes me as silly.

CHAIR - Thank you, Rhys. It is really good to have your insight from the inner workings, acknowledging that you are away from that now at this point.

Mr EDWARDS - Retired.

CHAIR - Retired from that life.

Mr EDWARDS - Thank you for the opportunity to appear before you. As I said, I think it is a very important topic you have chosen to inquire into and I look forward to reading your report when it comes out.

CHAIR - Thank you.

THE WITNESS WITHDREW.