2021 (No. 5)

2021

Parliament of Tasmania

LEGISLATIVE COUNCIL SELECT COMMITTEE

REPORT ON

PRODUCTION OF DOCUMENTS

Members of the Select Committee
Hon Ruth Forrest MLC (Chair)
Hon Jane Howlett MLC (Deputy Chair)
(discharged 17 March 2020)
Hon Ivan Dean MLC (Deputy Chair)
(appointed Deputy Chair: 16 February 2021)
Hon Meg Webb MLC
Hon Josh Willie MLC

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EXECUTIVE SUMMARY

According to the Australian Senate, *Guide to Senate Procedure: No. 12 – Orders for Production of Documents*:

> *The power to require the production of information is one of the most significant powers available to a legislature to enable it to carry out its functions of scrutinising legislation and the performance of the executive arm of government.*[1]

The Tasmanian Houses of Parliament and, committees established by them, have an inherent and unequivocal power to order members and witnesses to produce documents and the authority to treat refusal to produce documents as a contempt of the House. This reflects a fundamental principle of parliamentary democracy, that is the people elect representatives, Members of Parliament, to advocate and inquire on their behalf without impediment. This is especially important in an Upper House, which has a key role as a house of review.

The Committee notes appropriate and reasonable claims of immunity relating to the production of documents may arise in limited circumstances. However, the failure to produce documents has negatively impacted the Tasmanian Legislative Council's key scrutiny and oversight functions related to the actions, decisions and workings of government in circumstances where a resolution could not be reached.

The Committee examined processes and remedies available in other Australian jurisdictions that have been applied when disputes have arisen.

Parliaments have a range of political remedies, both punitive and coercive, that can be applied when responding to a failure to produce documents, however, the Tasmanian Legislative Council has not fully-exercised all political remedies available to address such a refusal.

This Committee was constituted in light of challenges faced by Parliamentary Committees in the Tasmanian Parliament in the absence of a defined resolution process.

A range of processes utilising independent arbitration have been established in a number of Australian Parliaments to deal with matters related to the refusal to provide requested or ordered documents sought by a House of Parliament or a parliamentary committee. Some processes have been used frequently, such as in New South Wales, and others such as in Victoria, are yet to be utilised or tested.

Of particular note, in New South Wales an independent arbitration process has been in place for over 20 years whereby all members of the New South Wales Legislative Council can access, with restrictions, ordered documents including those over which immunity has been claimed and no privileged information has leaked during this period.

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[1] Australian Senate, *Guides to Senate Procedure, No. 12 – Orders for Production of Documents,* Parliament of Australia website, accessed April 2019.

All dispute resolution processes are different in their application and are described and considered in this Report under the chapter titled *Existing Processes to Order the Production of Documents*.

The Report first describes the history of the Tasmanian Parliament, the principle of responsible government, existing powers of the Parliament and parliamentary privilege prior to examining the dispute resolution processes in other Australian jurisdictions.

After full consideration of the matters raised during the Inquiry, the Committee has made six recommendations. These recommendations relate to the implementation of an additional dispute resolution process and the use of political remedies to respond to the failure of government to produce documents.

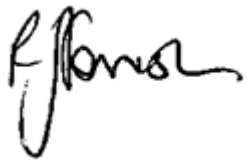
The Committee recommends an additional dispute resolution process be considered by the Standing Orders Committee based on the principles of Responsible Government and underpinned by the inherent and unequivocal power to call for documents, including the use of a suitably qualified independent adviser on claims of public interest immunity.

The Committee noted the importance of state service employees, government and all members of parliament having a full understanding of the role of the Tasmanian Parliament under the Westminster system of Responsible and Representative Government. Based on the evidence, the Committee recommends government and state service employees, government business enterprises and state owned company employees, and members of parliament receive education and training in this area.

To further assist, the Committee recommends guidelines be developed by government to clarify the rights and responsibilities of witnesses presenting evidence on behalf of the government and for the production of documents before parliamentary committees.

The Committee thanks all those who provided submissions and gave evidence. We note the invaluable contribution of Members of Parliament and Parliamentary Clerks, current and former, who have contributed advice and experience to this Inquiry.

The work of the Committee was predominantly carried out in 2019 and early 2020. The Committee's consideration of the evidence received was interrupted and disrupted by the COVID-19 pandemic which required a focus on time sensitive matters including the public health response and economic response and recovery. The evidence received remains relevant and current.



Hon Ruth Forrest MLC
Chair
4 March 2021

FINDINGS

The Committee makes the following findings:

1. The Tasmanian Parliament operates under the Westminster system of Responsible and Representative Government. Thus, the Government is subordinate and responsible to the Parliament.

2. It is essential state service employees, government and all members of parliament understand the role of the Tasmanian Parliament under the Westminster system of Responsible and Representative Government.

3. The Tasmanian Houses of Parliament and committees established by them, have an inherent and unequivocal power to call for witnesses and the production of documents.

4. The Tasmanian Legislative Council's key scrutiny and oversight functions related to the actions, decisions and workings of government are diminished by the failure to produce documents.

5. There may arise appropriate and reasonable claims of immunity relating to the production of documents.

   5.(a) Australian parliaments have respected the notion of documents revealing the deliberations of cabinet as being immune from disclosure.

6. The Tasmanian Legislative Council has the authority to treat refusal to produce documents as a contempt of the House.

7. The Tasmanian Legislative Council has a range of processes that can be applied under standing orders to exert political pressure/remedies to respond to a refusal to produce documents.

8. The Tasmanian Legislative Council has not fully-exercised all political remedies and processes available under standing orders to address a refusal to produce documents.

9. Government grounds for refusal to provide documents ordered by the Tasmanian Legislative Council and its committees based on claims of public interest immunity have not been fully tested.

10. Political remedies, both punitive and coercive, that have been considered and in some cases utilised in parliaments include, but are not limited to:

Punitive remedies:

- motions to postpone consideration of government business including particular bills or other notices, until after the requested information has been produced;
- censure motions;
- motions restricting the ability of the relevant member to progress government business;
- motions depriving the relevant member of procedures that might be available under the standing orders such as a suspension of standing orders to consider urgent business;
- use of standing orders to move a motion related to a matter of public importance (MPI) taking time out of a sitting day otherwise utilised to progress government business;
- motions to extend question time; and
- motions to suspend the relevant member.

Coercive remedies:

- writing to the Premier;
- writing to the relevant minister requesting rationale to support claims of immunity for production of documents;
- tabling of special reports related to non-compliance with subsequent motion to note report without notice;
- orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received in camera, not published for a specified period etc.);
- orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents;
- further orders refining the scope of the order for the production of documents;
- motions requiring the relevant member to explain the reasons for non-compliance with a previous order; and
- motions requesting the Auditor-General, or another independent third party, to examine the contentious material and report on the validity of the grounds claimed by the relevant member for non-production.

11. The Tasmanian *Right to Information Act 2009,* has no application to the Parliament or its committees.

12. Dispute resolution processes, utilising an independent arbitration mechanism are in place in other Australian jurisdictions with varying levels of utilisation with one jurisdiction's mechanism not being tested to date.

13. In New South Wales an independent arbitration process has been in place for over 20 years whereby all members of the New South Wales Legislative Council can access, with restrictions, ordered documents including those over which immunity has been claimed:

    13.(a) The Clerk of the New South Wales Legislative Council is required to maintain a register of members viewing ordered documents; and

    13.(b) no privileged information has leaked during this period.

14. In parliamentary jurisdictions other than the New South Wales Legislative Council, disputes over the production of documents called for by committees must be ultimately dealt with by their respective Houses.

    14.(a) The New South Wales Legislative Council introduced Sessional Order 40 in 2018 which provides for its committees to deal with disputes over the production of documents.

15. A number of Australian parliamentary jurisdictions have implemented procedural orders to assist when claims of public interest immunity arise in a response to a call or order for documents.

16. A number of governments have developed guidelines to inform witnesses appearing on behalf of the government before committees of their rights and responsibilities related to giving evidence and the production of documents.

17. Conflicting evidence was received regarding the impact on the provision of frank and fearless advice provided by state service employees to government and whether this would be affected if public officers knew that the production of certain documents may become public.

RECOMMENDATIONS

The Committee makes the following recommendations:

1. The Legislative Council and its committees consider the use of available punitive and coercive remedies to address non-compliance related to the production of documents.

2. An additional dispute resolution process regarding non-compliance be considered through amendment to the Legislative Council Standing Orders.

3. This Report be referred to the Legislative Council Standing Orders Committee to:

    - consider an appropriate additional dispute resolution process, based on the principles of Responsible Government and underpinned by the power to call for documents; and
    - consider the use of a suitably qualified independent adviser on claims of public interest immunity.

4. Consideration be given to the development of procedural orders to assist when claims of public interest immunity arise in the Legislative Council and its committees.

5. Government and state service employees, government business enterprises and state owned company employees and members of parliament receive education and training regarding the role and functions of the Tasmanian Parliament under the Westminster system of Responsible and Representative Government.

6. Guidelines be developed by government to clarify the rights and responsibilities of witnesses appearing on behalf of government presenting evidence and for the production of documents before parliamentary committees.

INTRODUCTION

On Tuesday 21 May 2019, the Legislative Council resolved that a Select Committee be appointed, with power to send for persons and papers, with leave to sit during any adjournment of the Council, and with leave to adjourn from place to place, to inquire into and report upon —

> *The options for an agreed process to resolve disputes that arise regarding the production of papers, documents and records between the Government and the Legislative Council and its Committees including Joint Committees where Members of the Legislative Council have membership.*

The Hon Jane Howlett MLC was discharged from the Committee on 17 March 2020 following her appointment as a Minister of the Government.

Seventeen (17) submissions were received by the Committee.

Public hearings were held in Hobart on the following dates:

- 6 and 30 September 2019;
- 1 and 29 November 2019; and
- 10 and 16 March 2020.

Interstate hearings were held on 24 September 2019 in Sydney, New South Wales and on 25 September 2019 in Melbourne, Victoria.

Twenty-seven (27) individuals gave verbal evidence to the Committee at the abovementioned hearings.

The submissions received and Hansard transcripts of the hearings are available at http://www.parliament.tas.gov.au/ctee/Council/LC%20Select%20POD.html

The Hansard transcripts should be read in conjunction with this report.

This Report provides a summary of the key findings contained in evidence presented to the Committee through the written submissions and verbal evidence provided during the public hearings.

RATIONALE FOR INQUIRY

The Legislative Council currently does not have an established procedure or precedence to resolve disputes over the production of documents. The Committee was established in response to disputes over the production of documents between the Government and the Legislative Council and its Committees including Joint Committees. The refusals to provide documents have been reported by way of Special Reports to the Parliament.

During the debate on the motion for the appointment of the Select Committee, Members expressed the need to resolve deadlocks in the future. The mover of the motion, the Hon Ruth Forrest MLC stated:

> *In Tasmania, we need to look at options to break such deadlocks, but maintain the integrity of the parliament and also ensure open and transparent government.*
>
> *In the absence of a structured and defined process, whether by way of Standing Orders or other appropriate mechanisms, will be a matter for the committee to consider.*[2]

Further, the Honourable Member stated:

> *It is an important issue. It is important that there can be some clarity around this so that not only the members of parliament in this place, particularly in the Legislative Council, but the members of the community who rely on the Legislative Council to do its work, can have some confidence that we are able to get access to the information we need.*[3]

The Hon Ivan Dean MLC stated:

> *… We need to have a clear position. It is going to arise again, we know that, it is just a matter of time and we should not have to go through this charade all the time of bashing our heads against a brick wall. We need to know where we stand. …*[4]

The Hon Rob Valentine MLC provided comment in relation to how these impasses hinder the role of the Legislative Council:

> ***…** it is important we find a way through these issues. It can, in some cases, quite seriously affect how well we can perform our duty.*
>
> *… If we cannot scrutinise documents that a government relies on to set its course, then there is not much review about it, is there? The Legislative Council has equal power under the Constitution Act and, in my view, must be allowed to exercise that power.*[5]

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2 The Hon Ruth Forrest MLC, Independent Member for Murchison, *MOTION – Appointment of Select Committee,* Parliament of Tasmania, Legislative Council, Report of Debates, 21 May 2019, pp. 46-47.

3 Ibid., p. 52.

4 The Hon Ivan Dean MLC, Independent Member for Windermere, *MOTION – Appointment of Select Committee,* Parliament of Tasmania, Legislative Council, Report of Debates, 21 May 2019, p. 51.

5 The Hon Rob Valentine MLC, Independent Member for Hobart, *MOTION – Appointment of Select Committee,* Parliament of Tasmania, Legislative Council, Report of Debates, 21 May 2019, pp. 50-51.

The Hon Josh Willie MLC, (Opposition Member) stated:

> *… We acknowledge there is no existing formal process to resolve disputes for the production of documents and there is no established precedent in this place.*
>
> *There is value in looking at a whole range of options to resolve those disputes, particularly looking at other jurisdictions. …*
>
> *… and look forward to the exploration of resolving these sorts of disputes, whilst protecting the integrity of the Parliament and the Legislative Council, which is of the utmost importance.*[6]

The Government did not support the establishment of a select committee. The Hon Leonie Hiscutt MLC, Leader of the Government in the Legislative Council stated:

> *The Tasmanian Government acknowledges the Legislative Council's function as a House of review and the inherent value of an objective and balanced assessment of government performance.*
>
> *…*
>
> *While the work of committees is significant, it must also be recognised that it is one of the several powerful parliamentary mechanisms to scrutinise the actions of the executive, ministers and the public sector generally.*
>
> *The government may be held to account through question time, independent statutory officers such as the ombudsman, general debate, judicial review, the Integrity Commission and laws that contain legislative review mechanisms.*[7]

Subsequent to noting Committee Reports describing this challenge including Legislative Council Government Administration Committee 'A' – Interim Report – *Inquiry into the Cost Reduction Strategies of the Department of Health and Human Services,* which included a separate chapter titled 'Procedural Challenges Associated with the Inquiry', Parliamentary Joint Standing Committee of Public Accounts - Special Report No. 5 - *Failure to Comply with Summons* (Special Report No. 5) and Legislative Council Government Administration Committee "A" - *Special Report on Failure to Provide Documents,* a motion to support the establishment of a Select Committee to examine mechanisms and procedures used by other parliamentary jurisdictions when dealing with disputes was proposed and supported.

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6 The Hon Josh Willie MLC, Labor Member for Elwick, *MOTION – Appointment of Select Committee,* Parliament of Tasmania, Legislative Council, Report of Debates, 21 May 2019, p. 48.

7 The Hon Leonie Hiscutt MLC, Leader for the Government, *MOTION – Appointment of Select Committee,* Parliament of Tasmania, Legislative Council, Report of Debates, 21 May 2019, pp. 47-48.

Special Reports to the Tasmanian Parliament

Since 2012 there have been three key refusals by governments to provide documents to parliamentary committees in Tasmania. As noted, in these Special Reports, this has negatively impacted on the committees' ability to fully report on the matters under investigation.

Members of the Legislative Council have expressed their concerns in debates and in committee reports about the challenges associated with parliamentary committees obtaining information.

Legislative Council Government Administration Committee 'A' – Interim Report – *Inquiry into the Cost Reduction Strategies of the Department of Health and Human Services*

In 2012 the Legislative Council Government Administration Committee 'A' – Interim Report – *Inquiry into the Cost Reduction Strategies of the Department of Health and Human Services* included a separate chapter in its Report titled 'Procedural Challenges Associated with the Inquiry'. The Interim Report stated:

> *60. An important procedural issue arising from the inquiry has been the ongoing difficulties the Sub-Committee has experienced in obtaining a range of information from the Government through Departments and through Ministerial offices directly.*
>
> *61. The Sub-Committee has been alarmed and frustrated by the difficulties in obtaining what should have been straight forward information during this inquiry.*[8]

The Government's refusal to provide the requested documents was based on the following claims:

> *83. This has included their refusal to produce information on public interest grounds or on the basis of unsubstantiated claims of Cabinet in confidence. At other times, the Departments have simply not responded in a timely manner to specific questions put to them in writing, which has caused significant delays in the inquiry process.*
>
> *84. The apparent trend in Departments dealing with Committee requests for information in the same manner as a Right to Information request is disturbing, and highlights the basic lack of understanding on the part of Government Departments of the functions and powers of the Parliament. This should be the subject of immediate action by the Government to educate Departmental and Ministerial staff to avoid similar circumstances in the future.*[9]

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8 Legislative Council Sessional Government Administration Committee 'A' – *Interim Report – Inquiry into the cost reduction Strategies of the Department of Health and Human Services,* Parliament of Tasmania, 2012, p. 14.

9 Ibid., p. 17.

Finding 29 of the Interim Report stated:

> *29. Departmental and Ministerial Officers do not appear to have an appropriate level of knowledge or understanding of the functions and powers of the Parliament and their obligations in performing their duties to the Parliament as public servants;*[10]

The Committee made the following recommendations:

> *6. Government Ministers cooperate fully with the business of Parliamentary Committees and attend Committee hearings when requested to do so in order to assist the Legislative Council fulfil it roles and functions under the concept of responsible Government;*
>
> *7. Department and Ministerial Officers undertake training in relation to the functions of the Parliament of Tasmania and their responsibilities as public servants in responding to requests for information.*[11]

Parliamentary Joint Standing Committee of Public Accounts Report - *The financial position and performance of Government owned energy entities*

In 2017 the Parliamentary Joint Standing Committee of Public Accounts Report - *The financial position and performance of Government owned energy entities* reported upon the challenges faced by the Committee in pursuing an unredacted copy of a letter titled 'The Sale of the Tamar Valley Power Station' (the Letter) dated 9 April 2015 between the Treasurer and the Minster for Energy. The Report stated:

> *The Committee's intention to complete the Inquiry by the close of 2016 was impacted by the complexity of the subject, the need to recall witnesses and difficulty in obtaining information. The Committee's deliberations were further protracted by the Government providing a redacted copy of the Tamar Valley Power Station letter of 9 April 2015 and refusing to provide an unredacted copy as requested on a number of occasions and as detailed in Special Report No. 5 to Parliament. …*[12]

The Parliamentary Joint Standing Committee on Public Accounts - Special Report No. 5 - *Failure to Comply with Summons* (Special Report No. 5) reported upon this refusal to provide the Letter separately during the course of the Inquiry into the financial position and performance of Government owned energy entities in Tasmania.

In summary the Treasurer based the claim of refusal on an assessment under the *Right to Information Act 2009,* a redacted copy was provided to the Committee. The Committee further requested that the Letter be released in safe-custody to the Clerk of the Legislative Council, to

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10 Legislative Council Sessional Government Administration Committee 'A' – *Interim Report – Inquiry into the cost reduction Strategies of the Department of Health and Human Services,* op. cit., p. 20.

11 Ibid., p. 22.

12 Joint Standing Committee of Public Accounts, *Inquiry into the financial position and performance of Government owned energy entities,* Parliament of Tasmania, 2017, p. 7.

enable the Committee to view the Letter. The Treasurer's response to this request stated the Letter included: [13]

> *… 'cabinet information' and the Departmental advice attached to that letter is a 'working document' including internal deliberative information'; both of which require confidentiality to be maintained.*[14]

The Committee sought legal advice on the abovementioned grounds. The Committee again requested the Letter citing the following legal advice in the request to the Treasurer as follows:

> *Given what I have already said, it follows, I think, that without seeing the entire document it is very difficult to express any confident view about whether the Treasurer's claim to public interest immunity in relation to the 9 April Letter has been substantiated. There is nothing on the face of the document (so far as its contents have been disclosed) which would indicate that it contains any details of the deliberations of Cabinet. It is not, for example marked "Cabinet in Confidence" or in any other way which would indicate that it has any greater sensitivity than any other inter-departmental correspondence. In addition, one can infer that there is a second dot point concerning an instruction given by the Treasurer to his Department. That is hardly likely to be a matter which would attract immunity. It is also inherently unlikely that one Minister would write an apparently open letter to another Minister in which he disclosed the deliberations of Cabinet.*
>
> *I think it follows from what I said earlier that I do not know precisely what is meant by the terms "cabinet in confidence" or "working documents". What I can say is that the mere use of those descriptive phrases does not assist in determining whether it would be contrary to the public interest for the contents of the 9 April Letter to be disclosed either confidentially to members of the Committee or to the public generally. It seems to me to be implicit in the Treasurer's refusal to disclose the full contents of the 9 April Letter even to the members of the Committee on a confidential basis, that the Minister considers the contents of the 9 April Letter to be so sensitive that not even elected members of Parliament are to be trusted with them. That is, if I may say so, a very extraordinary position.*
>
> *With great respect, it appears to me that the Treasurer has formed the mistaken view that the provisions of the Right to Information Act 2009 are somehow relevant to the question of whether, or to what extent, the Minister is required to comply with a request from the Committee for the production of documents. As I have already pointed out, that is not correct. In my opinion the Minister's duty to the Parliament is much higher than that of a government department to a citizen under the Right to Information Act 2009.*[15]

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13 Joint Standing Committee on Public Accounts, *Special Report No. 5 – Failure to comply with Summons,* Parliament of Tasmania, 2017, p. 2.

14 Ibid., pp. 2-3.

15 Ibid., pp. 3-4.

The Treasurer again refused release of the Letter and the Committee resolved to summons the Treasurer. The Treasurer appeared before the Committee and did not produce an unredacted copy of the Letter.[16]

In Special Report No. 5 the Committee found:

1. *That the Treasurer's claim to public interest immunity in relation to the Letter remains unsubstantiated;*
2. *There is nothing on the face of the Letter which would indicate that it contains any details of the deliberations of Cabinet, for example no marking such as "Cabinet in Confidence";*
3. *That the Treasurer consistently incorrectly relies upon the provisions of the Right to Information Act 2009 as being relevant to the question of whether, or to what extent, he is required to comply with a request from the Committee for the production of documents.*
4. *That Legal advice received by the Committee makes clear that the Treasurer's duty to a Committee of the Parliament is higher than that afforded an applicant under the Right to Information Act 2009; and*
5. *That the Treasurer has not complied with the summons issued to him by the Chair of the Committee on 21 March 2017 as he did not provide the unredacted copy of the Letter.*[17]

Special Report No. 5 made the following recommendation:

> *… that the House of Assembly and the Legislative Council consider what action they wish to take in response to the Committee's findings, which may include –*
>
> *i. Noting the report; and*
> *ii. Consider what action, if any, should be taken in relation to the Findings of the Committee.*[18]

On 11 April 2017 in the Legislative Council a motion was moved to consider and note Special Report No. 5. The Hon Ivan Dean MLC, Chair of the Parliamentary Joint Standing Committee of Public Accounts stated:

> *A procedural problem has been highlighted by this experience and we have to address it. A measured and considered response is required to manage such circumstances if they arise in the future. I have indicated that they will arise in the future.*
>
> *…*
>
> *Issues of a similar nature are being dealt with by other places. In New South Wales there is an unresolved dispute between the Legislative Council and the executive on how narrowly Cabinet documents should be defined, and a careful consideration of the whole*

[16] Joint Standing Committee of Public Accounts, *Special Report No. 5 – Failure to comply with Summons,* op. cit., p. 5.
[17] Ibid.
[18] Ibid., p. 6.

issue is required. Perhaps the formulation of a model best suited to our particular jurisdiction may be a sensible outcome.[19]

Legislative Council Government Administration Committee 'A' – *Special Report on Failure to Provide Documents*

In 2019 the Legislative Council Government Administration Committee 'A' – *Special Report on Failure to Provide Documents* reported upon the challenges faced by the Legislative Council Government Administration Committee 'A' - Sub-Committee – Inquiry into Acute Health Services in Tasmania (the Sub-Committee) in obtaining a copy of the KPMG Report (the Report).

The Sub-Committee had received evidence indicating the information contained within the Report was relevant and important to the work of the Sub-Committee. The Sub-Committee requested this Report on a number of occasions and encountered ongoing refusals by the Minister for Health. A key finding of the Inquiry was as follows:

The refusal of the Minister to provide the Committee with a copy of the KPMG report has hampered independent scrutiny of the demand factors impacting on the health budget and has limited its capacity to fully report against the Inquiry's Terms of Reference.[20]

The Minister for Health refused to provide the Report on the basis the Report was an internal document for the Government and which would impact on the principle of frank and fearless advice and further, reliance that the Report was exempt from production due to a Right to Information assessment under the *Right to Information Act 2009.*[21]

The Sub-Committee did not accept the Minister's reliance on the abovementioned claims of immunity. The Sub-Committee recommended:

... that the Legislative Council consider an effective mechanism to deal with the issue of ongoing disputes arising between the Government and Committees of the Parliament of Tasmania in relation to the production of papers and records (documents).[22]

In addition, the Legislative Council Government Administration Committee 'A' noted in its Report as to why the Sub-Committee did not proceed with issuing a summons for the provision of the Report. The Committee noted:

12. Based upon past history with the Government in relation to the provision of documentation to parliamentary committees, the Sub-Committee decided not to issue a summons for the provision of the Report. This was because it did not believe this would resolve the issue and would lead to unreasonable delays in concluding the inquiry.

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19 The Hon Ivan Dean MLC, Legislative Council, Parliament of Tasmania, *Hansard* - Motion - *Consideration and Noting, Special Report of the Parliamentary Standing Committee of Public Accounts – Failure to Comply with Summons,* Parliament of Tasmania, Legislative Council, Report of Debates, 11 April 2017, p. 65.

20 Legislative Council Sessional Government Administration Committee 'A', *Report on Acute Health Services in Tasmania*, Parliament of Tasmania, 2019, p. 7.

21 Legislative Council Sessional Government Administration Committee 'A', *Special Report on Failure to Provide Documents,* Parliament of Tasmania, 2019, p. 15.

22 Ibid., p. 16.

13. *The Sub-Committee instead resolved to report these difficulties to the Legislative Council for further consideration.*

14. *It is hoped that a sensible solution to these ongoing difficulties can be resolved with the Government.*[23]

[23] Legislative Council Sessional Government Administration Committee 'A', *Report on Acute Health Services in Tasmania,* op. cit., pp. 4-5.

TASMANIAN LEGISLATIVE COUNCIL

In order to be able to fully consider the Committee's Terms of Reference, it was important to understand the Westminster system of responsible government that underpins Tasmania's system of government. The following sections briefly describe historical background of the Tasmanian Legislative Council and its power to call for persons and documents.

Historical Background

Tasmania was a colony of New South Wales from 1803 until 1825. The events that led to Tasmania becoming its own colony in 1825 and enacting its own Constitution are described by Richard Lumb as follows:

> *… The Act of 1923 [1823] by s.44 gave the Crown power by Order in Council to separate Van Diemen's Land from New South Wales and to establish in the new colony a legislative and administrative structure similar to that of New South Wales. In 1825 this separation occurred with the formation of legislative and executive councils on the New South Wales pattern. The act of 1828 was also extended to Van Diemen's Land so that from 1828 onwards the colony had a constitution similar to that of New South Wales.*[24]

The 1842 act which conferred representative government on New South Wales did not extend to the colony of Van Diemen's Land due to the continuance of transportation to the colony.[25]

Lumb added:

> *… the Australian Constitutions Act of 1850 empowered the existing council to establish a new council to consist of twenty-four persons of whom one-third were to be nominated by the Crown and two-thirds elected by the inhabitants, and this new body was given power to alter the constitution and to substitute for itself a bicameral legislature. Pursuant to these enabling provisions the new council in 1854 enacted a constitution bill which was transmitted to England for the royal assent. The bill, which had not, as in the case of the other colonies, exceeded the powers conferred by the 1850 act, received the royal assent. Its immediate validity therefore rests on local enactment.*[26]

The Legislative Council of Tasmania's Annual Report 2019-20 provides a very useful brief history of the Legislative Council up until the establishment of the bi-cameral Parliament in 1856:

> *The Legislative Council of Tasmania was established in 1825 as a unicameral legislature following the separation of Van Diemen's Land from New South Wales.*
>
> *…*

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24 R. D. Lumb, *The Constitution of Australian States,* 5th Ed., University of Queensland Press, 1991, p. 33.

25 Ibid.

26 Ibid.
For further information in relation to the formation of the States and the Federation of Australia refer to Chapter 9, Blackshield and Williams, *Australian Constitutional Law and Theory, Commentary and Materials,* The Federation Press, 2018, 7th Edition.

The continuing prosperity and population growth of the colony were reflected by the increase in membership of the Council. In 1828, as a result of an Imperial Act, the Council was increased to 15 nominee Members (6 official and 8 unofficial) with the Governor as Presiding Officer.

In 1851, the Legislative Council Membership was further increased to a total of 24 Members. 16 Members were elected by restricted franchise and 8 Members were nominated by the Governor, who ceased to be a Member. …

…

… the proclamation of an act to permit the introduction of a bicameral, representative Parliament on 24 October 1856. The first elections were held in 1856 and the first Session of the new Parliament was opened on 2 December in that year.[27]

As noted on the Tasmanian Parliamentary Library website:

In March 1848 Tasmania's Governor William Denison suggested to English authorities that Tasmania ought to have two representative Chambers. He did so because he felt that:

> *'There is an essentially democratic spirit which actuates the large mass of the community and it is with a view to check that spirit, of preventing it coming into operation, that I would suggest the formation of an Upper Chamber.'*

This was rejected as an untried form of constitution but in 1854 a select committee of the colonial Legislative Council presented a report and a draft constitution which recommended the creation of a bicameral Parliament.

The plan was to have a popularly elected chamber and a 'more permanent and less precarious' but also elected upper chamber. The Council was to be 'indissoluble' and its high voting qualifications were reflective of a high property franchise. Lower House voters need only have 'allegiance to the Crown'. The principal role of the Tasmanian Legislative Council would be to:

> *'… guard against hasty and inconsiderate legislation by securing due deliberation previous to the final adoption of any legislative measure.'*

The report also suggested that the two Houses would differ because:

[27] Legislative Council, Parliament of Tasmania, *Annual Report 2019-2020,* p. 1.

'The instincts of the Assembly would be movement - progress - innovation. The instincts of the more Conservative body will be caution - deliberation - resistance to change if not fairly and fully proved to be beneficial.'

... Tasmania was the first Australian colony to be granted a constitution (the Constitutional Act of Tasmania) by the reigning Queen Victoria on 31 October 1854 (Act 18 Vict No. 17). Basically, the new Parliament was to be as suggested above, with the Governor, a Legislative Council and a House of Assembly acting together.

The new bicameral Parliament met for the first time on 2 December 1856.[28]

Westminster and Responsible Government

Since 1856 Tasmania has had a bicameral Parliament established on the Westminster model of responsible government.

This is similar to all the other State jurisdictions in Australia (except for Queensland which has since 1922 been unicameral). Each State has passed legislation and developed rules and procedures to assist in the effective operations of Parliament and their two houses.

The Legislative Council is the House of Review. Its primary role is providing a check on, and balance to, the Lower House by providing additional scrutiny of legislation and decisions of the Government-dominated House of Assembly.

The House of Assembly is where government is formed when the Party that has the support of the majority of Members generally forms the State Government.

As noted in the Legislative Council of Tasmania 2019-20 Annual Report:

The Legislative Council as the Upper House of the Parliament of Tasmania can be described as democratic with an independent character. The role of the Council is three-fold:

(i) to authorize the raising of revenue and the expenditure of State monies;
(ii) to examine the merits of legislation; and
(iii) to provide a Parliamentary check on the Government of the day. In modern times the role of the Legislative Council has expanded from the base of being a purely legislative body to a House that involves itself in the examination and analysis of actions, decisions and workings of the Executive Government. [29]

As noted by Gerard Carney, a definition of what responsible government encompasses is provided as follows:

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[28] Tasmanian Parliamentary Library, Parliamentary Backgrounders, *Tasmanian Parliament,* July 2005, Parliament of Tasmania Website, accessed 16 February 2021.

[29] Legislative Council, Parliament of Tasmania, *Annual Report 2019-20,* p. 3.

The principle of responsible government is the key feature of the Westminster system of Government on which all Australian State and self-governing territory constitutional systems are based. Central to this principle is the existence of an executive branch of government which is ultimately responsible to the people, not directly but through a popularly elected parliamentary chamber …

…

At the heart of responsible government lie the twin doctrines of collective and individual responsibility of ministers. Collective responsibility refers to the ministry as a whole being held to account for its decisions – initially by parliament, and ultimately by the electorate. …[30]

The origins of responsible government in Tasmania were implied in the *Tasmanian Constitution Act 1855,* Lumb described these references as follows:

The Tasmanian Constitution Act established a Legislative Council and a House of Assembly. The Legislative Council was to consist of fifteen members who were to retire on a basis of rotation, five every three years. They were to be elected by inhabitants possessing property or educational qualifications. … Responsible government was implicit in the Constitution Act in the reference to the liability of the present incumbents of ministerial positions to retirement or dismissal on political grounds, and provisions was made for the payment of compensation in the event of this happening.[31]

Substantial case law supports the notion that responsible government had been introduced to the Australian colonies through mid-nineteenth century enactments and that the Australian constitutions presupposed a system of responsible government.[32] Christos Mantziaris described how these propositions had never been fully explored until Lange and the Egan litigations:

Lange established a number of basic propositions about the character of responsible government and identified specific components of responsible government. This provided a foundation upon which Egan v. Willis and Egan v. Chadwick could build. Although the law in the Egan cases has been developed in response to the particular constitutional framework of New South Wales, it is of more general significance for all Australian jurisdictions. The combined discussion of responsible government in Lange and the two Egan cases now provides a much fuller picture of the doctrine.[33]

The Committee explored with witnesses how the system of responsible government applies to the Parliament and its committees.

As described by Professor Richard Herr OAM in his written submission to the Committee:

The main tenets of the Westminster system are:

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30 Gerard Carney, *The Constitutional Systems of the Australian States and Territories,* Cambridge University Press, 2006, pp. 257-258.

31 R. D. Lumb, op. cit., pp. 33-34.

32 Christos Mantziaris, Laws and Bills Digest Group, Parliament of Australia, *Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege,* Research Paper 12, 1999-2000, p. 11.

33 Ibid.

- *The Parliament is supreme.*
- *The Ministry (Government) is responsible to the Parliament.*
- *The non-elected Executive (bureaucracy) are responsible to the Parliament through the Ministry.*

…

Perhaps the central issue for understanding disputes regarding the production of documents under the Westminster system is that the Executive is subordinate to the Parliament.[34]

Former Tasmanian Solicitor-General Mr Leigh Sealy SC provided in his submission to the Committee an overview of the doctrine of responsible government as follows:

The so-called "Westminster model" of parliamentary government is usually described as being a system of "responsible government". In this context the term "responsible" does not mean "sensible" or "prudent". Rather, it describes what is perhaps the defining feature of the Westminster model of government - that those in charge of the day to day management of the affairs of government are answerable (that is to say, are "responsible") to the elected Parliament (and thereby, to the electors) for their own actions and for the actions of those whom they administer. Accountability is ensured by the constitutional requirement that those who are in charge of the administration of the government - the sworn Ministers of the Crown - must also be Members of one or other of the Houses of the Parliament. And by long-standing custom or "convention", it is the Member of the House of Assembly who can satisfy the chief executive officer - the Governor - that he or she commands the support of a majority of the Members of that House, who receives from the Governor a commission to form government and to "advise" the Governor as to whom, among the other Members of the Parliament, the Governor should appoint to be Ministers of the Crown.

…

Under the Westminster model, almost invariably, a Judge may not concurrently be a Member of the Parliament or (as a result) hold office as a Minister of the Crown. However, as previously mentioned, only Members of the Parliament are capable of being appointed as Ministers of the Crown. Therefore, by definition, all Ministers of the Crown are Members of the Parliament and are, consequently, liable to answer questions from other Members concerning the administration of the government in accordance with the procedures and Standing Orders of the House of which they are a Member.

…

… those responsible for administering the government must face regular, if not daily, questioning from other Members of the House of which they are Members in addition to being liable to appear before committees of the Houses.

[34] Professor Richard Herr OAM, *Submission #16,* pp. 1-2.

This very difference, and indeed, the term "responsible government" highlights something that is very often overlooked when considering the role and functions of the Parliament of Tasmania.[35]

Professor Herr OAM provided further evidence on the question of parliament's authority over the Executive, he stated:

In some ways, when I was looking at this and wrestling with the issue - and I know you want to talk mainly about amending the Standing Orders. On the other hand, it is difficult to tell the institution that is supposed to have all the strength that it needs to have more strength because you have it all, yet people forget this. This is when I find it difficult. We don't have the American system, there is not a co-equality between the legislature and the executive. Responsible government means that the government is subordinate; it is responsible to the parliament. You can't have a subordinate who has authority over the superior. The river can't rise above its source and all that sort of thing.

In a lot of ways, it seems to me that what you are trying to do is make sure you can do your job and that shouldn't be a difficult thing to argue. That is the point I wanted to make in my comments to you, not that you necessarily needed them, but I wanted to make the point. The supremacy of the parliament requires that the government accept its position of being responsible to you, not telling you what it's going to allow you to do to be able to do your job.[36]

Further, Professor Herr OAM stated:

***…** The point here is that parliament is the enabler of government. The government doesn't exist if you don't pass laws; the government does not exist if you don't pass money bills. You are the enablers. They are the supplicants to you, you are not supplicants to them. I am putting in fairly historic and clear terms because I find it frustrating at times - why should you have to - ?*

The question is, how do two arms of government work in a prudent way to achieve the public will? If push comes to shove, it should be the parliament that does the pushing and the shoving because you are the ones who are responsible, ultimately, to the people.

The government isn't responsible to the people, it can't be responsible to the people. Our whole system depends on it being responsible to the people through parliament.[37]

Clerk of the Tasmanian Legislative Council, Mr David Pearce provided his observations of how responsible government operates, he stated:

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35 Mr Leigh Sealy SC, *Submission #4,* 17 July 2019, pp. 2-3.
36 Professor Richard Herr OAM, *Transcript of Evidence,* 6 September 2019, p. 18.
37 Ibid., p. 19.

> ***…*** *My understanding of responsible government is that ministers are responsible to the House of Assembly or the house of government where they have confidence on the floor of the House. In terms of popular sovereignty, it's the Executive to the parliament and the parliament to the people. …*
>
> *Responsible government is a flexible thing. It can take slightly different forms but it's all about accountability - ministers being accountable individually for their actions in their departments and collectively as members of Cabinet. It's those notions and doctrines that are intertwined with that but it does change over time. Even the law of parliament has changed over time. Ministers these days don't only have capacity to control their departments and the actions within their portfolio departments but also sale and disposal of government business enterprises, which are very important. That has changed over time as well.*
>
> *It's about accountability. It's about scrutinising the actions of government and obtaining sufficient information to allow the upper House to do that. That's the crux of it, in my view.*[38]

Former Clerk of the Victorian Legislative Council, Mr Wayne Tunnecliffe stated:

> *… The whole Westminster system is based on the notion and principle that the executive is accountable to parliament. Provided that the Houses have the capacity to exercise their power of scrutiny, and they can do that by a range of things - questions, debates and so forth - the power to call for documents is a part of that armoury. The High Court has upheld the fact that the Legislative Council in New South Wales had the power to do what it thought was reasonably necessary to fulfil its scrutiny function.*[39]

Functions of the Tasmanian Parliament

The Egan litigation identified two key parliamentary functions: law making and scrutiny or review of the Executive's conduct in accordance with the principles of responsible government.[40]

The Committee received evidence in relation to how the functions of the Parliament interact with the system of responsible government in ensuring accountability of the Executive.

Mr Leigh Sealy SC in his submission stated:

> *… that parliament doesn't exist solely for the purpose of making laws. Its other really important function, particularly under the Westminster style of government, is to hold the government of the day to account.*
>
> *It does that in a number of ways.*

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38 Mr David Pearce, Clerk of the Tasmanian Legislative Council, *Transcript of Evidence,* 16 March 2020, pp. 28-29.

39 Mr Wayne Tunnecliffe, Former Clerk of the Victorian Legislative Council (1999-2014), *Transcript of Evidence,* 25 September 2019, pp. 34-35.

40 Christos Mantziaris, op. cit., p. 14.

One is by asking questions of government ministers, who under the Constitution must be members of parliament. So questions can be asked on the Floor of the House. Ministers, and indeed everyone else within a jurisdiction, are subject to the command of parliament to attend before it to give evidence, answer questions and produce documents and information. That is a very important part of parliament's functions. Indeed, it is inseparable from the lawmaking function because, as I tried to point out in the submission, you can't make wise and just laws unless you have good information.

Unless you can get information particularly about how current laws are functioning - usually you get that information from government - you can't make evidence-based decisions about whether the law needs to be changed, or whether you need new laws or whether some laws are past their use-by date. It is a core function of the parliament and its committees to hold the government to account not only in relation to those matters but also, as all members know, in relation to appropriations and things of that sort. This is to ensure that public moneys are being spent for the purposes for which the parliament has authorised their expenditure and not otherwise.[41]

Further, Mr Sealy SC in his submission provided information as to how the law-making and scrutiny functions of the Parliament correlate to ensure accountability of the Executive as follows:

No doubt, everyone would agree that it is the function of the Parliament to make laws for the better government of the State and its people. Many fewer would readily volunteer that it is also the function of the Parliament to conduct such inquiries as it sees fit in order to ascertain what, if any, new or modified laws could or should be made and to inquire into the administration, execution and compliance by the government of the day, with the laws which the Parliament has already made.

It takes only a moment's reflection to realise that the function of making laws and the function of conducting inquiries are completely complementary and of precisely equal importance if the Parliament is to operate effectively on behalf of the people. For unless the Parliament knows whether the government is administering existing laws properly, is expending public monies efficiently and for the purposes for which the Parliament appropriated those funds and is otherwise acting honestly and fairly in the conduct of public affairs, the Parliament cannot know whether existing laws are in need of amendment or whether new and better laws may be required.

Moreover, if the Parliament is unable to discover the truth about these matters then those who elected the Parliament - and who also elected the government - the people of Tasmania, are likewise unable to know the truth and so, cast an informed vote.

Of course the matters about which the Parliament may properly make inquires are not limited to the acts or omissions of government. In considering the state of the law and the desirability of any changes in the law, no logical limit can be placed upon the subject-matter into which the Parliament may have reason to inquire. It is for this reason that the Parliament of the United Kingdom has often been called "the Grand Inquest of the Nation". In 1837 the Chief Justice of England, Lord Coleridge said of the House of

[41] Mr Leigh Sealy SC, *Submission #4*, op. cit., pp. 1-2.

Commons:

> *"That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: It is unnecessary to attempt to do so now: I would be content to state that they may inquire into everything which it concerns the public weal for them to know; and they themselves, I think are entrusted with the determination of what falls within that category.*
>
> *Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary, and, where attendance is required, or refused, in either stage, of summons or arrest, there need be no specific disclosure of the subject matter of inquiry, because that might often defeat the purpose of the examination."*[42]

Source of power to order the production of documents

Tasmanian Parliamentary Privilege Acts

Unlike New South Wales, the Tasmanian Parliament has some of its Privileges enshrined in Legislation. The *Parliamentary Privilege Act 1858* includes powers prescribed to require persons to attend a House of Parliament, and any committee of either House and to produce "…any paper, book, record, or other document in the possession or power of such person…" as follows:

> ***Section 1. Power to order attendance of persons –*** *Each House of Parliament, and any committee of either House duly authorized by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be, and also to produce to such House or committee any paper, book, record, or other document in the possession or power of such person; and all persons are hereby required to obey any such order.* [43]

Section 2 of the *Parliamentary Privilege Act 1957* clarifies that joint committees have all the powers of a committee of either House:

> ***Section 2. Powers, &c., of joint committees –*** *(1) A joint committee of both Houses of Parliament duly authorized by both Houses has all the powers of a committee of either House duly authorized by the House and persons are required to obey its orders accordingly. (2) Section two of the Principal Act applies in relation to a joint committee of both Houses as if it were a committee of either House.*[44]

The *Parliamentary Privilege Act 1858* also provides the power to summarily punish for failure to comply with s 3(a). The relevant sections of the Act are reproduced below.

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42 Mr Leigh Sealy SC, *Submission #4*, op. cit., pp. 4-5.
43 *Parliamentary Privilege Act 1858 [Tas].*
44 *Parliamentary Privilege Act 1957 [Tas].*

Section 3. Houses empowered to punish summarily for certain contempts

Each House is hereby empowered to punish in a summary manner, as for contempt, by imprisonment in such custody and in such place as it may direct, during the then existing session or any portion thereof, any of the offences hereinafter enumerated, whether committed by a Member of the House or by any other person:

(a) The disobedience of any order of either House, or of any committee duly authorized in that behalf, to attend, or to produce papers, books, records, or other documents before the House or such committee;

(b) Refusing to be examined before or to answer any lawful and relevant question put by, the House or any such committee;

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

(d) The publishing or sending to a Member any insulting or threatening letter on account of his behaviour in Parliament;

(e) The sending a challenge to fight to a Member, on account of his behaviour in Parliament;

(f) The offering of a bribe to, or attempting to bribe, a Member; and

(g) The creating of, or joining in, any disturbance in the House, or in the immediate vicinity of the House.

Former Tasmanian Solicitor-General Mr Leigh Sealy SC in his submission provided an historical context as to how and why this privilege was enacted under the *Parliamentary Privilege Act 1858* as follows*:*

> *… Hampton was the Comptroller-General of Convicts for Van Diemen's Land. A Select Committee of the Legislative Council of Van Diemen's Land (which at the relevant time remained a single chamber) was set up to inquire into alleged abuses in the Convict Department and had summonsed Hampton to appear before it. Hampton failed to appear before the Select Committee and also refused to appear before the bar of the Legislative Council to explain his failure to appear before the Select Committee. Thereupon the Council resolved that Hampton was guilty of contempt and the Speaker of the Council (Fenton) issued his warrant for Hampton to be arrested and held in the custody of the Serjeant-at-Arms during the pleasure of the Council. The warrant was duly executed and following his subsequent release from custody, Hampton commenced an action for trespass against both Fenton and the Serjeant-at-Arms. Both the Supreme Court of Van Diemen's Land (Fleming C.J.) and on appeal, the Privy Council, held that the Legislative Council of Van Diemen's Land had no inherent power to punish a contempt "committed out of its doors". Speaking for the Privy Council Lord Chief Baron Pollock said;*
>
> > *"[I]f the Legislative Council of Van Diemen's Land cannot claim the power they have exercised on the occasion before us, as inherently belonging to the Supreme legislative authority which they undoubtedly possess, they*

cannot claim it under [the Australian Constitutions Act (No.2)] as part of the Common Law of England (including the Lex et consuetudo Parliamenti), transferred to the Colony by 9 Geo. IV., c. 83, sect. 24. The `Lex et consuetudo Parliamenti' apply exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a Colony by the introduction of the Common Law there."

Following the decision in Fenton v Hampton in February 1858, and, no doubt because of it, the Tasmanian Parliament passed the Parliamentary Privilege Act 1858 which remains in force to this day. That Act received the Royal Assent on 29 October 1858 and, among other things, empowered each House of what was by then a bicameral Parliament, to order the attendance of witnesses and the production of documents and to punish contempts whether committed within or outside the Parliament – see s1 of the Act.[45]

Following on from this power, section 17 of the *Constitution Act 1934* prescribes that the Legislative Council can make Standing Orders. The Standing Orders provide for the rules and orders of procedure for the operation of the Council and its committees to order the production of documents.

Section 17 of the *Constitution Act 1934* prescribes:

17. Houses to make standing orders

(1) Each House, as occasion may arise, shall prepare and adopt such standing rules and orders as shall appear to it to be best adapted for the orderly conduct of the business of such House; for the mode in which such House shall confer, correspond, and communicate with the other House; for the manner in which Bills shall be introduced, passed, numbered, and intituled in such House; for the proper presentation of Bills to the Governor for His Majesty's assent; and generally for the conduct of all business and proceedings of such House and of both Houses collectively.

(2) All such rules and orders shall be laid before the Governor by the House making them and, being approved by him, shall become binding and of force. [46]

Part 31 of the Tasmanian Legislative Council Standing Orders provides for the ordering of the production of documents in the Legislative Council. Specifically, Standing Order 318 states:

318. Tabled papers

Papers including records in any form may be ordered to be laid before the Council.[47]

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45 Mr Leigh Sealy SC, *Submission #4,* op. cit., pp. 6-7.

46 *Constitution Act 1934 [Tas].*

47 Parliament of Tasmania, *Legislative Council Standing Orders,* 2010, p. 81.

Further, Standing Orders under Part 31 that are of relevance are provided as follows:

> ***319. Perusal of papers ordered to be tabled***
> *All Departmental files and documents, laid before the Council by Order, shall be available for perusal by Members of the Council only; unless such Order or a subsequent Resolution directs that the files and documents are available for perusal by persons other than Members.*
>
> *…*
>
> ***322. Laid upon table by clerk***
> *Papers and other records required to be laid before the Council by any act of parliament, or by any order of the Council, may be deposited in the Office of the Clerk to be laid upon the table.*
>
> ***323. Order communicated to Premier***
> *All orders for papers made by the Council should be communicated to the Premier by the Clerk.*
>
> ***324. Copies of papers for assembly***
> *The Clerk of the Council shall transmit to the Clerk of the Assembly a sufficient number of all papers printed by order of the Council for distribution to the Members of the Assembly.*[48]

Tasmanian Legislative Council Standing Order 189 provides for select committees to send for persons and papers as follows:

> ***189. Power to send for papers***
>
> *Whenever it may be necessary, the Council may empower a Committee to send for persons, papers and records.*[49]

In relation to Joint Committees of the Tasmanian Legislative Council there is no specific Standing Order to order the production of documents under Part 20 – Joint Committees, however, Standing Order 219 should be observed as follows:

> ***219. Select committee procedure applies to joint committees***
> *In all cases relating to Joint Committees, and not otherwise provided for in these Standing Orders, the Rules for Select Committees shall be followed as far as they can be applied.*[50]

[48] Parliament of Tasmania, *Legislative Council Standing Orders,* op. cit., p. 81.
[49] Ibid., p. 47.
[50] Ibid., p. 55.

Egan v Willis and Cahill, Egan v Willis and Egan v Chadwick

Further to the powers conferred under the Tasmanian Parliamentary Privilege Acts the Egan decisions have confirmed that the doctrine of reasonable necessity applies in New South Wales and by extension to all Australian States.

Mr Harry Evans, the Clerk of the Senate, noted in 2009 that:

> *Applying the doctrine that the council [New South Wales] possesses the powers reasonably necessary for the exercise of its functions, the court held that the council has the power to order the production of 'State papers', and, by appropriate means, to enforce such an order.*[51]

This view is further supported and explained by Mr David Blunt the Clerk of the New South Wales Legislative Council:

> *The Egan cases were generated by the refusal of the former Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, to produce certain state papers ordered by the Council. This occurred on a number of occasions, resulting in inquiries by the Privileges Committee, and the House finding Mr Egan in contempt of the House for his failure to comply with the order of the House. Mr Egan was subsequently suspended from the House and escorted from the chamber by the Usher of the Black Rod to Macquarie Street. Mr Egan used this last point as a means of precipitating legal proceedings in the Supreme Court of NSW. In November 1996, in Egan v Willis and Cahill, the New South Wales Court of Appeal unanimously held that 'a power to order the production of state papers … is reasonably necessary for the proper exercise by the Legislative Council of its functions'.*
>
> *Mr Egan was granted leave to appeal to the High Court, where the key issue was the power of the Legislative Council to order the production of documents. The High Court in Egan v Willis in November 1998, confirmed that it is reasonably necessary for the Council to have the power to order one of its members to produce certain papers. (Gaudron, Gummow and Hayne JJ):*
>
> > *It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that 'to secure accountability of government activity is the very essence of responsible government'.*
>
> *However, while the High Court in Egan v Willis clearly affirmed the power of the Council to order the production of state papers, it did not consider the production of papers subject to a claim of privilege by the executive such as legal professional privilege, or public interest immunity. This was not resolved until the decision in Egan v Chadwick in June 1999, where (following the continued refusal of Mr Egan to produce documents in*

[51] Mr Harry Evans, Selected Writings, Papers on Parliament No. 52, *Reasonably Necessary Powers: Parliamentary Inquiries and Egan v Willis and Cahill,* December 2009, Parliament of Australia, p. 3.

response to orders of the House, this time on the grounds that they were the subject of claims of public interest immunity and legal professional privilege) the New South Wales Court of Appeal held that the Council's power to require the production of documents, upheld in Egan v Willis, extended to documents in respect of which a claim of legal professional privilege or public interest immunity could be made. However, the majority (Spigelman CJ and Meagher JA) did hold that public interest may be harmed if access were given to documents which would conflict with individual or collective ministerial responsibility, such as records of Cabinet deliberations."[52]

As can be clearly seen from the discussion above the Tasmanian Legislative Council and, its committees, have well established powers to call for the production of documents and the authority to treat refusal to do so as a contempt.

The Committee received evidence that questioned the legality around the Tasmanian Parliament's power to compel documents from the Crown. Professor Gabrielle Appleby, Dr Brendan Gogarty and Professor George Williams AO joint submission stated:

*The **legal** power of the Legislative Council and its Committees to require the production of documents has been addressed in the Parliamentary Privilege Acts. Section 2 of the Parliamentary Privilege Act 1957 clarifies that joint committees have all the powers of a committee of a single House.*

However, the Parliamentary Privilege Acts leave unclarified one key threshold issue, namely, whether the Legislative Council (including its committees and joint committees) has the power to compel the production of documents by an officer of the Crown, that is, a Minister or executive officer. This is because there is some legal uncertainty about the powers and privileges of the Council, and whether the Parliamentary Privileges Acts extend to the Crown, including its Ministers.

We recommend that this uncertainty be clarified as a matter of priority. In particular, we recommend that the scope of the power of the Legislative Council (including its committees and joint committees) to send for persons and papers, be explicitly extended to include the Crown. As the High Court clarified in Egan v Willis (1998) 195 CLR 424, these powers of the Legislative Council form part of the constitutional pillars on which responsible government can be practiced.[53]

Senior Law Lecturer at the University of Tasmania, Dr Brendan Gogarty provided further evidence in relation to this issue, he stated:

The Tasmanian Parliament at the time the Colonial Parliament, was a creature of imperial statute. It was created by the Imperial Parliament. It was subordinate to it. It was not given by that statute all of those powers and privileges that existed in the United Kingdom. The Privy Council agreed that if it were to be given those powers, it would be elevating it to the same level as the British imperial parliament, contrary to the rule of

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[52] Mr David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament New South Wales, *Parliamentary Sovereignty and Parliamentary Privilege, The Fundamentals of Law: Politics, Parliament and Immunity,* Legalwise Seminars, UNSW, 2015, p.17.

[53] Professor Gabrielle Appleby, Dr Brendan Gogarty and Professor George Williams AO, *Submission #13,* 1 August 2019*,* p. 2.

law in the Imperial Empire. Also because it was a creature of statute, it had to draw its powers from that statute. The statute did not give any of the colonial parliaments the privileges of the House of Commons; it didn't give them coercive powers and didn't give them colonial powers.

Interestingly, as I said, Hampton left the colony before any of this could be resolved. It was resolved against the Legislative Council. The Council then passed what we have now - the 1858 act. The 1858 act, however, is the creature of that very parliament, the Tasmanian Parliament, which was found to lack those express powers so it can't legislate to give itself powers if it did not have power to give itself those powers. The 1858 act is a limited act. It was limited at the time, it is not expressed to bind the Crown. In the colonies there was a strong presumption against the Crown ever being bound, but you also have to note that in 1858 about half the Legislative Council was appointed by the Crown. The Crown had the right to overturn or repeal certain statutes so this was outside the capacity of the Van Diemen's Land parliament altogether –

> *The Tasmanian Parliament is a legislative body consisting of members in part elected by the inhabitants and in part appointed by the Crown. The Governor's assent or dissent to bills is liable to be controlled by instruction from the Queen.*

There has to be assent to which he is bound to conform. They can be disallowed by Her Majesty.

Necessarily, at the time, the bill would have had to say, 'this act binds the Crown'; it would never have passed through the House and it would have been disallowed. It was non-expressed to bind the Crown. The new act was never retested against the comptroller for convicts who was a member of the executive. We do not really know whether the new act would have been upheld either.

The act itself, at the time, could not have bound the Crown. We get through to 1931. Now Tasmania does something interesting; it legislates - this is the Acts Interpretation Act - to say in 1931, 'No Act shall be binding on the Crown unless express words are included therein for this purpose'. The Parliamentary Privilege Act necessarily does not include that; it has never been amended to include it so we would assume that it is not intended to bind the Crown. The Acts Interpretation Act applies to all statutes.[54]

The Committee questioned witnesses in relation to whether the *Parliamentary Privilege Act 1858* binds the crown.

Mr Leigh Sealy SC stated:

> *In my view there is almost no doubt that the power conferred on the parliament by the Parliamentary Privilege Act extends to the Crown. Indeed, I deal with the history of how that act came to be passed in some little detail. It was in circumstances where the controller of prisons had refused to appear before the then Legislative Council; that is,*

[54] Dr Brendan Gogarty, Senior Law Lecturer, University of Tasmania, *Transcript of Evidence,* 6 September 2019, pp. 37-38.

someone who is in the employ of the Crown. The very purpose of the Parliamentary Privilege Act when it was passed in 1858 was to enable the parliament to obtain documents from the Crown.

It used to be the law in this country that no act bound the Crown unless there was - and you still see it in some of the older acts - 'this Act binds the Crown'. It will sometimes say 'in all of its capacities'. In the early 1980s, there was a decision called Bropho v State of Western Australia in which the High Court of Australia said, no, there is no longer in Australia any presumption that legislation does not bind the Crown; it is a matter of looking at the particular enactment and determining what the intention of parliament was, whether the enactment was intended to bind the Crown. If that intention can be discerned, then it binds the Crown.

Having regard to the role of parliament and the system of what we call responsible government and parliament's role of holding government to account, it seems to me inherently unlikely that you could conclude that when parliament passed the act and allowed it to remain on the books, it did so in the belief that it doesn't bind the Crown.

I come back to this point about it being just issuable facts. I would have to think about this, but you might have some difficulty in going to court and seeking a declaration or some sort of order from the court that the government of the day was bound by the terms of the Parliamentary Privilege Act, which is to say the Crown. I think the better view is that clearly the act was intended to bind the Crown from the very outset. Having regard to the fact that one of the principal functions of parliament is to hold the government to account, it would be close to absurd to suggest that somehow parliament meant to exclude the Crown from the operation of the act and put the government, as it were, beyond reach of the parliament. It is unthinkable, quite frankly.

While I recognise there's that general area of concern, in some cases where the act is silent whether it binds the Crown or not, the modern view now generally is that all legislation binds the Crown, unless there is some discernible indication in the legislation that the Crown is not to be bound.[55]

Professor Richard Herr OAM, University of Tasmania stated:

***CHAIR** - You are not in any doubt about the Crown being bound?*

***Prof. HERR** - No, as I said. What worries me is that if the parliament starts not operating on and enforcing the conventions that give it its authority, including the authority to make laws, you then create uncertainty for the courts and I'd rather not go that way. When you start legislating, the courts will then start interpreting for you whether you should or should not do things.*

***Mr DEAN** - That would create a few problems.*

***CHAIR** - But you believe the power exists?*

[55] Mr Leigh Sealy SC, *Transcript of Evidence,* 6 September 2019, p. 8.

> ***Prof. HERR*** *- I do, yes. Oh yes. I don't have any doubt about that. For me, the documents from the executive say that they have accepted it always; I think it exists by the ancient rights and powers of the parliament, as it were.*[56]

The Tasmanian Government's submission acknowledged the Parliament's power to order the production of documents:

> *Notably, the Parliamentary Privileges [Privilege] Act 1858 (the Act) was passed for the very reason of ensuring that the Tasmanian Houses of Parliament and any Committee of either House had adequate power to order the attendance of persons and the production of papers. These powers are comparable to those found in the majority of other Australian jurisdictions, and represent one of the cornerstones of Executive Government accountability.*[57]

The Clerk of the Tasmanian Legislative Council Mr David Pearce when asked stated:

> ***CHAIR*** *- You don't have any doubt that the power exists under our current structures to call for and receive documents from the government and from ministers?*
>
> ***Mr PEARCE*** *- No, I have no doubt that we have the power to do that. I think that's clear; section 1 of the Parliamentary Privilege Act, on its face, allows that. We have the legal determinations that support that as well. I don't think there's any doubt that we have the power to call for those papers and documents. Whether you get what you're calling for is another question.*[58]

The Committee noted with respect to Professor Gabrielle Appleby, Dr Brendan Gogarty and Professor George Williams AO joint submission and further, Dr Gogarty's evidence to the Committee that it is considered a well settled convention that the Tasmanian Houses of Parliament and committees established by them are deemed to have an inherent power to order members and witnesses before them to produce documents.

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56 Professor Richard Herr OAM, *Transcript of Evidence,* op. cit., pp. 29-30.

57 Tasmanian Government, *Submission #11,* 29 July 2019, p. 1.

58 Mr David Pearce, op. cit., *Transcript of Evidence,* p. 29.

GROUNDS FOR IMMUNITY RELATED TO PRODUCTION OF DOCUMENTS

The Tasmanian Legislative Council and, its committees, have well established powers to call for the production of documents and the authority to treat refusal to do so as a contempt. The Committee recognises there may arise appropriate and reasonable claims of immunity by governments relating to the production of documents. This chapter explores the grounds upon which governments may claim immunity commonly known as public interest immunity.

Background

Public interest immunity or executive privilege, historically known as crown privilege, can be described as follows:

> *… the Executive Government may seek to claim immunity from requests or orders, by a court or by Parliament, for the production of documents on the grounds that public disclosure of the documents in question would be prejudicial to the public interest.*[59]

By the end of the nineteenth century the Houses of the United Kingdom Parliament were invested with the power to order documents that were necessary for its information. The power was not absolute, a sufficient cause was required for the power to be exercised. This power is extended to the Australian Parliament by way of section 49 of the Constitution.[60]

However, within the Australian Parliament questions have arisen as to the limits of this power to call for the production of documents from the Executive. This has given rise to conflict between public interest immunity and parliamentary privilege.[61]

Mr Harry Evans, former Clerk of the Australian Senate, wrote:

> *The terminology "public interest immunity" is significant. The Senate has made it clear that a claim that particular information should not be produced must be based on a particular ground that disclosure of the information would be harmful to the public interest in a particular way. A statement that the holder of information does not wish to produce it, or that the information is confidential, is not a proper claim for public interest immunity.*
>
> *It is open to the Senate to determine that any risk of harm to the public interest by disclosure of information is outweighed by the benefit to the public interest in the provision of the information.*
>
> *The Senate has also made it clear that claims in relation to information held by government must be made by ministers. The government's guidelines for public servants appearing before parliamentary committees also emphasise this principle.*[62]

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59 House of Representatives Practice, *17 – Documents – Public Interest Immunity,* 6th Edition, Parliament of Australia Website, accessed October 2020.

60 Ibid.

61 Ibid.

62 Mr Harry Evans, *The Senate - Grounds for Public Interest Immunity Claims,* hc/pap/14613, 19 May 2005, p. 1.

Public interest immunity and the Courts

Decisions by the Courts have determined the law of public interest immunity, in that no class of document is entitled to absolute immunity from disclosure and that all cases may be resolved by the Court on the balance of the competing aspects of the public interest. This development has occurred over a number of years. This claim was once determined by the Courts to be irrefutable.

The power to call for the production of documents within the New South Wales Legislative Council has been upheld by the New South Wales Courts in relation to claims of legal professional privilege and public interest immunity. Dr Gareth Griffith described these rulings as providing significant implications for Upper Houses generally within Australia in relation to public interest immunity as follows:

> *… For the first time the courts have decided on the application of the doctrine of public interest immunity where the point at issue is the disclosure of government documents to a House of Parliament. The precise application of that doctrine to Cabinet documents may not be entirely clear, but principles established in Egan v Chadwick will surely form the basis of future practice in this regard. That decision is based upon an elucidation of a power of scrutiny which, to a significant extent, has been found to derive from the principle of responsible government. Indeed, the cases are, if nothing else, important landmarks in the judicial discussion and treatment of that key constitutional principle. Even if the conventions of responsible government still cannot be said to be enforced by the courts, they are most certainly recognised by them and employed with considerable freedom and vigour when relevant aspects of the law of parliament fall [fail] to be decided.*[63]

Former Tasmanian Solicitor-General, Mr Leigh Sealy SC in his submission provided context as to how this law has evolved over the years:

> *It used to be the law that if such a claim was asserted by the government against an opponent in civil litigation that that claim was regarded as conclusive and the courts would not look behind it. However, that position changed in the United Kingdom in 1968 after the decision in Conway v Rimmer and in Australia in 1978 after Sankey v Whitlam was decided.*
>
> *Since then, courts in both countries have proceeded upon the basis that they have the power to require the production to them of those documents which are said to be immune from production, for the purpose of determining whether it is, or is not, contrary to the public interest that that information be disclosed publicly or perhaps only to the opposing party and on any, and if so, what terms as to confidentiality.*
>
> *…*
>
> *Accordingly, it may now be said with some confidence that the law in Australia is that in civil litigation, the Crown (and its emanations) no longer enjoys absolute immunity from*

[63] Gareth Griffith, *Egan v. Chadwick and Other Recent Developments in Powers of Elected Upper Houses,* Briefing Paper No 15/99, New South Wales Parliamentary Library Research Service, August 1999, p.33.

the production of documents on any ground, including on the ground of "public interest immunity" even where documents record or reveal the deliberations of Cabinet. Where it is claimed that it would be contrary to the public interest for the Crown to be required to produce particular documents or classes of documents to an opponent, the Court will order that those documents be produced to the Court to enable the Court to determine whether or not the interests of justice require that the documents be produced unconditionally or subject to some restriction such as production in confidence or to the opponent's legal advisers only and not to the opponent personally or in some modified form or not at all.[64]

Public interest immunity and the Parliament

Executive Governments in Australia and comparable jurisdictions have frequently claimed that they have the right to withhold information from the legislature if the disclosure of the information would not be in the public interest. No legislature worthy of name has conceded that there is any such right or privilege adhering to the executive government.[65]

Parliamentary privilege does not allow for the principles established by the Courts to be enforceable in the Parliament, due to the absence of third-party review of these non-adjudicated claims by the Executive remaining largely unresolved except, perhaps ultimately, by the electors. Mr Leigh Sealy SC stated:

That doesn't happen in the parliamentary sphere for two reasons. First, the question of whether the government should or must produce documents to the parliament isn't just issuable [justiciable], which is to say it is not a matter capable dealt with by the courts because of provisions of the Bill of Rights which gave rise to parliamentary privilege. So no-one can inquire into the proceedings of parliament - no-one outside of parliament, not even a court, subject to some minor qualifications.

The result is therefore that it's not possible for parliament to go to court to get a ruling on whether the government needs to produce a document or vice versa. The problem for parliament is that, as things are presently constituted, there is no-one like a judge who can take a neutral position and determine whether the claim made on behalf of the executive government that the documents are covered by a form of public interest immunity is a good claim or not.[66]

In the Australian House of Representatives where there is commonly a majority government disputes over public interest immunity are less likely to arise. However, this is not the case in the Australian Senate where exists a different political situation, whereby the Government does not hold a majority. Odgers' Australian Senate Practice noted the Senate's practice when dealing with public interest immunity claims (see chapter on *Existing Processes to Order the Production of Documents - Senate of the Australian Parliament* for remedies used) as follows:

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64 Mr Leigh Sealy SC, *Submission #4*, op. cit., pp. 10-11.

65 Mr Harry Evans, *The Senate's Power to Obtain Evidence,* Papers on Parliament No. 50, March 2010, p. 5.

66 Mr Leigh Sealy SC, *Transcript of Evidence,* 6 September 2019, p.54.

While the Senate undoubtedly possesses this power, it is acknowledged that there is some information held by government which ought not to be disclosed. This principle is the basis of a postulated immunity from disclosure which was formerly known as crown privilege or executive privilege and is now usually known as public interest immunity. While the Senate has not conceded that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has usually not sought to enforce demands for evidence or documents against a ministerial refusal to provide them but has adopted other remedies.[67]

Categories of public interest immunity claims that have attracted some measure of being potentially acceptable for immunity from production to the Senate have been summarised below as provided in Odgers' Australian Senate Practice:

- prejudice to legal proceedings;
- prejudice to law enforcement investigation;
- damage to commercial interests;
- unreasonable invasion of privacy;
- disclosure of Executive Council or cabinet deliberations;
- prejudice to national security or defence;
- prejudice to Australia's international relations;
- prejudice to relations between the Commonwealth and the states; and
- other grounds - there are also some lesser grounds of very limited scope for legitimate claims. Undermining public revenue or the economy may be apprehended in disclosure of some information.[68]

Types of public interest immunity claims in cases before the Senate that have not received acceptance or have been explicitly rejected are summarised below as provided for in Odgers' Australian Senate Practice:

- advice to government;
- information subject to statutory secrecy provisions;
- legal professional privilege;
- freedom of information issues; and
- statutory authorities and public interest immunity.[69]

[67] Odgers' Australian Senate Practice, *Chapter 19 – Relations with executive government,* 14th Edition, 2016, p. 644.
[68] Ibid., pp. 662-667.
[69] Ibid., pp. 667-671.

Cabinet documents

Disputed claims regarding the definition of cabinet documents has continued in Parliaments when certain documents have been requested. In the absence of an independent arbiter or authority to determine the claim contested documents continue to be debated and disputed. The question of what constitutes a cabinet document that could reasonably attract a claim of immunity was a key consideration of the Committee.

Odgers' Australian Senate Practice provided a distinction between cabinet deliberations versus cabinet documents as follows:

> *It is accepted that deliberations of the Executive Council and of the cabinet should be able to conducted in secrecy so as to preserve the freedom of deliberation of those bodies. This ground, however, relates only to disclosure of deliberations. There has been tendency for governments to claim that anything with a connection to cabinet is confidential. A claim that a document is a cabinet document should not be accepted; as has been made clear in relation to such claims in court proceedings, it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word "cabinet" in or on it. …* [70]

The High Court decision in *Commonwealth v Northern Land Council* is described by Christos Mantziaris as not providing clarity or a definitive definition of documents that a claim of public interest immunity would reasonably apply:

> *That case ruled that documents which recorded the actual deliberations of Cabinet or a committee of Cabinet were subject to public interest immunity. The High Court acknowledged that 'documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet ... are often referred to as Cabinet documents', but it expressed no view as to whether such documents could be brought within the ratio of the case.*[71]

In New South Wales, in the *Egan v Chadwick* decisions there was no advance on a clear definition. *Egan v Chadwick* held that the Legislative Council did not have the power to require the production of documents which directly or indirectly revealed the deliberations of cabinet. It was stressed that this immunity from production only applies to documents revealing Cabinet deliberations. Cabinet documents which are in the nature of reports or submissions prepared for the assistance of cabinet '*may, or may not, depending on their content*' be immune.[72]

The majority of evidence received by the Committee provided that cabinet documents cannot be strictly categorised as sitting within this branch of cabinet confidentiality that warrants immunity. This has been the basis for a number of jurisdictions establishing procedures for dispute resolution.

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70 Odgers', op. cit., p. 665.
71 Christos Mantziaris, op. cit., p. 38.
72 *Egan v Chadwick and Others* [1999] NSWCA 176, [57].

The Tasmanian Government stated in its evidence that cabinet documents should not be produced on the premise of Cabinet confidentiality. The Tasmanian Government submission stated:

> *Cabinet confidentiality is critical so as to ensure robust Cabinet deliberation and decision making occurs, and that is a fundamental principle of the Westminster system of Government. The High Court, in this ruling, further noted that even as progress is made towards the concept of open government, it is generally accepted that Cabinet documentation should remain exempt. Without the certainty of Cabinet confidentiality, Cabinet members may feel inhibited in exchanging differing views while concurrently maintaining Cabinet solidarity once a decision had been made.*[73]

Further, Ms Jenny Gale, Secretary of the Department of Premier and Cabinet advised the Committee at a hearing:

> *The construct of Cabinet currently allows for the frank and fearless exchange of views and advice. Cabinet is collectively responsible for the performance of the government and each minister acts jointly with and on behalf of Cabinet colleagues in their capacity as ministers. That collective responsibility, which is a longstanding notion of Executive government, is supported by the strict confidentiality afforded to Cabinet documents and discussions within the Cabinet room.*
>
> *Some of the legal opinion that has formed part of discussions in other jurisdictions indicates that - and this is my lay interpretation of that, certainly not a legal interpretation - it is in the public interest for deliberations of Cabinet to remain confidential and, were this not observed, it's likely to mute free and vigorous exchange of views. What that means is that Cabinet is a forum in which ministers, while working their way towards a collective position, are able to discuss proposals and a variety of options and views with complete freedom. The openness and frankness of discussions in the Cabinet room are protected by the strict observance of this confidentiality.*[74]

The 2018 version of the Government of Tasmania's Department of Premier and Cabinet, Cabinet Handbook defines what a cabinet document is for the purposes of cabinet confidentiality as follows:

> *For the purpose of Cabinet confidentiality, without seeking to be exhaustive 'Cabinet documents' may include: Cabinet Minutes, a document recording a Cabinet decision, Cabinet Agendas; other records of Cabinet discussions; records of discussions or deliberations between Ministers, Secretaries of Departments and other senior officials and/or ministerial staff which would tend to reveal the deliberations of Cabinet if disclosed, or any other record relating to the deliberation or decision of the Cabinet. This includes any information submitted to or proposed to be submitted to Cabinet for its deliberation.*[75]

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[73] Tasmanian Government, *Submission #11,* op. cit., p. 2.

[74] Ms Jenny Gale, Secretary, Department of Premier and Cabinet, *Transcript of Evidence,* 1 November 2019, pp. 15-16.

[75] Government of Tasmania, Department of Premier and Cabinet, Cabinet Office, *Cabinet Handbook,* April 2018, p. 7.

Former Administrative Law/Public Law Lecturer at the University of Tasmania, Honorary Associate Professor Rick Snell questioned the inclusion of this definition, he stated:

> *… it seems we are actually going backwards at the moment - even further than we maybe had been.*
>
> *That kind of forwards-backwards analogy is a little bit difficult, because I think it's much more confused. I think the Government makes a very strong point that in a number of areas they have become much more open and transparent than they have been previously. They have funded the Ombudsman far more effectively than previously - but at the same time it doesn't stop them doing other things retrospectively. This whole dispute that has led to this committee is an example of that. …*
>
> *As an example, if you are committed to open government, you wouldn't have amended the Cabinet handbook in that particular way, and you would have realised that's what you were doing.*
>
> *If you are committed to open government and some of the principles that both the previous Premier and current Premier have outlined, you would go through your Cabinet handbook and probably revamp it from the very beginning. If anything was to illustrate a degree of success, would be that. …*
>
> *We already have a system with the idea that Cabinet information loses its cloak of secrecy within 10 years. We also have, as part of that particular section, subsection 5, that the premier may release Cabinet information when he or she wants to. There is already a device in place if you had a premier of the right mind to effectively adopt the ACT system, or adopt the New Zealand system, to effectively say that Cabinet information will automatically be available unless there is a good reason not to.*
>
> *Let us just change this whole process and default to another system. That does not then release information that is damaging or information that may alarm the public unnecessarily during an epidemic that may be occurring et cetera, but it does effectively put to you and to your officials that the intent is to make as much of this information available as possible and to identify what the risks are.*[76]

Mr Sam Engele, Executive Group Manager, Policy and Cabinet, Chief Minister, Treasury and Economic Development Directorate, Australian Capital Territory provided how a distinction between cabinet documents vs cabinet deliberation is assessed under the Australian Capital Territory's freedom of information legislation as follows:

> ***Mr ENGELE -*** *With the FOI act as it relates to Cabinet documents, we are in the process of testing with the Commonwealth Ombudsman our escalation points for any disputes about the exact nature as it relates to Cabinet documents. There is an emphasis not to release any deliberative material of Cabinet, but the Commonwealth Ombudsman, who we use for a lot of our reviews of decisions in the ACT, has been working through a*

[76] Honorary Associate Professor Rick Snell, Former Administrative Law/Public Law Lecturer, University of Tasmania, *Transcript of Evidence,* 10 March 2020, p. 22.

rationale for what constitutes the delivery of [sic] [deliberative] material and has generally been of the view that factual points don't constitute deliberative material and therefore anything that has been factual within a Cabinet submission has generally been released upon review by them.

We have found that a lot of Cabinet submissions and other materials have been released upon review. We are working with them to refine [inaudible] parameters about what constitutes deliberative material, but generally it has been found to be material that can be shown to remove the confidence of Cabinet decisions themselves rather than the material that's provided to Cabinet on which to make those decisions.

***CHAIR** - To clarify, there have been varying views put to this committee over the course of our hearings about information that is provided by departments or by advisers or others leading into the Cabinet process, and often these are public servants putting together their packages of information to inform a decision the Cabinet will make. Are you saying that if they are factual, they would generally be released without redaction …*

***Mr ENGELE -** That's correct. Obviously we also ensure that once private personal details and the like and the things that impact Commonwealth-state relations would not be released. They are under a certain category, but in terms of just if it's a factual information status update of a particular issue, they have been released. That's correct. The Cabinet rules will capture all those materials, briefings and other advisories that went into a deliberative decision. The assessment is not whether the document itself was a Cabinet submission or an email or a brief, but whether the material will remove the veil of Cabinet in terms of the decision-making of ministers.*

***CHAIR** - Clearly documents that may reveal a matter that went to a vote in Cabinet wouldn't be released that identified which members voted which way.*

***Mr ENGELE** - Yes, that's right. I think the things that pertain to particular advice have also been found to be deliberative as well. That captured some of the briefings that would be provided to ministers in weighing up balancing factors. The factors themselves, whether it be the cost of taking a particular action or facts that relate to the issue at hand, have tended to be viewed as [if] they're just facts and therefore they have been released.*

***CHAIR** - To clarify, if you have an issue or a paper that proposes or argues two different aspects of the same topic, so that Cabinet when it makes a decision is aware of what the positive impacts may be as well as what the negative impacts may be, putting two different potential arguments forward there, would that sort of information be excluded as deliberative?*

***Mr ENGELE** - Yes, that would be captured as deliberative. A typical very common example will be if you undertake a certain action that it will come at a cost to government and whether that cost is warranted. That has been viewed as deliberative generally, because the release of information would be that ministers chose not to take an action because it was too expensive and that would reveal what their deliberations*

were. There could be certain parts of that Cabinet submission that were released as factual.

***CHAIR** - … the actual costing itself would be factual … the building of this new school will cost $x million. That would be factual and released?*

***Mr ENGELE** - Yes, in some cases it does vary based on its particular nature. Clearly any information that's just sent up for noting which by its nature is generally factual because it's not asking for a decision will be releasable. When things sent up for decision go to FOI, a series of people will try to assess whether by releasing that fact it reveals deliberation. It's not a hard and fast rule. As I said, we're still working with the Commonwealth Ombudsman's decisions to better understand what they constitute. In many cases the bureaucracy has made a particular decision and then the proponent of the FOI has sought to appeal that. That automatically goes to the Ombudsman for the next step for review. In some cases, they've made a decision around Cabinet that we may not agree with, but we have been working with them to better understand their rationale for that.*

***CHAIR** - Never having been a member of Cabinet - I don't think anyone at this table has been - in your experience in the ACT, are the papers set out with matters for information, matters for decision or in some format like that? Is there a pretty clear delineation as to what is information and what is deliberative information, if you like, for making decisions?*

***Mr ENGELE** - No, look they're not. They tend to have been wound together. I think also we have had instances where documents that were asked for FOI were released in relation to briefings for ministers for Estimates hearings, so budget Estimates or our annual report hearings. We had, in some sections, flagged as 'not for release' under FOI but regardless the Ombudsman has applied their own independent lens and having things tied all in a particular way has not changed the nature of the information there or the Ombudsman's decisions around that. We have found that just by labelling things 'not for public release' that doesn't change its nature or the decisions of the Ombudsman.*[77]

Tasmanian Labor Party Shadow Attorney-General Ella Haddad MP in her submission to the Committee stated:

It is clear there is a strong public interest in the maintenance of the convention of Cabinet confidentiality. Any erosion of this convention would stifle internal debate and diminish the quality of Government decision-making.

It is also clear a document's mere association with Cabinet is not in itself a sufficient basis for preventing its public release, let alone its provision to a Parliamentary Committee. The fact a document is claimed by the Government or a minister to be 'Cabinet information' does not automatically make that claim true.

[77] Mr Sam Engele, Executive Group Manager, Policy and Cabinet, Chief Minister, Treasury and Economic Development Directorate, Australian Capital Territory, *Transcript of Evidence*, 10 March 2020, pp. 2-3.

Ensuring only 'true' Cabinet information is kept confidential-or in reverse, that public information is made available to the public-is clearly in the public interest. It is also essential for the Legislative Council to perform its role as a house of review. …[78]

The Hon Michael Egan AO, former Treasurer and Leader of the Government in the New South Wales Legislative Council during the Egan decisions viewed cabinet documents as a category pertaining to Cabinet confidentiality, he stated:

Mr EGAN - *Well, I think documents that go to Cabinet for the consideration of Cabinet are clearly cabinet documents. I agree that you have to be careful that you can't just haul documents before Cabinet, pass them over the table and then declare that they are cabinet documents. They have to be documents that are actually dealt with and considered by Cabinet.*

Mr WILLIE *- So, advice to government, deliberations?*

Mr EGAN - *Advice to government, yes.*[79]

The Hon John Hannaford AM, former Leader of the Opposition in the New South Wales Legislative Council during the Egan decisions provided a definition of 'what constitutes a cabinet document' as follows:

If it were up to me to set a definition, I would be looking at what is the material that I, as the minister, received at the cabinet table to assist me in making a decision on the proposals that were brought before cabinet. That invariably consisted in the New South Wales context in the initiating minute, then all of the correspondence from each of the other agencies, which was gathered together by the cabinet office and made available to cabinet members to assist them in reaching their deliberations. That is the cabinet material because cabinet does not have anything else.

What the cabinet office might want to do is to then extend that to all of the material that all of the agencies had in forming a view as to what ought to go into the piece of material that goes to cabinet in order to close down access to information. That, in my view, is sailing the ship too far across the sea.[80]

Further, the Hon John Hannaford AM suggested that a definition of 'what constitutes a Cabinet document' could be provided for in a potential standing order:

My advocacy would be that you have within your governance framework a clear statement as to what the House would regard as a cabinet document.

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78 Ms Ella Haddad MP, Shadow Attorney-General, Tasmanian Labor Party, House of Assembly Tasmania, *Submission #10,* 26 July 2019, p. 2.

79 The Hon Michael Egan AO, former Treasurer and Leader of the Government in the New South Wales Legislative Council, *Transcript of Evidence,* 24 September 2019, pp. 68-69.

80 The Hon John Hannaford AM, former Leader of the Opposition in the New South Wales Legislative Council, *Transcript of Evidence,* 24 September 2019, p. 15.

That might lead to confrontation with the executive government over that particular item, but at least it is a clear starting point as far as the Chamber is concerned as to what it would regard as a cabinet document. A view as to what is a cabinet document tends to vary depending upon the nature of the cabinet at the time, but at least it opens up the start of a discussion with the executive government.

If you have discipline around your definition of what is a cabinet document, it is more likely than not that the cabinet would accept that.[81]

Former Minister in the Victorian Legislative Council the Hon Gordon Rich-Phillips MP provided his opinion of what constituted a cabinet document:

The reality is, most cabinet documents - certainly ones I saw as a minister - do not reveal the deliberations of cabinet. They reveal the decisions of cabinet. They show the information that was given to cabinet to make decisions, but typically they do not record cabinet at a meeting. It will discuss issues, it will reach a decision. More often than not, a paper that goes to cabinet will already have a recommendation on it.

…

A minister will typically go to cabinet saying, this is what I want to do, this is my recommendation. It will be discussed. It will be agreed, or it will not be agreed. The discussions that take place in the cabinet room are not recorded. To the extent that they are the deliberations of cabinet, releasing a cabinet document is not going to disclose those, anyway. It will disclose the decision that was made. It may disclose the information that was provided to make that decision in the sense of background papers and so forth. But deliberations typically are not recorded, so they are not likely to be disclosed with cabinet documents.[82]

A former Secretary of Department of Premier and Cabinet, Mr Rhys Edwards commented on how the wide categorisation of Cabinet documents is not helpful, he stated:

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 minister 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.[83]

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81 The Hon John Hannaford AM, op. cit., p. 15.

82 The Hon Gordon Rich-Phillips MLC, former Minister and current Member of the Victorian Legislative Council, *Transcript of Evidence,* 25 September 2019, pp. 16-17.

83 Mr Rhys Edwards, *Transcript of Evidence,* 30 September 2019, p. 3.

Honorary Associate Professor Snell described categorising Cabinet documents as an outdated method in the age of open information, he stated:

> *… It is a retrograde, static, outdated, outmoded approach to the handling of information by governments of any degree of sensitivity. Effectively, it's a blackhole in terms of the way the RTI operates, but also government information systems themselves.*
>
> *It takes what I have written about in some articles as a categorical approach to determining information sensitivity. It effectively says, 'Does this belong to a certain category?' If it does, then it should remain confidential or secret. You will see that in the submission from the Government. You will see that even in Leigh Sealy's submission, and certainly in Mr Egan's submission, you will see that type of approach.*
>
> *As long as it can be given the definition, 'Cabinet document' of some description, it ought to remain confidential by a general principle perspective - i.e. Cabinet documents ought to be treated confidentially because they are part of that ministerial collective responsibility approach. Therefore, as soon as you can label it 'Cabinet', it ought to have a degree of confidentiality to it, regardless of what it may be. It could be bus timetables that have got themselves into a Cabinet document and by definition ought to have a superior degree of protection.*
>
> *I've advocated - and clearly the ACT has adopted and New Zealand has followed for 20-odd years - the idea that it should be about consequences. What is the consequence of releasing that particular information at that time? If there is a negative consequence or an adverse consequence, you probably should not release the information regardless of how you describe it, whether it is Cabinet information, personal affairs information, internal working documents. If there is a degree of sensitivity about it and the consequences of releasing it are going to be adverse and it's an unacceptable risk or impact, it should not be released.*
>
> *Currently, it's quite clear in the government's submission - and it's almost the same submission but has less detail than they put in the 1994 submission when they were proposing changes for the Freedom of Information Act about justifying the need and degree of secrecy attached to Cabinet documents - that the whole Westminster system would collapse if there is any access to that Cabinet information. Clearly, from my understanding, minutes are not taken of Cabinet discussions in Tasmania about who said what at what particular stage, so that degree of sensitivity that you are really trying to protect through this Cabinet-in-confidence process doesn't really exist. There is no record or information apart from verbal recounting by the participants in that meeting, who often verbally recount later down the track to various people.*
>
> *Or write a book or whatever else. To my mind, this furphy about Cabinet confidentiality and the necessity for our Westminster system to hang off it and that everything else should be redesigned around it is completely off the charts in terms of its actual applicability. When you look at something like New Zealand, where now there is an order out that effectively all Cabinet documents have to be released within 30 working days unless there is a good reason not to, to me that's the most sensible approach you*

can have to that kind of government information-handling process. It ensures that the advice that goes before Cabinet is tested, it's going to be able to withstand external scrutiny and will win approval from stakeholders who have been involved in that particular process.

When you look at the Tasmanian Cabinet Handbook and the requirements for documents going before the Cabinet process, you almost ask yourself, 'Why does any of this need to be kept confidential?' as a generalisation because there is supposed to be rigour, there is supposed to be evidence, they are supposed to be to the point et cetera. I just don't accept the necessity for that almost blanket approach to Cabinet confidentiality. I think it should be done on the merits, on a case-by-case basis.[84]

Professor Anne Twomey, a constitutional law expert from University of New South Wales advised the Committee:

To be a genuine Cabinet document it needs to some extent reveal a position taken at Cabinet. It might be revealing a position the minister proposing something was going to put to Cabinet for that sort of Cabinet submission and the Minutes that cover this. Or it could be revealing how in consultation prior to Cabinet the different views of different departments and what they advise their ministers in relation to it. All those things are legitimately Cabinet documents, but there are certainly some kinds of documents which are described as created for the purposes of Cabinet which actually never go anywhere near Cabinet and have very little to do with it which an independent arbiter might be able to say that goes beyond the pale. You would need to have some kind of guidance for an independent arbiter to assess that on and is one of the difficulties.[85]

Another constitutional law expert, Mr Bret Walker SC in his evidence to the Committee stated:

… I personally think the doubt that leads to the most dissatisfaction, and the possibility of abuse by excessive claims on the part of the Executive, arises with documents which are - I'll call them 'expert' or 'policy' documents - such as the business case for a large expenditure of public money, which sometimes is given to Cabinet. As you know, they are not always given to Cabinet; often only a fair precis or paraphrase is given to Cabinet. Where they are given in whole to Cabinet, or where it is known from Cabinet records that a precis of them has been given to Cabinet, the argument is frequently and almost invariably advanced on the part of the Executive that there cannot be disclosure. There is Cabinet secrecy because their disclosure would, by implication, reveal the content of discussions and decision-making in Cabinet. Very often that is simply not true.

I look forward, facetiously, to the day when somebody says that a newspaper article which has been discussed around the Cabinet table is thereby prevented from being disclosed. Believe me, there will be a spurious argument advanced to the effect that it should not be disclosed; that is, the fact that it was before Cabinet. In many ways, I'm sympathetic with it. While the law states as it is, I don't want us to be able [to] eavesdrop on Cabinet. That would appear to be self-defeating. Unless it is amounting to

[84] Honorary Associate Professor Rick Snell, op. cit., pp. 14-15.

[85] Professor Anne Twomey, Faculty of Law, University of New South Wales, *Transcript of Evidence,* 16 March 2020, p. 35.

eavesdropping on Cabinet, then I really doubt whether all the many documents that come within Cabinet's consideration are thereby removed from parliamentary scrutiny. Given that those documents also serve multiple and very important functions outside Cabinet, it seems to me that it ought to suffice, as a principle, to require the document to be identified as one that has had as its only deployment in government, informally of discussion or the recording of decisions by cabinet.

If business-case consultant reports, in my opinion, unless they go no further than cabinet; that is, cabinet knocks the idea on its head, are to be used as part of a blueprint for the expenditure of hundreds of millions or more of taxpayers' money, then every fibre of my constitutional being argues that must be available for parliamentary scrutiny. [86]

Internal Government deliberations

Further to the argument of why cabinet documents should be immune from disclosure is that disclosure would have the capacity to impact on the provision of frank and fearless advice by public servants to government. Odgers' Australia Senate Practice noted:

It had long been argued that one class of documents, those concerned with the policy-making process, should be absolutely protected from disclosure because without such protection public servants might not be willing to proffer advice fearlessly and candidly. In Commonwealth v Northern Land Council the Court made the following observations on this argument:

When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest. The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has "received an excessive dose of cold water".[87]

Department of Premier and Cabinet Secretary, Ms Jenny Gale stated:

Under the current system, which has Cabinet confidentiality, public servants give that frank and fearless advice, knowing that it remains confidential.[88]

The Committee further questioned Ms Gale.

***CHAIR** - … Once the public servant's job is done, in that they have provided that advice or collated the documentation needed to support a particular recommendation that may go to Cabinet, their work is done. It is then the minister's responsibility to prosecute the case in Cabinet and for the collective responsibility around the decision-making, and*

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86 Mr Bret Walker SC, *Transcript of Evidence,* 16 March 2020, pp. 3-4.
87 Odgers', op. cit., p. 648.
88 Ms Jenny Gale, op. cit., p. 24.

then the government to take it from there. Doesn't the responsibility end at that point, in terms of the accountability? They have done their job.

If documentation, advice, information, a consultant's report, whatever it is that comes as the package to give effect to the recommendation made, that is done to the best of the person's ability. They cannot control whether the minister accepts or rejects or modifies the outcome. Surely that is the end of the process for those public servants involved in that process?

***Ms GALE** - I guess I cannot answer that because individuals are different and behave in different ways, so –*

***CHAIR** - But individuals all have to act under the same legal requirements that you have stated in the State Service Act.*

***Ms GALE** - That is right, they are required to but, again, I reiterate that those requirements in the State Service Code of Conduct have been framed in the context of the current statutory framework, which is in terms of the responsible government and the confidentiality of Cabinet, and so on. Again, we are talking about a scenario that is very difficult for me to give an answer to. I will not speculate, but I guess were that framework to change, it might be time to review the remainder of the framework, if you understand what I am saying. I just think that, that is a question that –*

***CHAIR** - I am not sure what you mean by 'the remainder of the framework'.*

***Ms GALE** - Well, the State Service Code of Conduct and the principles, everything that is to do with the workings of the public servant and the decision-making, which is part of that notion of responsible [government].*

***CHAIR** - How might that need to change? How would their role change?*

***Ms GALE** - I guess I am saying that if you are suggesting that if, for example, Cabinet confidentiality changed, we are getting to the point of whether –*

***CHAIR** - No, I am talking about the documentation. Some of the information - not the deliberation, let us get away from that part - the supporting documentation, consultant reports and other items of information that go to Cabinet to inform a decision, not the deliberations. How might their responsibilities need to change under the code of conduct if they were to become public at a later time?*

***Ms GALE** - Again, that would be speculative. The point that I was trying to make was if that notion of confidentiality were to change, so if processes were to change, because it is all part of, if you like, the whole process, then it might mean that there would need to be a reflection on all of that process.*

I am not saying one way or the other whether it would change or not; it is often the case with policy and so on that when one aspect of it changes, it would be wise to reflect on the rest of it. There may be subsequent or consequential changes as well.

I am not saying one way or another that it would or it would not, but currently, at the moment, the State Service Code of Conduct and the State Service principles apply, but they apply within the context of the current statutory framework, and those respective conventions of Cabinet confidentiality and so on.[89]

The Committee notes there is a current review into the Tasmanian State Service that may inform amendments to the *State Service Act 2000.*

In light of the current review and comments made by Ms Gale the Committee sought information regarding the implementation and application of the *State Service Act 2000* with particular regard to the role and responsibilities of public servants in providing advice to Government.

Emeritus Distinguished Professor Jeff Malpas, former Professor, School of Philosophy, University of Tasmania provided background on the original intent of the *State Service Act 2000* and its intersection with the provision of frank and fearless advice and the concepts of openness and transparency of government underpinning the role of the public servant as follows:

My conception of the act is not that it is intended to reduce transparency, but exactly the opposite. For instance, the emphasis in that part of the Act is on the state service as apolitical, and as, quote, 'performing its functions in an impartial, ethical and professional manner'. I take transparency and honesty in government to be at the heart of our democratic system - and so I also take that emphasis in the act on impartiality, ethics and professionalism to be read in that light.

I find it very hard to see how one could read the State Service Act - and particularly that first part of the act - and see it as justifying excessive restrictions on information. I would argue that the emphasis on honesty, that is an important element in the act, itself ought to incline you towards the view that transparency should be the default option. I would actually argue that the default option here ought to be the release of documentation, rather than the holding back of documentation and information. We need to have good reasons for keeping information confidential.[90]

The Committee questioned Professor Malpas regarding amending the framework of the *State Service Act 2000* if the notion of cabinet confidentiality as cited by Ms Gale were to change, he stated:

I might add that neither Greg [Vines – former State Service Commissioner] *or I could see any reason why there was some suggestion that the framework of the act would need to be changed. It is precisely the framework of the act that weighs in on the side of transparency and accessibility, not on the side of secrecy or restriction of information. It seems to me that the framework of the act would be completely consistent with ensuring that documentation was made available. I do not believe the framework of the act is consistent with the idea that one should restrict the availability of documentation.*

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89 Ms Jenny Gale, op. cit., pp. 25-26.

90 Emeritus Distinguished Professor Jeff Malpas, *Transcript of Evidence,* 16 March 2020, pp. 14-15.

CHAIR *- To clarify, you are saying that the way the act is currently structured, promotes openness, transparency, releasing documents unless there is a good reason not to. Ms Gale was suggesting that to enable that you would have to change the guiding principles of the act.*

Mr MALPAS - *I put exactly that question to Greg. He, like me, could not see any reason why that would be so. It may be that you could try to read some of the disciplinary provisions in the body of the document in that way, but if you look at the first part of the document, which is the statement of principles, those principles emphasise all of the sorts of points that I have been talking about here. The spirit of the act, it seems to me, is the spirit of open democratic government. It is not the spirit of closed managerial decision-making.*

I would like Jenny or somebody else who holds this view, to point out exactly where the framework would need changing and exactly why the act would be inconsistent with the provision of what I see as exactly what the act asks for, which is frank, fearless and impartial advice. How could the requirement to give impartial advice be compromised by knowledge that that advice might be available to a wider group than just the person you are giving the advice to? I simply do not see the argument there and I certainly do not think that there is any evidence that is the case.

…

In this respect, I think it is interesting to consider the New Zealand situation. They have actually instituted an arrangement whereby, in relation to any Cabinet decision, all of the documentation relating to that decision, all the details of the decision, has to be released within 30 days of that decision. That is enshrined in New Zealand law. …. If you are going to give good advice, and it is going to be made publicly available, you want to make sure that that advice is not going to be contested by somebody else.

If anything, the onus is on you to do a better job. The more secrecy, and the more you know that advice is only going to be seen by a few people, then the less inclination there is to make advice frank or fearless, or indeed accurate.

I would really like to see an argument or evidence to the contrary because, frankly, I can't see there is any empirical evidence, or any theoretically derived evidence. In fact, it seems to me there are a lot of reasons why we might think exactly the contrary: that frank and fearless advice will be encouraged by making documents and decisions more available and transparent.[91]

Mr Rhys Edwards provided comment on how right to information laws has had a stultifying effect on public servants, he stated:

… 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

[91] Emeritus Distinguished Professor Jeff Malpas, op. cit., pp. 18-19.

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.'*[92]

Honorary Associate Professor Snell also provided commentary, he stated:

[The Mandarin Article] ... Basically what he went through and said was advice from a public servant ought to be objective, it ought to be impartial, it ought to be able to withstand scrutiny, it ought to speak truth to power. This is what frank and candid advice is.

In my opinion, that type of frank and candid advice welcomes transparency rather than runs away from transparency. It's the public servants and the advisers who are not prepared to have their words out in the public and subject to scrutiny and subject to justification who will argue that their frankness and candour would be diminished by having it available in that process. It has been written in the New Zealand context by a former secretary of the Department of Cabinet that in their view, advice over periods of time has substantially improved as a result of the Official Information Act of New Zealand because people knew they were writing or advising for future scrutiny and they would need to stand by those comments 10 or 15 years down the track; they provided the best advice they could in the circumstances - or they were only asked to provide limited advice and not full advice; and they made note of the fact that they were advising on a particular area as required, but other information could be made available.

In those particular terms, this is what the public service is all about and generally will be the kind of norm of behaviour. I think the argument about people running away and

[92] Mr Rhys Edwards, op. cit., pp. 3-4.

effectively becoming 'yes' people, in response to the fact that there could be some transparency down the way is effectively not justifiable.

…

I think it really depends on the type and quality of the public service you have. If you don't expose them to that degree of scrutiny, they may well be timid. The Tasmanian public servants I encounter in normal, everyday life are not timid, are not shy, are not tailoring their advice to fit what they think people want to hear at that particular time.

I would be surprised that in their public capacity and in their official capacity, they become such retiring individuals and subject to being frightened about what people will respond to their advice.[93]

Honorary Associate Professor Snell also described frank and fearless advice as an uncomfortable aspect of modern management, he stated:

***…** increasingly the area of dissent or the area of conveying opposition to a proposal from higher up is frowned upon. It's seen as being unhelpful; it's seen as being disruptive in that process. The organisations over time have effectively shaped themselves to remove individuals and others from the organisations who tend to lay their cards on the table and say, 'Interesting idea, but here are some negative aspects to that particular process'.*

I think in Tasmania in particular there has been a reticence, especially at the senior levels of the public service, but it's the same at the Commonwealth level, to things like the right to information, on the basis that the release of information can be uncomfortable.

It is much better in today's age of the 24/7 news cycle, spin doctors and so on - always to be seen backing the winning side, always seen to be right without questioning that process. Frank and fearless advice is an uncomfortable aspect of modern management.[94]

Further, Honorary Associate Professor Snell stated:

I think it can change. New Zealand is an example.

… I think the way you change it is by releasing relevant, high-quality, timely information. That minimises the ability of the media to run off on a tangent.[95]

Mr Leigh Sealy SC also noted:

I don't think you can extend that to those who are engaged by Cabinet, whether as members of the public service or as private consultants, to provide advice to government.

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93 Honorary Associate Professor Rick Snell, op. cit., p. 16.
94 Ibid., p. 17.
95 Ibid., p. 16.

Advice should always be fearless and independent. It should never be toadying and made to accommodate the wishes of the person you think you are providing advice to.

Speaking as a legal practitioner, it would be a complete abdication of your duty to provide advice to a client that you thought they wanted rather than advice that was correct. You are doing your client a disservice apart from professional disservice. I think that argument about frank and fearless advice can be closely confined to Cabinet.

***CHAIR -** Cabinet deliberations?*

***Mr SEALY -** To Cabinet deliberations, yes.*

***Ms WEBB** - Not necessarily to advice?*

***Mr SEALY** - Not to a document that has made its way to Cabinet and Cabinet has had a look at it and said, 'Well, no-one can see that now'. Speaking for myself, if I were asked to provide advice to Cabinet, I certainly wouldn't tailor it to what I thought Cabinet wanted to hear. I would tell them what I thought the correct answer was.*

***Ms WEBB** - More importantly, would you tailor it or would it change the nature of the advice, or the scope of the advice, if you knew whether it would absolutely not be shared further, say to other members of parliament, or whether it may be? I think that is the argument being made.*

***Mr SEALY** - Yes, I suppose that's true. I suppose I might say things I might be prepared to say things in an advice that I wouldn't otherwise be prepared to say if I thought the advice would never see the light of day.*

It seems to me it is preferable that, and I don't mean to personalise this, but if you assume I am providing this advice, it is better that I should understand that what I am writing may well be made public than have an understanding that what I am writing will never be made public. That would sharpen the mind of anyone who thought, 'Well, hang on, this is going to be open to public scrutiny'.[96]

Mr Sam Engele was questioned as to what impact the freedom of information legislation in the Australian Capital Territory has had on public servants' approach to providing advice:

I don't think it's had any impact. Some of the experience, I note, in New Zealand is also to release Cabinet documents quite soon after. In discussing the issue with some of their colleagues over there, their view is that it has improved the quality of advice because now it's up for review much sooner.

I don't know that it has had a material impact in the ACT at all. We still aim to provide the best advice possible to the Chief Minister as part of our Cabinet briefings and we don't take into consideration whether things are going to be released at some time in the future.

[96] Mr Leigh Sealy SC, *Transcript of Evidence,* op. cit., pp. 12-13.

It's interesting with some of the Cabinet documents now being released under the 10-year rule, some ministers were ministers back 10 years ago as well so there are Cabinet documents coming up that they were authors of earlier in their careers. But I don't think it's really had a material impact at all.[97]

Further, Mr Engele was questioned in relation to whether public servants' approach in providing advice had changed.

CHAIR *- From your communications within your workspace, you haven't heard these genuinely raised concerns that will we have to rethink how we do this?*

Mr ENGELE *- No, the key thing for us is that we are probably a bit more conscious in terms of writing something in a way that holistically explains an issue, so that if a document is released, it is clear what the issue was. Sometimes in the past you might have written things without putting in a lot of the background material, whereas now there is probably an effort to make sure that each document stands on its own in relation to clearly articulating all the factual issues.*

In terms of changing the advice itself, I haven't seen anything like that in the Australian Capital Territory, but we definitely have changed the advice that we provide as part of our Cabinet briefings.

CHAIR *- It sounds like clarity is considered to be important, so that if it isn't only the minister who picks it up at a later time, but a member of the public, no-one is making an assumption about background knowledge. Wouldn't that indicate that there is perhaps a more thorough approach to providing advice?*

Mr ENGELE *- That's right. Rather than changing a particular position or briefing in a particular way, it is probably more to do with how things are documented, and making sure that they are more thorough in terms of the background information.*[98]

Professor Anne Twomey stated her experience was that public servants were reluctant to provide frank and fearless advice on the premise that this advice could be made public:

Certainly, public servants were much more reluctant to put anything controversial in their brief to ministers if they were concerned it was going to end up on the front page of the Daily Telegraph in the future. Yes, the type of advice was given was much more anodyne. I know, even myself, that some of the more direct and aggressive things I said as a public servant were all said in things that were Cabinet documents. They were all having Cabinet confidentiality because they were comments on Cabinet minutes and whether or not the Premier should agree to particular proposals. I probably would not have said the same thing as openly and as clearly if I was doing it in something not the subject of Cabinet confidentiality.

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97 Mr Sam Engele, op. cit., p. 4.

98 Ibid., p. 10.

That is one of the reasons for Cabinet confidentiality, to make sure people can actually speak their mind and say what they think without the fear of it turning up on the newspaper and being made public soon thereafter. Yes, it does have a big impact on public servants once they are aware whatever they are writing might be made public and being used for political purposes in the parliament. That would make them very reluctant to say clearly this idea is really stupid for the following five reasons, that sort of thing. It is a pity if you lose that, you want your public servants to be able to point out why something is stupid, even if ministers do not agree with it.[99]

Professor Twomey was questioned in relation to the notion of frank and fearless advice becoming public and whether this in turn could produce better quality advice as seen in the New Zealand jurisdiction.

Ms WEBB *- Would it be this public servant is less likely to say, I would advise against that and here are the reasons? Would they not say that, or would they feel they needed to more accountably make a case for whatever the advice was? What we have heard from some other people is actually knowing it may be in the public domain encourages advice more well thought out, well-argued or backed by evidence.*

Could you talk this through more and make a distinction in your view on between what public servants may or may not say, or whether they would say it in a different way, or feel they had to provide a different level of rationale?

Prof TWOMEY *- That is a good point. I do not know how far that actually goes in reality. As a general principle, public servants always want to make sure when they give advice they give well-reasoned and supported advice. It is more a matter of how you do it and how you deal with something particularly politically sensitive. They are the things going to end up on the types of requirements for the production of documents and on the front of the newspaper.*

In those circumstances the question is, do you make it very clear to the minister you recommend against something because it will have all these potentially horrendous consequences, particularly if you know the minister is rather keen on doing X. A public servant is likely to feel reluctant to say, well, X is a bad idea for these five reasons, because they know if the government then goes ahead and does X, then the advice is released, the public servant has bagged what the minister did and said so, here are all the terrible reasons and why it should not have been done. That sort of thing is going to get you and your minister into a whole lot of trouble. There is a real risk that people are second guessing what the minister wants to hear and giving them the type of advice that they can then use to justify their position if or when the advice becomes public. You don't want that.

As a general principle, public servants should feel free to give robust advice on the basis that then maybe the minister will change their mind. Public servants are less likely to give robust advice if they are aware that their advice is likely to be rejected or something

[99] Professor Anne Twomey, op. cit., p. 40.

that the government is not overly keen on they are less likely to say it simply because they know then if it is released it will get both them and their minister in strife.

***Ms WEBB** - Can I follow up then to ask you, are you alerting us or highlighting that risk to us as a theoretical risk that you're imagining will happen or are you saying it based on something you tangibly know to be true because you have seen it or experienced it or anecdotally heard about it actually happening in terms of constraint? I am asking you to make that distinction because we have heard from the New Zealand model for example views that have asserted that the quality of the advice provided has been improved by the proactive scheduling of release of Cabinet documents. Because what you are saying is quite the opposite of that [and] we have heard that from a jurisdiction where it is playing out and they are speaking from experience and I want to check whether you are speaking from direct experience where you can point to that happening or whether you are imagining that is what would happen based on your past experience.*

***Prof TWOMEY** - What I can tell you definitely did happen, at least for a period of time while I was working in the Cabinet office was that any briefs that dealt with controversial matters ended up with instructions saying please see me and that meant we had to deal with things orally and not in writing. That was certainly true. It did happen. I don't know whether that continued to happen because maybe people were sick of doing that but certainly in the time shortly after Egan and Willis and Egan and Chadwick a lot of things that were controversial were dealt with orally rather than in writing. I can also tell you that it was also the case that we were required to ring the Solicitor-General and find out orally first what sort of position they were going to take before we asked for advice. That certainly happened.*

In terms of whether or not people pulled back on what they said or how they described things, it is hard to know. My instinct is that people were more wary about what they put in writing simply because that could happen but I couldn't give you chapter and verse evidence of it. I should say I left working in government not long afterwards so I was only there for a couple of years after Egan and Chadwick and Egan and Willis so I couldn't tell you how it played out in the long term but I am conscious of the fact that as a public servant myself I was always more inclined to be more direct when I was writing in something that I knew was protected as a Cabinet document, than when I was writing something which I knew was vulnerable to being published. That was just me and I have to say I am a pretty direct type of person anyway. Heaven knows what other people do.

…

***CHAIR** - Can I follow that up? You can make a credible argument on either side of the coin here. It is somewhat concerning to listen to what you have just said. We are not talking about the federal parliament, we are talking about our parliament, but if there is an inclination to hold back for fear of upsetting the government, don't we need to have a really serious training program within the public service to depoliticise it? …*

***Prof TWOMEY** - Yes, well, I think you need to have an even stronger education program for ministers themselves. Certainly at the Commonwealth level - I don't know about the state level in Tasmania, it may be more benign there - but I do talk to people about these*

things and I have been told on numerous occasions recently that if you behave in a way that challenges what the Commonwealth minister wants to do, you get sacked. Someone was sharing an example the other day of a particular minister who, when told that he could not do X, just sacked the relevant public servant. It is a real issue of the independence of public servants and how they behave.

If that keeps on going, ideally, public servants should be completely independent in giving the best advice. I always did and I took the view if someone sacked me I didn't care because I could get a better job somewhere else. I was pretty relaxed about it but there are other people who depend upon their jobs and don't want to risk being sacked. Ever since they got rid of tenure in the public service and they put heads of government departments on contracts, and that when a government comes in it can clear out heads of public service, there are these risks for public servants. It is the case, manifestly so, that advice becomes more wary, less honest and more directed towards what the government wants to achieve rather than what is the best outcome and in the public interest and I think that is a real pity. [100]

The Hon John Hannaford AM stated:

A document that is created stands on its own. If it is a document created for purposes of the cabinet discussion, it therefore forms part of papers presented to the cabinet, and I would regard that as something that needs to be protected. Why? Because I have seen agencies provide very full, very frank assessments of some of the proposals put up by various ministers for policy reform. Any attempt to impede that very full and frank assessment being given to the cabinet is a step which I would regard fraught with danger.

The bureaucracy may well commission independent reports, which are given to the bureaucracy, for assisting the bureaucracy in making a full and frank advice to the cabinet. I do not regard such documents as appropriately being cabinet documents.

It is the advice of the agencies to the cabinet which are advisories that ought to be preserved in the interest in sustaining an accountable democracy. [101]

The Hon Michael Egan AO was also questioned about the issue:

***Mr WILLIE** - The current arbitration process that has been implemented in New South Wales, do you see that would have had an impact on the public service in terms of its frank and fearless advice to government? Do you think, since that has been implemented, public servants would be restrained in the advice they give to government?*

***Mr EGAN -** Of course.*

***Mr WILLIE** - Do you think there may be instances where public servants and ministers are dealing with things orally or outside a documented process to avoid -*

[100] Professor Anne Twomey, op. cit., pp. 40-42.
[101] The Hon John Hannaford AM, op. cit., p. 6.

Mr EGAN - *You have hit the nail on the head.*

Mr WILLIE *- You think that is a regular occurrence?*

Mr EGAN - *Of course. Some of that is an official policy of the bureaucracy or a government of the day. But it is just human nature that people are going to be restrained in the advice they give to ministers if that advice can become public. That is the reason Cabinet discussion is confidential, because you want Cabinet members to feel unrestrained in what they say. You want them to be able to think out aloud and at the end of the day, of course, Cabinet members have to accept whatever Cabinet decision is made or otherwise they leave the Cabinet. That is really the same, I think, with the bureaucracy; they'll give you frank advice in writing if they know that it's not going to be on the front page of the Daily Telegraph six months later.*[102]

Legal professional privilege

The Egan litigation ruled on legal professional privilege as not being a sufficient claim for immunity from production to the New South Wales Legislative Council and underpinning this ruling was the doctrine of responsible government. The following commentary is provided regarding the Court's interpretation.

In analysing this privilege, the courts firstly characterised the relationship between Mr Egan and the Parliament and defined the meaning of this privilege, Christo Mantziaris described this analysis as follows:

> *The Court's analysis of legal professional privilege hinged on the characterisation of the relationship between Mr Egan and the Parliament as a 'special relationship' governed by public law principles. This characterisation precluded the basis and the usual rationale for the privilege.*
>
> *The Court applied the orthodox understanding that the rationale for legal professional privilege is the facilitation of representation of clients by legal advisers and the fostering of trust and candour between client and lawyer. It also acknowledged the fundamental nature of these rights, noting that only 'unmistakably clear language' could deprive a claimant of this privilege.*[103]

Commentary by the judicial officers on the decision is provided by Christos Mantziaris as follows:

> *Spigelman CJ refused the claim for legal professional privilege by holding that the special nature of the accountability relationship between the Executive and Parliament-as it was recognised in Egan v. Willis-trumped the common law rights which legal professional privilege would otherwise accord. Thus:*

[102] The Hon Michael Egan AO, op.cit., p. 68.
[103] Christos Mantziaris, op. cit., p. 34.

> *In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. In my opinion, access to legal advice is reasonably necessary for the exercise by the Legislative Council of its functions.*

It will be observed that Spigelman CJ's analysis also applies the method and test established in Egan v. Willis: the relevant function of the Legislative Council is identified (Parliament's scrutiny of the Executive) and then it is asked whether the particular power or privilege is 'reasonably necessary' for the performance of that function.

Priestley JA proceeded in a similar manner. Yet as indicated above, this analysis of Executive functions went one step further, by noting that the expenditure of public money underscores executive activity. Upon this view:

> *[e]very document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.*

On this view, the expenditure of public money provides an additional ground for bringing documents produced by the Executive under Parliamentary scrutiny. It is interesting to speculate whether this ground would extend to documents which are brought into the possession of the Executive but are not produced by it. The basis for denying legal professional privilege for such documents would be an acknowledgment of the special relationship of accountability between the Executive and Parliament.[104]

Odgers' Australian Senate Practice noted that the Senate does not accept claims of legal professional privilege on the following grounds:

> *It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for a refusal of information in a parliamentary forum.*
>
> *The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected*

[104] Christos Mantziaris, op. cit., pp. 34-35.

government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.[105]

The following chapters examine other parliamentary jurisdictions standing orders and models when dealing with disputes over the production of documents.

[105] Odgers', op. cit., pp. 668-669.

EXISTING PROCESSES TO ORDER THE PRODUCTION OF DOCUMENTS

The Committee received and heard evidence of the existing processes in the Australian Senate, Australian States and Territories currently available to its committees including joint committees when disputes over the production of documents occur.

TASMANIAN LEGISLATIVE COUNCIL

The Legislative Council's power to source the production of documents lies within the *Parliamentary Privilege Act 1858* and the Legislative Council Standing Orders provide the mechanism for ordering the production of documents. The Clerk of the Tasmanian Legislative Council Mr David Pearce stated:

> *In terms of the upper house of the parliament, our Standing Orders provide for documents to be called for. The Parliamentary Privilege Act also provides at section 1, I think on its face, an absolute power to call for persons, papers and documents.*
>
> *Occasionally over time, it has been our practice to have orders for the production of documents. It hasn't happened very often …*[106]

Committees are delegated by the House of Parliament under which they are constituted and have delegated powers, however contempt can only be dealt with by the House.

The procedural option available to the Council and its committees when non-compliance occurs over the production of documents was noted by Mr Pearce to be through the parliamentary mechanism of a notice of motion:

> *For example, moving a notice of motion that the Leader, in our case, we don't have ministers - one minister - but the Leader predominately would be required to produce a document. If they failed to do so they could be called on to provide a reason for it, within a certain period of time and for the Council then to make a judgment about whether that reason is sufficient.*
>
> *Again, it is giving all members in an open transparent way an opportunity to consider the positions. I think it is important. It hasn't happened often but that is available to the upper House and, as I said at the outset, orders for production of documents have been few and far between.*
>
> *That is another avenue for the House to consider, not only committees reporting back but bring that report back and then pursue that with an order for production of the document as a step. Tacked on to that could be a reason for not complying with that order. The House itself can then make judgments about whether that is sufficient or otherwise and then try to navigate a path beyond that in terms of obtaining information or being able to live without certain parts of the information or all the documents or trimming the request back to, or refining the order for production of the document, to*

[106] Mr David Pearce, op. cit., p. 24.

something else so it takes a different look or shape. Those are all things that the House can do with a majority support of members.[107]

Further, Mr Pearce advised the Committee there were punitive and coercive processes available to the Council when there is further resistance to producing a document, however, this could be a challenging pathway in the Council due to the absence of a relevant Minister:

***Mr PEARCE** - That is the problem because the Leader, generally, is not in possession of the document. The minister and the Executive would have it. So, that's always been the conundrum for the upper House: how do you put pressure on, in a punitive sense or in a coercive sense, to allow the Leader to produce something or provide an explanation? Of course, it's either punitive or a coercive type of punishment and of course at the moment our Leader may not have possession of the documents so it's very difficult.*

***CHAIR** - The Government would certainly be challenged by the Leader being suspended in terms of getting their legislative agenda through.*

***Mr PEARCE** - Certainly, that's something for the House. That's a tool available to the House, one of those coercive-type tools that the House could possibly look to use and that's a judgment call at the time, depending on the circumstance.*

I think that's a thing too that I'm always conscious of in providing advice to members is the different circumstances because every circumstance is different and warrants a different approach and a different action. Of course, we have stepped through processes and Standing Orders would guide you through, that's helpful to an extent but it may not cover every circumstance. It's nice to have flexibility, I think, also in terms of how you can navigate through a circumstance. Every circumstance is different, every call for a paper is different, you are dealing with a different minister, a different government, a different Executive. So, flexibility, I think, is an important consideration.[108]

Mr Pearce also provided comment on the effectiveness of the current processes:

***Mr PEARCE** - They're probably not as prescriptive as some would like them to be but, as I said at the outset, I believe in flexibility too. Each case is different and the circumstances warrants different actions.*

You can always have a resolution to ask for reasons and explanations, and keep pursuing the matter until you're satisfied that you've exhausted all those avenues and it becomes a stalemate and a Mexican stand-off, to a point. There may be Standing Orders; there may be an improvement in terms of having reasons provided more clearly and maybe within a certain time frame. Those sorts of changes could be made that are clear.

***Mr DEAN** - We've moved on since those Standing Orders were put together as well and we've seen some issues arise - not many, thankfully. Are you of the view they might be able to be strengthened? That's your position, is it?*

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[107] Mr David Pearce, op. cit., p. 27.

[108] Ibid., pp. 27-28.

***Mr PEARCE** - I believe so. Again, it's a matter of degree. It's a matter of how far you want to go, taking all those considerations into account, but there might be some scope for some prescriptive standing order on the path.*[109]

Tasmanian Labor Party Shadow Attorney-General Ella Haddad MP in her submission to the Committee indicated a preference for the Tasmanian Legislative Council to draw upon its current powers to force a resolution of dispute and provided information around the political remedies that the Senate utlilise to resolve disputes over non-production of documents as follows:

Various powers are conferred on the Legislative Council by the Parliamentary Privilege Act 1858 and the Standing Orders. These might assist it to resolve disputes over the production of documents. When considered in the context of similar legislation in other jurisdictions, or simply in relation to current disputes over the production of documents, it might be the case that the Parliamentary Privilege Act and the Standing Orders could be updated or modernised.

Chapter 12 of the Brief Guide to Senate Procedures outlines a number of remedies available to the Australian Senate should a minister refuse to produce a requested document:

> *The refusal of a minister to comply with an order of the Senate may ultimately be dealt with as a contempt of the Senate, with penalties applied in accordance with the Parliamentary Privileges Act 1987. On most occasions, however, ministerial refusals to produce information are resolved through political means, according to the circumstances of the case.*

As the Brief Guide explains, these 'political means' might include:

- *motions to postpone consideration of particular bills, including until after the requested information has been produced*
- *censure motions*
- *motions restricting the ability of ministers to handle government business*
- *motions depriving ministers of procedural advantages they enjoy under the standing orders*
- *motions to extend question time or other elements in the routine of business*
- *orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received in camera, not published for a specified period etc.)*
- *orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents*

[109] Mr David Pearce, op. cit., p. 29.

- *further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance*
- *motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non- production.*

Many similar 'political means' are available to members of the Legislative Council. A key advantage of drawing upon the Legislative Council's existing powers is that it does not require the agreement of the Government of the day. This approach affirms the independence, powers and responsibilities of the Legislative Council in our system of Government. Alternative approaches have the potential to be viewed as outsourcing the Legislative Council's powers and responsibilities to a third party or body.

Drawing on the existing powers of the Legislative Council arguably provides more flexibility and is more conducive to negotiation and cooperation than systems where documents are referred to an adversarial arbitration process.

However, if the Government is willing to accept the political consequences of refusing to produce a disputed document, the powers of the Legislative Council do not necessarily force it to do so. The approach might therefore be least effective in relation to the most important documents.

It should also be noted a number of the above measures were employed by the Legislative Council in its dispute with the Treasurer over the release of the Tamar Valley Power Station letter.[110]

[110] Ms Ella Haddad MP, Shadow Attorney-General, Tasmanian Labor Party, House of Assembly Tasmania, *Submission #10,* 26 July 2019, pp. 3-4.

SENATE OF THE AUSTRALIAN PARLIAMENT

Standing Order 164 - Order for the Production of Documents, Senate Committees

This section examines the Senate's *Standing Order 164 – Order for the production of documents.* Standing Order 164 does not prescribe an independent arbitration mechanism and explores the existing processes or political remedies that are available to the Senate when governments refuse to provide documents.

Further explored are committees of the Senate. Non-compliance to produce documents cannot be dealt with by committees. Non-compliance can only be dealt with by the Senate. Procedural orders are available to committees to guide both committees and governments when public interest immunity and commercial confidentiality claims may arise within committee proceedings.

Source of power to order the production of documents

The Australian Parliament inherited the powers of the United Kingdom Houses of Parliament. The Senate's power to order the production of documents is explained by the *Guides to Senate Procedure: No. 12 – Orders for the Production of Documents* as follows:

> *The Senate possesses this power through section 49 of the Constitution which provides that the powers of the Houses of the Commonwealth Parliament are, until declared by the Parliament, the powers of the UK House of Commons at the time of the establishment of the Commonwealth in 1901. Those powers undoubtedly included the power to call for documents. In 1987, the Commonwealth Parliament declared its powers through the Parliamentary Privileges Act 1987, section 5 of which provided for the continuation of those powers in force under section 49 of the Constitution (except to the extent varied by that Act).*[111]

As noted in Odgers' Australian Senate Practice the Senate reasserted its inquiry powers in a powerful resolution agreed to in the context of the Whitlam Government's overseas loan scandal as follows:

1. *That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by Section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.*

2. *That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.*

3. *That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does*

[111] Australian Senate, *Guides to Senate Procedure: No. 12 – Orders for Production of Documents,* Parliament of Australia website, accessed April 2019.

not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

4. *That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.* [112]

The Senate possesses the power to make rules and orders under the Constitution as follows:

> *Section 50 of the Constitution empowers the Senate to make rules and orders with respect to how its powers, privileges, and immunities may be exercised and upheld, and the order and conduct of its business and proceedings.*[113]

In addition to the Senate's Standing Orders, the Senate produces *Procedural orders and resolutions of the Senate of continuing effect.* This publication consists of procedural orders affecting the processes of the Senate and its committees, and resolutions expressing opinions of the Senate. The Australian Senate website described these orders and resolutions as follows:

> *… significant in that they relate to the manner in which the Senate conducts its legislative and inquiry functions and exercises and upholds its constitutional powers.*[114]

Standing Order 164

Standing Order 164 (SO 164) is provided outlining the processes to be followed by the Senate as follows:

> ***164 Order for the production of documents***
>
> *1) Documents may be ordered to be laid on the table, and the Clerk shall communicate to the Leader of the Government in the Senate all orders for documents made by the Senate.*
>
> *2) When returned the documents shall be laid on the table by the Clerk.*
>
> *3) If a minister does not comply with an order for the production of documents, directed to the minister, within 30 days after the date specified for compliance with the order, and does not, within that period, provide to the Senate an explanation of why the order has not been complied with which the Senate resolves is satisfactory:*
>
> *a) at the conclusion of question time on each and any day after that period, a senator may ask the relevant minister for such an explanation; and*
>
> *b) the senator may, at the conclusion of the explanation, move without notice— That the Senate take note of the explanation; or*
>
> *c) in the event that the minister does not provide an explanation, the senator*

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112 Odgers', op. cit., pp. 643-644.

113 Australian Senate, *Procedural orders and resolutions of the Senate of continuing effect,* Parliament of Australia website, accessed April 2019.

114 Ibid.

may, without notice, move a motion in relation to the minister's failure to provide either an answer or an explanation.

(amended 9 November 2005)[115]

Background

In 1903, SO 164 was adopted and included paragraphs (1) and (2). In 2005, SO 164 was amended to include paragraph (3). The inclusion of this paragraph derived from … *remedies or proposed remedies associated with individual orders for production of documents, as well as from the similar arrangement applying to unanswered questions on notice in SO 74(5).*[116]

S0 164 was routinely used in the early days of the Senate to obtain information from government however, this procedure fell into disuse after the Senate's first decade because governments supplied information as a matter of course. SO 164 was revived in the 1970s and has been routinely used, particularly to obtain information about matters of controversy.[117]

Processes followed under Standing Order 164

The *Guides to Senate Procedure: No. 12 - Orders for production of documents* sets out the processes to be followed under SO 164 as follows:

> *Basic procedure*
> *Documents may be ordered to be "laid on the table" of the Senate. Standing order 164 contains provisions about communicating such orders, tabling "returns" to orders and dealing with non-compliance. Most orders for production of documents start with a notice of motion, which is moved and determined during "Discovery of formal business" on any sitting day … Sometimes an order for production of documents is contained in an amendment moved to a motion for a particular stage in the consideration of a bill…*
>
> *An order for production of documents has the following elements:*
> - *The "activating" words, "that there be **laid on the table**", are the core of any such order. Alternative phrases, such as "the Senate **calls on** the Minister to table…", do not have the same force, although a minister **may** choose to respond as if the resolution were an order for production of documents.*
> - *The person at whom the order is directed is identified. This is usually a minister but orders have also been directed to statutory authorities or office holders. If the relevant minister is a member of the House of Representatives, the order is directed to the Senate minister representing that portfolio. If the recipient of the order is not specified, responsibility for acting on the order lies with the Leader of the Government in the Senate to whom all such orders are communicated by the Clerk under standing order 164.*

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115 Australian Senate, *Standing Orders and Other Orders of the Senate, Standing Orders,* Chapter 26 – Tabling of Documents, 164 Order for the production of Documents, Parliament of Australia website, accessed April 2019.

116 Australian Senate, *Annotated Standing Orders of the Australian Senate, Standing Orders,* Chapter 26 – Tabling of Documents, 164 Order for the production of documents, Parliament of Australia website, accessed April 2019.

117 Australian Senate, Guides to Senate Procedure: No. 12 – Orders for Production of Documents, *last reviewed* 2019, Parliament of Australia website, accessed April 2020.

- *A deadline for production of documents is specified. This is essential for the order to be effective. In specifying a deadline, the volume and nature of the documents requested should be taken into account. The deadline may be a specific time and date or contingent on another event occurring; for example, an Act commencing or a minister receiving a report. For a permanent order (otherwise known as an order of continuing effect), there may be an annual or biannual deadline.*
- *Finally, the documents are identified. They may be identified by title or by a description of individual (or classes of) documents. The order may specify* ***information,*** *rather than documents, which may require the respondent to create a document (or return) containing the information. In some cases, particular information is excluded from the order to make it clear that the Senate is not requiring publication of, for example, cabinet submissions or* ***genuinely*** *commercial sensitive information.*[118]

Remedies for non-compliance

The Senate accepts there is some information that should not be disclosed, however, the Senate has not conceded in defining particular categories of documents that could attract immunity from production. The Senate's submission stated:

> *While the Senate undoubtedly possesses this power, it acknowledges that there is some information held by government that it would not be in the public interest to disclose. However, the Senate has not conceded that there are particular categories of documents that are immune from disclosure or beyond the reach of the Senate's inquiry powers. Therefore there are no automatic exemptions to disclosure for cabinet submissions or national security documents or other classes of documents for which governments have frequently claimed public interest immunity. The Senate has instead set out a process that applies to all categories of documents in which the government, or other recipient of an order for documents, is able to advance public interest immunity claims, but it is ultimately for the Senate to determine whether the claim is accepted.*
>
> *The Senate has thus dealt with claims of public interest immunity on a case by case basis, building up a body of precedent and practice but refraining from conceding any ground on its right to determine such claims...*[119]

The Senate has numerous options to pursue information when sufficient explanations from ministers are not returned or there is a non-compliance to a return to order. All of the remedies require the support of a majority of the Senate to implement.[120]

The Senate has the power to adjudge a refusal to produce documents as a contempt of the Senate. The Senate does not rely on this power. The Senate submission stated:

> *It is open to the Senate to treat a refusal to produce documents as a contempt of the Senate and therefore to impose a penalty or imprisonment or a fine. However, the*

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118 Australian Senate, *Guides to Senate Procedure: No. 12 – Orders for Production of Documents, last reviewed* 2019, Parliament of Australia website, accessed April 2020.

119 Mr Richard Pye, Clerk of the Senate, Australian Senate, *Submission #5*, p. 1.

120 Ibid., p. 6.

Senate has invariably preferred political or procedural remedies. There are practical difficulties involved in the use of the contempt power, including the probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the direction of a minister. A penalty imposed for contempt may be contested in the courts under the Parliamentary Privileges Act 1987, and it is possible that the courts in such a challenge could determine a claim of public interest immunity. As noted, above, it has long been the view of the Privileges Committee that it would be unwise for the Parliament to allow the courts to adjudicate claims of public interest immunity.[121]

The Senate's preferred remedies in resolving disputes can be described as procedural and political, these remedies broadly fall into two categories: punitive remedies and coercive remedies, the Senate submission stated as follows:

Punitive remedies generally make it more difficult for ministers to operate in the Senate and for a government's legislative program to be achieved. Examples include:

- *declining to further consider particular bills until after the requested information relating to the bills has been produced;*
- *censure motions;*
- *motions restricting the ability of ministers to handle government business;*
- *motions depriving ministers of procedural advantages they enjoy under the standing order, such as the ability to rearrange business on any day or determine the order of government business on the Notice Paper; and*
- *motions to extend question time or other elements in the routine of business.*

Coercive remedies are those which use alternative means of obtaining all or part of the information to which access has been refused. Committees often play a major role in such remedies because of the ability of committee members to question minister and officials directly, and because they can take evidence in camera. Examples include:

- *orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received in camera, not published for a specified period etc);*
- *orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents;*
- *further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance;*

[121] Mr Richard Pye, op. cit., p. 4.

- *motions requiring minister to explain to the Senate the reasons for non-compliance with a previous order and providing for motions to be moved, without notice, to take note of such explanations; and*

- *motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non-production.*

… One formal remedy that can be pursued by a single senator is set out in standing order 164(3). This provides that a senator may seek an explanation of, and initiate debate on, any failure by a minister to respond to an order for documents within 30 days after the documents are due. The order thus providing a mechanism for senators to draw attention to any reluctance to produce documents, while taking time out of the sitting day that could otherwise have been utilised to progress government business.[122]

Overall Effectiveness

As noted in *Odgers' Australian Senate Practice – Chapter 18 – Orders for the production of documents* provides statistics on the overall effectiveness of orders for the production documents in the following table:

Parliament	Orders	No. of orders complied with	% of orders complied with
1993 – 1996	53	49	92.5
1996 – 1998	48	43	89.6
1998 – 2001	56	41	73.2
2002 – 2004	89	43	48.3
2004 – 2007	21	15	71.4
2008 – 2010	63	30	47.6
2010 – 2013	53	19	35.8
2013 – 2016	117	23	19.7

These figures also show a dramatic increase in resistance by governments to the orders.[123]

[update: Although the table shows a decreasing compliance rate with orders, the response rate does not reflect the outcomes from subsequent action to pursue the information. In 2015, the Procedure Committee published guidance for responses by ministers …and recommended a process for tracking public interest immunity claims … During the 45th Parliament, there was a much sharper response rate, with substantial compliance with orders in 52% of cases, partial compliance in a further 18%, and public interest immunity claims made in respect of virtually all of the remaining orders. It should be noted, however, that in several cases, multiple orders (for instance, rejecting

[122] Mr Richard Pye, op. cit., pp. 4-6.
[123] Odgers, op. cit., *Chapter 18 – Documents tabled in the Senate,* p.581.

public interest immunity claims and reiterating or refining orders) were required before the documents sought were produced.][124]

Senate Committees

Generally, committees of the Senate possess the same inquiry powers as the Senate. However, committees do not possess the power to deal with non-compliance to an order for the production of documents, this non-compliance has to be reported to the Senate to be dealt with. As noted in Odgers' Australian Senate Practice as follows:

> ***Power to call for persons and documents***
> *Legislative and general purpose standing committees and most select committees possess the full range of inquiry powers, enabling them, if necessary, to summon witnesses and order the production of documents. A person failing to comply with a lawful order of a committee to this effect may be found to be in contempt of the Senate and, in accordance with section 7 of the Parliamentary Privileges Act 1987, subject to a penalty of up to six months' imprisonment or a fine not exceeding $5 000 for a natural person or $25 000 for a corporation. While committees have power to send for persons and documents, they do not have power to deal with consequences of a failure to comply with such an order. The Committee's role ends with reporting the matter to the Senate to deal with the possible contempt.*[125]

However, to assist with non-compliance within committee proceedings the Senate has agreed to procedural orders to guide committees and governments when claims of commercial confidentiality and public interest immunity may arise.

On 30 October 2003, the Senate agreed to an order setting out guidelines in relation to dealing with claims of commercial confidentiality. The order stated:

> ***11 Senate and Senate committees – claims of commercial confidentiality***
>
> *The Senate and Senate Committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of information.*[126]

On 13 May 2009, the Senate agreed to an order setting out a process to be followed and criteria to be considered in the making of public interest immunity claims to Senate committees. The Senate submission stated:

> *The persistence of minister and officers in declining to answer questions or produce documents at estimates hearings, without properly raising recognised public interest*

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[124] Odgers' Australian Senate Practice Supplement to the 14th Edition, *Chapter 18 – Documents tabled in the Senate – Order for Production of documents,* Updates to 30 June 2019, p. 33.

[125] Odgers', op. cit., *Chapter 16 – Senate Committees,* p. 500.

[126] Australian Senate, *Standing Orders and Other Orders of the Senate, Procedural orders of continuing effect, 11 Senate and Senate committees – claims of commercial confidentiality,* Parliament of Australia website, accessed April 2019.

grounds, led to a resolution on 13 May 2009 prescribing the process to be followed for making and determining public interest immunity claims.

The order provides that an officer who considers that information that should be withheld from a committee should state the harm to the public interest that could result from the disclosure of the information, and should refer the matter to a responsible minister if requested by the committee or a senator. On receipt of such a reference, the responsible minister is required to consider the matter and state whether, and on what ground, the information should not be provided because of possible harm to the public interest. The committee or a senator, if not satisfied with the minister's statement, may refer the question to the Senate. The order does not specify the public interest grounds on which information might be withheld, as the categories of such grounds, while well known, are not closed. The order also does not prejudge any particular circumstance in which a claim may be raised, but leaves the determination of any particular claim to the future judgment of the senate.

Although it took some time for the 2009 order to be consistently observed, it is now referred to in the government guidelines for official witnesses appearing before parliamentary committees, is quoted in chairs' opening statements at each round of estimates hearings, and is regularly, although not consistently, applied by minister and senior public servants who wish to resist disclosure of information or documents.[127]

See Appendix 1 – Procedural order – 10 Public Interest Immunity claims.

[127] Mr Richard Pye, op. cit., pp. 3-4.

LEGISLATIVE COUNCIL OF THE NEW SOUTH WALES PARLIAMENT

Standing Order 52 – Order for the Production of Documents and Sessional Order 40 – Order for the Production of Documents by Committees

This section examines the Legislative Council of the New South Wales Parliament's *Standing Order 52 – Orders for the production of documents* and *Sessional Order 40 — Orders for the production of documents by committees.*

Source of power to order the production of documents

The New South Wales Parliament, has never defined in legislation the extent of its privileges nor has it inherited the privileges of the United Kingdom Houses of Parliament.[128] The Council's power to order the production of documents is based on the common law principle of 'reasonable necessity' (the Houses of Parliament possess such powers as are 'reasonably necessary' for the Houses to function effectively).[129]

Development of Standing Order 52

The New South Wales Legislative Council routinely exercised its power to order the production of documents between 1856 and 1934, from 1934 until 1995 this power fell into disuse. This changed in 1998 when the government did not have a majority in the House, the House again attempted to exercise this power to order the production of documents.[130]

In evidence to the Committee, former Clerk of the New South Wales Legislative Council, Mr John Evans provided an account of the key events occurring in the New South Wales Legislative Council that led to the Egan cases and the development and adoption of standing order 52. These events have been summarised as follows. [131]

13 November 1995 — A motion of censure noting the failure to return ordered papers and referring the matter of appropriate sanctions to the Privilege and Ethics Committee was agreed to, adjudging the Hon Michael Egan guilty of a contempt of the House.

1 May 1996 — A motion of censure was agreed to by the House on the failure to return papers regarding the Lake Cowal goldmine. Further, the motion called on the Hon Michael Egan to produce all papers by 9.30 am the next day.

2 May 1996 — A further motion of contempt and suspension was agreed to by the House. In particular, the motion stated:

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[128] New South Wales Legislative Assembly Practice, Procedure and Privilege, Part 2, *Chapter 2 – Such Powers and Privileges as are Implied by Reason of Necessity,* Parliament of New South Wales, accessed April 2019, p. 1.

[129] Mr Harry Evans, Papers on Parliament No. 52, *Reasonably Necessary Powers: Parliamentary Inquiries and Egan v Willis and Cahill,* op. cit.

[130] Jenelle Moore, *The Challenge of Change: A possible new approach for the independent legal arbiter in assessing orders for papers*, 2015, Workshop 5A: Parliamentary Privilege in Contemporary Society, Parliament of New South Wales, accessed May 2019, p. 1.

[131] Mr John Evans, former Clerk of the New South Wales Legislative Council, *Transcript of Evidence,* 24 September 2019.

> *That this House regarding it as necessary to retain information on any matter affecting the public interest and in order to protect the rightful powers and privileges of the House and to remove any obstruction to the proper performance of the important functions it is intended to execute hereby suspends the Treasurer from the service of the House for the remainder of today's sitting, orders for the Treasurer to attend in his place at the table on the next sitting day to explain for noncompliance with the order for documents on the closure of the Vet Labs, Fox Studios and Lake Cowal goldmine and his failure to table documents on the recentralisation of the Department of Education.*[132]

The Hon Michael Egan was escorted by the Usher of the Black Rod (the Hon Michael Egan initially refused to leave) from the parliamentary precinct to the footpath on Macquarie Street.

Following his suspension from the House, the Hon Michael Egan instituted legal proceedings in the Supreme Court for unlawful trespass by the President and Usher of the Black Rod. The trespass action was to ultimately test the powers of the House to call for the production of documents both under the standing orders and the inherent and implied powers of the House.

10 May 1996 — The Privilege and Ethics Committee found the powers of the House to call for documents uncertain and not appropriate to recommend sanctions. The Committee recommended that legislation should be introduced to clarify the powers and privileges of the House.

14 May 1996 — The President informed the House of the institution of proceedings in the Supreme Court for unlawful trespass. The House deferred the attendance of the Treasurer in his place until after the court case was finalised.

Egan v Willis v Cahill **Decision**

24 November 1996 — The decision was handed down by the Court of Appeal. Gerard Carney explained the Court's judgement:

> *Since there was no statutory adoption of the privileges of the UK House of Commons [in NSW], as occurred elsewhere at the Commonwealth and State level, the Court applied the common law test of "reasonable necessity" to determine whether it was reasonably necessary for the Council to have such power in order to function. Gleeson CJ and Mahoney JA easily concluded that such a power was reasonably necessary for the proper exercise of the functions of the Council, which included the scrutiny of the executive … In contrast, Priestly JA relied on the legislative function of the Council in holding that the Council should "have the power to inform itself of any matter relevant to a subject on which the legislature has power to make laws".*[133]

Mr Evans explained the Court's reasoning around the suspension and unlawful trespass:

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[132] Mr John Evans, op. cit., p. 43.

[133] Gerard Carney cited in David Clune, *The Legislative Council and Responsible Government: Egan v Willis* and *Egan v Chadwick – Part Three of the Legislative Council's History Project*, 2017, pp. 17-18.

The courts also held that the resolution of the Council suspending Mr Egan was within the Council's power as a matter of self-protection and coercion. However, while the Standing Orders warranted the removal of Mr Egan from the Council Chamber they did not warrant his removal from the land occupied by the parliament. Mr Egan's removal to the footpath in Macquarie Street was therefore excessive and constituted a trespass.[134]

3 December 1996 — The Hon Michael Egan delivered a ministerial statement regarding *Egan v Willis v Cahill* and advised the government would be lodging an appeal to the High Court.

The President called on the Hon Michael Egan to attend and explain his reasons for non-compliance to an order of the House on four occasions and to table certain papers. The Hon Michael Egan moved as a matter of privilege and without notice that in view of the further legal proceedings he had instituted in the High Court, the order of the House be postponed again until those legal proceedings had been ruled upon.

1996-1998 — The House did not pass any further orders for papers until a contentious issue arose around the contamination of Sydney's water supply. On the 24 September 1998 an order for papers was agreed to.

13 October 1998 — In response to this order the Government tabled advice from the Crown Solicitor advising some documents ordered would not be provided on the basis of legal professional privilege and public interest immunity. Dr David Clune OAM provided explanation as to why the Government took this view as follows:

The question of whether the Council had the power to call for the tabling of privileged documents had been raised but not decided in the Egan v Willis cases. Justice Kirby, for example said:

> *There would, indeed, be exceptions to the obligation of a member, including a minister, to table documents demanded by a resolution of a chamber of parliament. Such exceptions could arise on grounds of individual privacy, confidentiality (as for example papers disclosing cabinet discussions) public interest immunity, as well as other grounds. At this stage of these proceedings it is unnecessary to say anything about such grounds of exemption.*

The Government thus had some reason to believe that the courts would support its stand.[135]

Later in the day, there was a motion of censure for failure to table all of the requested documents, further, the motion stated that documents were to be tabled by 5.00 pm the next day. Mr Evans stated what was provided for in the motion of censure:

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134 Mr John Evans, op. cit., p. 43,

135 David Clune, op. cit., p. 22.

…The motion provided for documents subject to claims of legal professional privilege and public interest immunity to be clearly identified and made available only to members of the Legislative Council and not published or copied without an order of the House. The motion also provided for the first time that in the event of dispute by any member of the House communicated in writing to the Clerk as to the validity of a claim of legal professional privilege or public interest immunity in relation to a particular document, the Clerk was authorised to release the disputed document to an independent legal arbiter - a Queen's Counsel, Senior Counsel or retired judge of the Supreme Court appointed by the President for evaluation and report within five days as to the validity of the claim.

The report from the independent arbiter was to be tabled in the House and made available only to members and not published or copied without an order of the House. Interestingly, the order also provided in the case of a document for which privileges [sic] [privilege was] claimed and which is identified as a Cabinet document shall not be made available to a member of the Council; the legal arbiter may be requested to evaluate any such claim.

In regard to the report of the independent arbiter, the President was to advise the House of any report from an independent arbiter at which time a motion might be made forthwith that the disputed document be made or not made public without restricted access.[136]

14 October 1998 — The Government tabled some of the requested documents, but withheld documents it claimed were privileged. Later that day, The President announced:

…summonses had been issued out of the Supreme Court in proceedings of Egan v Chadwick, Evans & Cahill claiming that the Council had no power at all in the production of documents subject to claims of legal professional privilege or public interest immunity or to determine itself a claim for legal professional privilege or public interest immunity.

Secondly, declaring that the Council had no power to determine claims for privilege or immunity, and no power to appoint an independent arbiter to determine claims on privilege or immunity; and thirdly, an injunction restraining the defendants from taking any steps to compel compliance with the orders of the House made on 13 October 1998.[137]

20 October 1998 — The House agreed to a motion of contempt (third occasion) for failure to fully comply with an order related to Sydney's water supply. The Hon Michael Egan was suspended from the House for five days. The motion in part read:

… the House regarding it as necessary to obtain information on any matter affecting the public interest, and in order to protect the rightful powers and privileges of the House and to remove any obstruction to the proper performance of the important functions it is intended to execute hereby suspends the Treasurer from the service of the House for

[136] Mr John Evans, op. cit., p. 44.
[137] Ibid., p. 45.

five sitting days or until he fully complies with the order of 13 October 1998, whichever first occurred.[138]

22 October 1998 — The President informed the House an amended summons in the proceedings of *Egan v Chadwick, Evans & Cahill* had been issued to include the resolution suspending the Hon Michael Egan for five sitting days was punitive in nature and beyond the powers of the Council.

Egan v Willis & Cahill High Court Decision

Mr Evans summarises the High Court's decision as follows:

> *… shortly after the October incidents, the majority of the court, Gaudron, Gummow and Hayne, confirmed it was reasonably necessary for the Council to order one of its members, even when they are a minister, to produce certain papers in accordance with the system of responsible government under which the Council has a role in scrutinising the actions of the executive in a bicameral parliament. As the majority noted, it has been said of the contemporary position in Australia that 'whilst the primary role of parliament is to pass laws, it also has important functions to question and criticise the government on behalf of the people', and that [to] 'secure accountability of government activity is the very essence of responsible government'.*[139]

24 November 1998 — A motion was agreed to by the House noting the continued failure to table all the documents that had been requested on five previous occasions and called for papers to be tabled before 11.00 am on 26 November 1998. Further, the motion included similar provisions regarding claims of privilege as the motion agreed to on 13 October 1998.

26 November 1998 — The Government tabled the majority of the requested documents but maintained its refusal to table documents viewed to be privileged by the Government.

The Hon Michael Egan tabled a report by Sir Laurence Street, whom the government had appointed as an independent legal arbiter to assess the validity of the government's assessment over privileged documents.

A motion was agreed to adjudging the Hon Michael Egan guilty of contempt for failure to fully comply with the previous four orders and the suspension for the remainder of the session, or until compliance with the order. The following amendment was agreed to:

> *An amendment to the motion for return of privileged documents and assessment by an arbiter was agreed to. Privileged documents were to be delivered to the Clerk by 11.00 a.m. the next day. Cabinet documents could be reviewed by the independent arbiter. Members could inspect the privileged documents, but no notes could be taken or a document copied or removed from the Office of the Clerk and I was required to keep a register of members inspecting the documents showing the date and time.*[140]

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138 Mr John Evans, op. cit., p. 45.

139 Ibid.

140 Ibid., pp. 45-46.

27 November 1998 — No papers were received as ordered. The President directed the Usher of the Black Rod to remove the Hon Michael Egan from the House. Due to prorogation the parliamentary session only continued for three more days.

2 December 1998 — A sessional order was agreed to:

> *... after all these procedures for passing orders for papers and in which the individual orders included provisions for the appointment of independent arbiters and the processes for returning documents with returns and assessment by the independent arbiter, the House adopted a sessional order dealing with claims over privileged documents and assessed by an independent arbiter.*[141]

1999 — The sessional order was not readopted, however, soon after the commencement of the new parliamentary session, the Court of Appeal handed down its judgement in *Egan v Chadwick.*[142]

Egan v Chadwick **Decision**

The Court of Appeal handed down its decision on 10 June 1999. Dr Gareth Griffith summarises the decision as follows:

> *… In the event, all three members of the Court of Appeal agreed that the Council's power to call for documents did extend to privileged documents, on the basis that such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the Executive.*
>
> *However, there were different views on the question of the extent of the power to order documents. In particular, Priestley JA found no limitation on that power. Whereas the majority of Spigelman CJ and Meagher JA found that the power does not extend to ordering the production of Cabinet documents. Meagher JA's formulation of the restriction was broader in this regard, with his Honour granting immunity to Cabinet documents generally. For Spigelman CJ, on the other hand, the immunity applied to documents which, 'directly or indirectly, reveal the deliberations of Cabinet'; as for documents prepared outside Cabinet for submission to Cabinet, 'depending on their content', these 'may, or may not' also lie beyond the Council's power…*
>
> *Central to all three judgments was the principle of responsible government. But, again, it was construed differently, with the Chief Justice arguing that certain indicia of that principle, notably ministerial responsibility, prevents the disclosure of documents revealing the deliberations of Cabinet. Meagher JA appeared to concur with that view, while Priestley JA arrived at a different understandings [understanding] of the implications arising from the related principles of representative government and responsible government.*[143]

The Hon Michael Egan did not appeal this decision to the High Court.

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141 Mr John Evans, op. cit., p. 46.

142 David Clune, op. cit., p. 63.

143 Gareth Griffith, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses, Briefing Paper 15, (1999),* New South Wales Parliamentary Library Research Service, p. vi.

Former Clerks of the New South Wales Legislative Council, Ms Lynn Lovelock and Mr John Evans provided the following summary of the significance of the Egan cases as follows:

> *In effect, Egan v Willis and Egan v Chadwick have confirmed the Council's power to order the production of government papers including those documents for which claims of legal professional privilege or public interest immunity could be made at common law, with one exception: documents that disclose the actual deliberations of Cabinet.*[144]

Following the Court of Appeal's decision in *Egan v Chadwick,* further amendments to the sessional order occurred. In 2004, Standing Order 52 was adopted (see Appendix 2 – *Standing Order 52 – Order for the production of documents*). Dr Clune OAM described the amendments as follows:

> *The first order for papers agreed to by the House in 1999, which ordered the production of documents previously ordered and not yet provided, included a provision for privilege to be claimed. However, rather than require that an arbiter assess the validity of any claim the subject of a dispute, in keeping with previous resolutions and the 1998 sessional order, the order instead provided that a dispute would be resolved by a resolution of the House.*
>
> *Notwithstanding, after that initial resolution every subsequent order made included provision for an independent legal arbiter to make an assessment on any claims the subject of a dispute. The terms of the resolutions adopted varied slightly to those adopted previously, but generally formed the basis for those incorporated into SO 52(6) to (8) in 2004, which set out the dispute mechanism, and the terms of SO 52(4), which made provision for the Clerk to receive documents out of session if the House was not then sitting.*
>
> *From 2004, SO 52 formalised these arrangements, with two additions:*
>
> - *The time within which the arbiter must provide a report on a dispute was extended from five calendar days to seven (SO52(6)), and*
> - *On the motion of a Government member during the Standing Orders Committee's consideration of the proposed new standing orders, SO 52 (9) was inserted to require that the Clerk maintain a register showing the name of any person who examines a return.* [145]

Key Developments

Following the Egan cases, the New South Wales Government has generally complied with orders for the production of documents. However, in 2018 the Government withheld documents ordered by the Council, and the Council asserted its power to require that the documents be produced. Notably, the Executive did ultimately provide the documents to the Council.[146]

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144 *New South Wales Legislative Council Practice,* Chapter 17 – Documents, 2008, p. 480.

145 David Clune, op. cit., pp. 63-64.

146 Mr David Blunt, Clerk of the Parliaments, Legislative Council, Parliament NSW, *Submission #12*, 26 July 2019, p. 3.

The Clerk of the New South Wales Legislative Council, Mr David Blunt in his submission noted the divergence of views relating to cabinet documents:

> *What the 1998 decision in Egan v Chadwick left in the view of some observers unsettled, however, was the situation with regards to "cabinet documents," with the three judges making different statements on this point.*
>
> *Over the 20 years since the Egan cases, from time to time members have suspected that certain important documents otherwise captured by the terms of an order have not been produced, on the grounds they are deemed by the executive government to be "cabinet documents" or "cabinet information." In a very small number of cases this has been made explicit, mostly it has been supposition. On a couple of occasions in that time, while some members expressed interest in testing the issue, they never pursued the matter. In other instances, whilst disappointed for example that "business cases" or other consultant reports known to exist have not been produced, members have found enough information of interest in the other documents produced. However, all that changed in early 2018.*[147]

In 2018, the New South Wales Government withheld documents requested by the Legislative Council in relation to stadium redevelopments, the relocation of the Powerhouse Museum and the Tune Report on the out-of-home care system. The Leader of the Government at the time insisted the powers of the Legislative Council did not extend to cabinet information.[148]

Mr Blunt in his submission explained what action the New South Wales Legislative Council took in the circumstances:

> *The Leader of the Government was censured for his non-compliance with the orders of the House and further ordered to produce the documents by the next day or attend in his place to explain the reasons for his continued non-compliance. On the next sitting day, the President tabled correspondence from the Department of Premier and Cabinet advising that there were no further documents for tabling and attaching advice from the Crown Solicitor. It was anticipated that a motion would be moved to suspend standing orders to enable a further motion to be moved holding the Leader of the Government in contempt and suspending him from the service of the House in order to compel compliance. However, when the Leader of the Government was called upon to address the House as to his reasons for continued non-compliance he advised that the documents would now be produced voluntarily.*
>
> *The business cases and the Tune report were produced: the Tune report was immediately provided in full and made public; the business cases were provided in full subject to claims of privilege, with redacted versions made public. Given the continued assertion by the Leader of the Government and the Department of Premier and Cabinet that the powers of the House did not extend to requiring the production of "cabinet information", the Leader of the Opposition moved a motion which sought to crystallize the position of the House. The motion, agreed to by the House on 21 June 2018, rejected*

147 Mr David Blunt, op. cit., *Submission #12*, 26 July 2019, pp. 2-3.
148 Ibid. p. 2.

the Government's use of the definition of "cabinet information" in the Government Information (Public Access) Act 2009 in these matters as the Government's reliance on that definition "is likely to have led to a much broader class of documents being withheld from production to this House." The motion asserted the power of the House to require the production of Cabinet documents such as those produced on this occasion, and that the test to be applied in determining whether a document falls within this category is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick. …[149]

The resolution of 21 June 2018 is provided at Appendix 3 which includes a summary of the three judges, including Spigelman CJ, in relation to cabinet information, at paragraphs 8(a) to (c).

Standing Order 52 processes

A summary of the processes prescribed under Standing Order 52 are provided:

Understanding order 52, orders for papers are initiated by resolution of the House. On an order for papers being agreed to, the terms are communicated by the Clerk to the Director General of the Department of Premier and Cabinet, who liaises with the departments or ministerial offices named in the resolution to coordinate the retrieval of the documents requested. On or before the due date imposed by the resolution, the Director General lodges the return comprising the documents with the Clerk of the Parliaments. If the House is not sitting the Clerk receives the documents out of session and announces receipt of the return on the next sitting day.

In returning documents to the House, the executive may make a claim of privilege over some or all of the documents provided. Where a claim of privilege is made over documents, the return must also include reasons for the claim of privilege. Documents returned to the House must be accompanied by an indexed list of all documents tabled, showing the date of creation of each document, a description of the document and the author of the document. Where documents are subject to a claim of privilege, a separate index of those documents is required to be provided.

Once the documents have been tabled in the House or received out of session by the Clerk, they are deemed to have been published by authority of the House, unless a claim of privilege has been made. The documents are made publicly available in the same way as any other tabled paper. Documents over which a claim of privilege has been made are kept confidential to members of the Legislative Council only in the Office of the Clerk and may not be copied or published without an order of the House.

A claim of privilege by the Government over a document or documents supplied in a return to order (thereby necessitating that it be kept confidential) may be disputed by any member of the Council by communication in writing to the Clerk. On receipt of such a communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter for evaluation and report as to the validity of the claim of privilege. The independent legal arbiter is appointed by the President and must be either a retired Supreme Court judge, Queen's Counsel or Senior Counsel.

[149] Mr David Blunt, op. cit., *Submission #12*, 26 July 2019, p. 3.

The report of the arbiter is required within seven days. However, on several occasions arbiters have sought an extension of time where privilege has been claimed over a large volume of documents.

Once completed, the arbiter lodges his or her report with the Clerk, who makes it available to members. The Clerk also informs the House of receipt of the report at the next sitting. As is the case with privileged documents, the report is confidential to members, and cannot be published or copied without an order of the House.

Following receipt of the arbiter's report, in most cases, the member responsible for lodging the dispute on the claim of privilege will then give notice of a motion for the arbiter's report to be tabled and made public. While it is usual for this motion to be agreed to, and the report tabled at a later hour of that day, this is not always the case.

In cases where the arbiter's report is tabled and the arbiter has recommended that the claim of privilege on certain documents be denied, a member will then usually give notice of a motion requiring the Clerk to lay the documents considered not to be privileged on the table of the House and to authorise them to be published. The motion is moved on a subsequent day and, if agreed to, the documents are tabled by the Clerk later that same day.

If the arbiter's report upholds the claim of privilege, the papers remain restricted to members only. While the House, as the final arbiter on any claim of privilege, may vote to make the documents public at any time, notwithstanding the recommendation of the arbiter, this has not happened to date.[150]

The Clerk's role under Standing Order 52

Mr Blunt explained the consultative role provided by himself and his staff when administering Standing Order 52 as follows:

Mr BLUNT - *Where a member wishes to initiate an order for the production of documents, they do so by way of giving you a notice of motion in the House, which then sits on the notice paper overnight and is moved the next sitting day, either by a formal business or with debate. More likely, it will sit on the notice paper for some days, maybe a couple of weeks and during that time there will be some negotiation around its terms. The first involvement my staff and I have with the matter is when a member approaches us with a draft notice of motion and wants it put into the appropriate form. My staff and I will play some role, at that stage, in terms of trying to assist the member to have the motion drafted in a way that will capture the documents they are after without causing the resources of the public service to be unnecessarily diverted from their core work and ensure the motion is not drafted so widely as to collect a truckload of documents, when all they are after is one or two specific documents. We do have that role up-front, trying to assist members with the drafting of their notices.*

[150] Mr David Blunt, op. cit., *Submission #12– Appendix 1 – Senate Legal and Constitutional Affairs References Committee Inquiry into a claim of public interest immunity raised over documents,* pp. 3-4.

Once an order has been agreed to by the House, after that process of negotiation going on behind the scenes and potentially with amendments moved on the floor of the House, once a motion has been agreed, it becomes an order of the House. I am obliged, under standing order 52 to communicate the terms of that order to the secretary of the Premier's Department.

The Premier's Department, known now as the Department of Premier and Cabinet, coordinates the collection of the relevant documents from ministers and agencies and required to return them to me.

If the House is sitting when they are received, I will immediately inform the House of their receipt. If the House is not sitting, I will communicate to all the members of the House within an hour or so what has been received, that is, the volume of material, how many boxes of documents are immediately public, how many boxes that are subject to a claim of privilege and we go from there.

Members and their staff, the media and other stakeholders can immediately begin to inspect the documents not subject to a claim of privilege. The documents subject to a claim of privilege are available for inspection by members of the Legislative Council only.

…

The next stage I would be involved in is if a member, having inspected documents subject to a claim of privilege, believes a claim of privilege has been drawn too widely and is not perhaps, justifiable.

If they feel there is an overriding public interest in the material - subject to a claim of privilege - being able to be put into the public domain so they can use the material in debate in the House and otherwise consult more broadly about this, the mechanism under standing order 52 is they can lodge a dispute in relation to the claim of privilege. They do this by writing to me as Clerk.

I may have some involvement with the member if they are seeking advice about the framing of their letter of dispute.

***CHAIR -** So you do assist with this because it is a letter to you?*

***Mr BLUNT -** Yes, it is a letter to me. It may be simply providing them with some precedence of previous letters of dispute. They may want to know where they can have access to a previous report of an arbiter, so they can understand the arbiter's thinking around something like public interest immunity or legal professional privilege.*

It may go a little beyond that, but it is assisting them to interpret what is in an index to a set of privileged documents or assisting them to understand what is in the claim of privilege lodged with the privileged documents.

If they lodge a letter of dispute concerning the claim of privilege, I then take this to the president. There has never been an instant where a president has not authorised the appointment of an independent legal arbiter.

…

… In the past, that would have been the beginning and end of any role that I have. Once the former arbiter was appointed, we would deliver the relevant documents to the arbiter, together with their letter of appointment and the letter of dispute from the member. The arbiter would do the work offsite. We would get a report some weeks later. The report would be reported to the House et cetera and the subsequent steps would be taken in the House.[151]

The Hon Keith Mason AC QC is the current independent legal arbiter for the New South Wales Legislative Council, his appointment has included an additional process for the Clerk, Mr Blunt explained:

… With that consultative process that Mr Mason has adopted, I am in a sense the conduit for those submissions. He will ask me to approach DPC to request submissions from them. I will receive those submissions and pass them on to Mr Mason. There is a new and more involved role there with the arbiter's process.

Look, to be frank, at times we will have some discussions around the things that he is doing, but certainly the determinations about those disputes concerning claims of privilege are very much the arbiter's determination and his alone. Their recommendation is really to the House. It is then for the House to decide what to do with those recommendations.[152]

Members viewing documents subject to a claim of privilege

The Clerk of the New South Wales Legislative Council, Mr Blunt advised the Committee since the Egan decisions there has never been a breach of confidentiality of a document subject to a claim of privilege. Mr Blunt explained the process during his evidence to the Committee:

Mr BLUNT - *When members come to inspect the documents I give them a little homily about the rules for the inspection of privileged documents. One of the things I emphasise to them is that in the 20 years since the Egan cases, more than 300 returns to order, more than half of those, including documents subject to a claim of privilege, we have never had a leak in 20 years. I know that members from some other parliaments find that extraordinary. I think it is extraordinary.*

CHAIR *- You must be very convincing.*

Mr BLUNT - *I think it is an extraordinarily good thing. It reflects very, very well on our methods…*

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151 Mr David Blunt, Clerk of the Parliaments, Legislative Council, Parliament NSW, *Transcript of Evidence,* 24 September 2020, pp. 18-20.
152 Ibid., p. 21.

…

***Mr WILLIE** - How confident are you that members haven't discussed it with a third party in confidence?*

***Mr BLUNT -** With anyone else outside the Legislative Council? Absolutely. My understanding is that the significance of the power of the House to order the production of documents, the significance of the fact that the Legislative Council has put in place a mechanism for dealing with claims of privilege, a mechanism that has not been found or achieved or put in place in other jurisdictions; it has not been put in place in the Australian Senate, has not been put in place in other states, hasn't even been put in place in the US Congress, which is grappling with these very issues, nor the House of Commons in the UK. I think members of the Legislative Council appreciate the significance of the mechanisms that are in place. There is a great respect for the need to maintain that confidentiality they have had over that 20 years.*[153]

Further, Standing Order 52(9) prescribes the Clerk is required to maintain a register recording the name of any person examining documents tabled. Mr Blunt noted:

… Each member who comes to inspect a document subject to a claim of privilege needs to sign in, needs to indicate which documents they are looking at and which subject matter. We have a record of that going back over 15 years now.[154]

Mr Blunt also provided details on the number of members that view documents, subject to any claim of privilege and non-privileged claims made over documents:

In every case the member who has initiated the order, who has given the notice of motion and then moved the motion, will come and inspect those documents. Sometimes that is the only member who will come and inspect the privileged documents. On other occasions though, when there is a matter of significant interest across political parties within the House, there may be one representative of each political party, or each of the key groupings in the House, who will come and examine those documents or at least some of them. Don't forget, though, that in addition to the documents subject to a claim of privilege, there is often a greater volume of documents returned that are not subject to a claim of privilege which are available for public inspection. On every occasion members and members' staff will come and inspect those, members of the media and so on, but particularly members' staff will be put to work to go through those with a fine-tooth comb.[155]

Further, Mr Blunt stated:

… Certainly, if there is a dispute in relation to the claim of privilege and the independent legal arbiter has provided a report with a recommendation to the House. Often after the

[153] Mr David Blunt, op.cit., *Transcript of Evidence,* pp. 21-22.
[154] Ibid., p. 23.
[155] Ibid.

arbiter's report is notified to the House, there will be a motion that the arbiter's report be tabled and be made public. There will then be a motion the arbiter's recommendation be implemented, which will involve certain documents to a claim of privilege being made public. At that point, often other members of the House come to view the documents in question, as well as reading the arbiter's report to be able to turn their mind to whether it is a good idea to lift the claim of privilege in relation to those documents.

For us in New South Wales, it would be a deleterious step to wind that back so that only the member who initiated the order is able to view the privileged documents. Other members would not be able to form a view about the merits or otherwise in lifting the claim of privilege if they could not actually view the privileged documents.[156]

Mr Blunt explained what actions members are restricted to when viewing documents subject to a claim of privilege:

Mr BLUNT - *...what they can do is take handwritten notes and they can inform themselves; number three, what they can't do is photograph the documents or photocopy them. They can't discuss their contents with anyone other than the other members of the Legislative Council. They can discuss them with Legislative Council colleagues. They can't discuss them with their staff. They can't discuss them with members of the other House, and they certainly can't discuss them with the media or anyone else.*

If they feel that they are constrained in their ability to perform their parliamentary duties by that, the appropriate thing for them to do is to lodge a dispute about the claim of privilege and effectively try to get the critical documents into the public domain. That is the only way they can do that.

CHAIR - *I don't have a legal background and there may be a very legalistic, complicated document I am reading and not fully understanding the implications of it, for example. If I don't feel I have the confidence in any other member of the Legislative Council being able to provide a better explanation than what I can ascertain, is there any avenue other than lodging a dispute that I can actually get some assistance in understanding it?*

Mr BLUNT - *No.*[157]

The independent arbitration mechanism

The independent arbitration mechanism to resolve claims of privilege on documents returned in the New South Wales Legislative Council is a well-established practice. Mr Blunt in his submission stated:

... since the Egan decisions, orders for the production of papers have become common in the Legislative Council, with over 300 orders made since 1999. In over 180 of those

[156] Mr David Blunt, op. cit., *Transcript of Evidence,* p. 25.
[157] Ibid., p. 22.

returns to order, the executive has made a claim of privilege. The validity of the claim has been disputed by a member of the House on 38 occasions.[158]

Mr Blunt explained the process:

In a nutshell: a member may dispute a claim of privilege by writing to the Clerk, who advises the President that a dispute has been lodged. The President appoints an independent legal arbiter, who must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge. The Clerk releases the documents subject to the dispute to the arbiter, who assesses the claim of privilege made by the executive. The arbiter prepares a report that the Clerk makes available to members. While the arbiter makes recommendations as to the validity of the claim of privilege, the House is the ultimate authority, and can resolve that previously privileged documents be tabled and made public.[159]

The role of the independent arbiter

The independent arbiter performs a key role in this process. A document provided in a return to an order and whereby the document is subject to a claim of privilege, the House's scrutiny role is limited, Mr Blunt explained:

… MLCs can 'inform themselves in relation to the contents of a privileged document and can discuss the contents only with fellow members. Without a successful challenge to the claim of privilege, there is virtually nothing more that can be done with such documents in the house or in Committees'.[160]

If a dispute arises over a claim of privilege the standing order allows for the arbitration process to be triggered, Mr Blunt explained:

Rather, the role of the arbiter in our model is about whether or not the documents will stay privileged or whether they will ultimately be made public.

The role of the arbiter in exercising that duty is to consider and report to the house whether or not the claim of privilege made by the executive government is valid and to recommend whether or not that claim should be upheld. The report of the arbiter themselves does not change the status of the document. It is merely a recommendation to the house. Ultimately, it is up to the house itself to decide whether or not to act on the arbiter's recommendation. Whilst in the overwhelming majority of instances the arbiter's recommendations are followed and implemented, it does not always happen. It is always up to the house; it is up to the member who has initiated the dispute to garner majority support in the house to have the arbiter's recommendation implemented.[161]

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158 Mr David Blunt, op. cit., *Submission #12 – Appendix 1 – Senate Legal and Constitutional Affairs References Committee Inquiry into a claim of public interest immunity raised over documents,* p.6.

159 Mr David Blunt, op. cit., *Transcript of Evidence,* p. 5.

160 Mr David Blunt cited in David Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick*, 2017, p. 38.

161 Mr David Blunt cited in Australian Senate, Legal and Constitutional Affairs References Committee Report, *A claim of public interest immunity raised over documents,* March 2014, p. 21.

Prior to 2014 and since the Egan decisions, three independent legal arbiters have been appointed and together have reported on 48 disputes. The first arbiter, Sir Laurence Street QC, former Chief Justice of New South Wales formulated a two-step test. Firstly, determining that the claim of privilege made was valid and secondly, whether the public interest in disclosure over-rode that claim, even if it was validly made.[162]

In 2014, the current independent legal arbiter, the Hon Keith Mason AC QC, sought submissions as to his role when first appointed, in evaluating claims of privilege, and took this opportunity to set out his understanding of the broad principles by which an assessment should be determined as Dr Clune OAM explained:

> *'The arbiter's primary task, as I see it, is to report whether legally recognised privileges as claimed apply to the disputed documents … ' However, he accepts that 'wider public interests also deserve acknowledgement.' As long as 'over-riding harm' is not done to the operation of the executive and bureaucracy, debate stemming from the public release of tabled documents is of the essence of representative democracy.' Mason specifically links consideration of the public interest in disclosure to the powers of the Council, as recognised in the Egan cases:*
>
> > *The focus should always be on the needs of the House in performing its constitutional functions. With some snippets of confidential information the House's need will be met if only members are free to access them … With most information, however, the House's need may indicate that is should be free to disseminate the information publicly unless there is clear over-riding need for the confidentiality urged by executive.*
>
> *Mason is applying a new, single-step test. However, he cautiously incorporates public interest considerations and thus seems likely to arrive at conclusions similar to those of previous arbiters.*[163]

The Committee received evidence within submissions and from witnesses in relation to possible amendments or improvements in relation to Standing Order 52.

In 2009, the House did not receive a full disclosure on a return to order, known as the 2009 Mount Penny Order. The Privileges Committee reported on Standing Order 52 and the Committee called for a number of changes to the order for papers system. Mr Blunt stated in relation to this issue that:

> *Since Mr Mason's appointment as arbiter, the process has developed somewhat. Those developments are very consistent with the recommendations of the privileges committee in the Mount Penny report from 2013, in that Mr Mason has adopted a process whereby submissions are sought from the relevant government agencies through the Department of Premier and Cabinet. The member may get a second opportunity to respond to the submissions from DPC and the other government agencies …*

[162] Jenelle Moore, op. cit., p. 3.
[163] David Clune, op. cit., pp. 38-39.

At the time of [the] Legislative Council Privileges Committee report in 2013, DPC said that they were at a disadvantage because they really only had one shot at making a privilege claim when they were returning the documents initially. They felt that they were at something of a disadvantage in that regard. So, this process that Mr Mason is following is a more iterative process, it is more consultative in that it allows further submissions to be made and considered. It often sees the range of documents in dispute being narrowed down because in some cases the agencies will say, 'Now that I know the members disputing the claim over these 50 documents, we will no longer press our claim into relation to 40 of them'. So, you end up with a much narrower sort of dispute in the end.

***CHAIR** - This reflects the recommendations made by the privileges committee so in the future, in your view, would it be sensible to amend the Standing Orders to insert this sort of consultative process within them?*

***Mr BLUNT -** At the time when my view was sought by the privileges committee I suggested to them that it was not necessary to change the standing order. It was really up to the arbiter appointed at any time to determine on a case-by-case basis the particular approach that they wanted to take. I have not changed my view in that regard.*

***CHAIR** - You think it better to be silent on that and let the arbiter make the decision?*

***Mr BLUNT -** Yes, that's right. From my point of view, it seems to be working and working really well.*[164]

Former Leader of the Opposition during the Egan decisions, The Hon John Hannaford AM stated a proposed standing order could prescribe a process for the arbitrator in exercising their power.

***Mr HANNAFORD -** Again, if you were to acquire as part of your sessional order or standing order, the person initiating the call has to identify the purpose of the call, and an understanding of the outcome. That also provides guidance for the arbiter in the examination of the documents and the purpose for which they are being delivered. You might have a large number of documents. A PII [public interest immunity] relates to a stream of consideration of the agency, but the consideration of the parliament for the call was a different stream. If you understood why you are making the call, as distinct from a fishing expedition, that becomes guidance for those who are examining the documents, but also for those who have to report on a claim for PII or cabinet confidentiality.*

***Ms WEBB** - Presumably, that would be particularly important. It is not just a matter of whether there is a valid claim for PII. It is competing claims for PII because, as you say, the claim for PII might be different to the intent for which documents were being sought. If that is clearly articulated, that allows you to adjudicate that competing claim - is what you are saying?*

[164] Mr David Blunt, op. cit., *Transcript of Evidence,* p. 20.

Mr HANNAFORD - *That is correct.*[165]

Constitutional law expert, Mr Bret Walker SC highlighted three possible improvements to Standing Order 52 in relation to the arbitration process:

> *I would strongly urge they instead be called either an adviser, or if you'll forgive the pretention, a rapporteur - I will explain that later. You would never give him or her authority to decide anything. You would never give away the authority of the House or delegate it to a committee to make these decisions.*
>
> *My own view is that they are so important they should always come back to the House on report from a committee. They are a very solemn and serious part of the non-legislative function of Chambers of the Legislature in assistance with responsible government and they must not be blurred by appearing to delegate them or subcontract them out to somebody who is not a member.*
>
> *I don't like the language of 'adjudicator' or 'arbiter', or anything like that for the distinguished, mostly jurists, who occupy these positions around the country. I would much rather they be called adviser, or if that is too plain vanilla, 'rapporteur'. Why do I mean 'rapporteur'? That is the French fancy title that in English we have adopted for people whose opinions are valued, but who lack all decision-making power. Whether they are in Europe, like the preliminary stage of a continental judicials constitutional case, or whether it is in the United Nations, the bringing together of evidence and submissions for consideration by either the Security Council or the General Assembly.*
>
> *It emphasises it is a person whose job it is to try to synthesise in a way, that of course, will express opinions, and maybe convey advice, but will never, ever come anywhere near making a decision. I deprecate any notion, for example, of a rapporteur choosing one way or the other, whether the public interest in disclosure outweighs the public interest of secrecy, when it comes, say, to a matter of great commercial importance to the state.*
>
> *Very often, as we all know, the public interest in secrecy will be extremely obvious, at least for a short time, perhaps while tenders are being considered. That is a really obvious one. I am bound to say, I do not understand why a Legislative Chamber would ever subcontract out that judgment. That is classically a judgment to be made by a vote on the floor of the House and not made by people whose experience, like mine, is with adversarial litigation or constitutional advising.*[166]

Secondly, Mr Walker SC recommended:

> *The second thing is that, as a matter of what I will call 'decorum', I would expect and hope that whenever a rapporteur says, for reasons that are not evidently wrong, that something is Cabinet secret, then my own view is to avoid constitutional conflict of a kind that might end up in a court - which would be very unfortunate, to be avoided*

[165] The Hon John Hannaford AM, op. cit., p. 12.
[166] Mr Bret Walker SC, op. cit., pp. 4-5.

almost at all costs - then a counsel should accept that advice about Cabinet secrecy. That makes it act as if it were a ruling. The language of it not being a ruling is very important but, in practice, with Cabinet secrecy, my own view is if the person you have chosen to advise you in that topic says these documents are subject to Cabinet secrecy, that really ought - except in the most exceptional of cases, where his or her reasons are nonsense or self-contradictory - that ought to be the end of it.[167]

Thirdly, Mr Walker SC recommended that an inclusion to Standing Order 52 distinctly defining the independent arbiter's role could be of potential benefit:

… to make clear that the rapporteur is not to express a preferred position concerning disclosure or treatment of documents which, being subject to a claim of public interest immunity or legal professional privilege, thereby cannot be preventative production. That is no answer to the House's call. It is only a very powerful factor, depending on the circumstances, against the kind of use you might make of it. I think everything would be much better if this independent person was simply tasked to impartially present arguments for and against. My own view is that, in my experience, it would very greatly assist members in their consideration of what they want to do.[168]

The Committee noted the New South Wales Legislative Council's Paper: *Evading scrutiny: Orders for papers and access to cabinet information by the NSW Legislative Council.* This Paper discussed the issue of a scrutiny gap and whether only true cabinet documents are being withheld from the Legislative Council. The Paper suggested consideration be given to include a reference to cabinet documents as previously included in past resolutions as follows:

The first resolutions passed by the Legislative Council setting out procedures for orders for papers in the wake of Egan v Willis envisaged a role for the arbiter in adjudicating cabinet exemption claims, but did not propose for members to have access to these documents prior to such adjudication. For example, the first resolution, passed in October 1998, included the following provision:

> *Any document for which privilege is claimed and which is identified as a Cabinet document shall not be made available to a Member of the Legislative Council. The legal arbiter may be requested to evaluate any such claim.*

The wording was varied slightly in a subsequent resolution passed in November 1998, but still assumed a role for the adjudicator and reiterated that members would not have access to cabinet documents:

> *Where any documents for which privilege is claimed is identified as a Cabinet document the document must not be made available to a Member of the Legislative Council. The Clerk is authorised to release the documents to the independent arbiter for evaluation and report under paragraph 5.*

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[167] Mr Bret Walker SC, op. cit., p. 7.

[168] Ibid.

By 2003, following the 1999 decision in Egan v Chadwick, the sessional order preceding standing order 52 omitted any reference to cabinet documents and the role of the arbiter in assessing claims based on cabinet confidentiality, as does the current standing order. Therefore, in future, the Council could consider asserting the requirement under the standing order that cabinet documents be produced in just the same way as other privileged documents.[169]

Further, the Paper noted the suggestion of the arbiter only viewing the cabinet document in order to report:

If this is a bridge too far, consideration could be given to reverting to the procedure originally envisaged in 1998, which involved an arbiter being asked to adjudicate on whether a privilege claim on cabinet documents should be upheld. The arbiter would receive the actual documents in order to make an assessment of whether the document was a 'true' cabinet document and should therefore, in accordance with Egan v Chadwick, be excluded from the return.

Presumably, the idea that only an arbiter (and not members) would access supposed cabinet documents is based on the particular sensitivity of this class of documents and the risk of leaks but it would not be difficult to see why some members may object to such a proposal: members are able to access other documents over which a claim of privilege is made many of which are highly sensitive, none of which have been leaked since the resurgence of orders for state papers in the late 1990s. And as discussed in Part 1 of this paper, the courts regularly inspect cabinet documents in determining public interest immunity claims. So why should members of the Legislative Council not be similarly entrusted?[170]

Another consideration highlighted in this paper was the limitation the index presents in adjudicating on claims of privilege:

Whatever approach the Council takes to the current scrutiny gap, it should at the very least, continue to insist on receiving an index of all documents withheld on cabinet grounds, as emphasized in the 2005 and 2014 resolutions and notwithstanding the refusal of the executive to provide details of cabinet documents to date. However, the limitations of such an index should also be kept in mind. Several commentators have noted that access to documents over which a claim of privilege has been made, rather than just an index, is fundamental to adjudicating claims of privilege. For instance, in 2010, Ms Lovelock told the Senate Finance and Public Administration References Committee:

> *I cannot see how the arbiter can make a valid assessment solely on the basis of the claim that the executive put forward. I think that it is impossible to do that without seeing what the documents are. I think it could end up with formulaic responses by the executive that would be impossible to dispute*

[169] Legislative Council of New South Wales, Parliament NSW, *Evading scrutiny: Orders for papers and access to cabinet information by the NSW Legislative Council,* 2017, p. 17.

[170] Ibid.

> *because they are formulated in such a way that they fall within any definition of what would be legal professional privilege.*

However, the former Clerk of the Senate, Harry Evans, said it may not be necessary to look at documents over which a claim of privilege has been made; that could be left to the judgement of the arbiter, but: 'If the arbiter comes back and says "I'm not able to determine this matter because I really can't tell whether the claim is justified without seeing the documents", then the Senate could order the production of documents to the arbiter'. Of course nothing in the above discussion should be taken to suggest that the current practice, whereby privileged documents are provided to all members, should in any way be changed.[171]

In this paper, Mr Bret Walker SC provided his opinion on how this scrutiny gap can be addressed:

For Bret Walker, the long term solution to the 'obvious and glaring gap' in the accountability of the executive to Parliament lies in dispensing with the 'fiction' of cabinet solidarity, which in his view will continue to be eroded by governments of the future: 'fractious and internally divided' coalitions 'where the rough welds are very obvious.' However, absent the executive giving up its secrecy, he believes the disclosure of all cabinet documents to the Council is unlikely to be effected in the courts or by legislation. The best hope, Walker suggests, is for members to 'shape' their powers by their conduct:

> *Perhaps the only thing at the moment—but certainly the first thing to be done at the moment—is that the Council and thoughtful individual members of the Council, as well as the Council speaking collegiately, ought to say, 'We note that the return is deficient in this fashion; we deplore the deficiency; we maintain that Egan v Chadwick is wrong, and we move on'.*

Fifty years on, says Walker, someone will pull all of those statements together so that the position by the Legislative Council will be recognised as the 'true state of affairs': ' … because the way in which the law is made in this area is not as it is for any other area with which I am familiar. So it is partly what you do but what you do also includes what you say.'[172]

Potential misuse

The Committee received evidence in relation to the potential misuse of Standing Order 52. The Hon John Hannaford AM stated the opportunity by political parties to be involved can result in an abuse of the power of the process:

> ***Mr HANNAFORD -*** *There should be a transparent responsibility within the Legislative Council for exercising the power so that the members who initiate a call for documents should in fact be accountable for that. It is not sufficient to say that the executive must be accountable to parliament or that the administration should be accountable to*

[171] *Evading scrutiny: Orders for papers and access to cabinet information by the NSW Legislative Council,* op.cit., pp. 17-18.
[172] Ibid., pp. 18-19.

parliament, but the members of parliament who exercise the power should also be responsible and accountable for the exercise of that power.

Where does that lead you? When a call for papers is made, there should be a purpose for that call. …. They should be able to be identified. If you are looking at the purpose for a call, are you concerned about the policy for which the documents were created, and is that policy adequate or appropriate? If you are making a call, is your concern about an executive failure in the administration of that policy? Are you concerned about an administrative failure about the implementation of that policy? Or are you concerned about improper behaviour in the exercise of the powers which give rise to the creation of the documents you are calling for. That purpose, in a framework of governance, ought to be understood upfront.

It is important if it is identified within the resolution that has called for the production of the documents because it will also give some discipline to the debate around whether that call should be supported by the parliament.

They should also report to the parliament on the outcome of the call for papers. In New South Wales, 300 calls, with what consequence? On 38 occasions there has been an analysis of cabinet confidentially or of public [interest] immunity. I don't know of any, but perhaps the Clerk will be able to provide some understanding. But if you don't have an outcome, it gives rise to the reason for the administration to be concerned that there has been an abuse of power and that the power has only been used as a witch-hunt of some form. That leads to an allegation of an abuse of power by the parliament, which ought to be curtailed in some way.[173]

The current Independent Legal Arbiter The Hon Keith Mason AC QC provided comment on this possible abuse of power.

Mr MASON - *I don't think I share Mr Hannaford's views. If you look at the purpose of the power as expounded in Egan v Willis - I touch on this just by repeating it in some of my reports - the executive is subject to parliament. Egan v Willis says that includes the individual Houses of parliament and anything of interest to parliament in its executive or oversight function is fair game in an order for papers.*

Does politics intrude in that? Of course it does, but it's on both sides of the record. The government obviously wants to keep a lot of things confidential for all sorts of good and practical reasons. I wouldn't use the word 'abuse' on either side, but on one side of it there can be lack of frankness. We need to get on with the job of governing and we do have private interests to protect, including commercial interests of government, so why should we be putting these documents into the public domain? Sometimes there are excessive claims of immunity. I saw that as a barrister as well.[174]

[173] The Hon John Hannaford AM, op. cit., p. 4.

[174] The Hon Keith Mason AC QC, *Transcript of Evidence*, 24 September 2019, pp. 35-36.

Constitutional law expert Professor Anne Twomey questioned whether the standing order was being used to fulfil its role in keeping the government accountable or being used as a political tool. She stated:

> *One of the problems is that it can be used as an abuse of process. Here the problem, of course, is that these issues are inherently political, and you will often find that parties - it does not matter which one is in government and which one is in opposition - will try to use this method in an upper House for political advantage, not in the public interest. There may be circumstances in which political advantage is achieved through doing things that actually damage the public interest, so you have to be quite careful in terms of how this is used.*
>
> *This did not happen while I was working in the Cabinet office, but I am aware at least of an allegation. I do not know the full details, but I am aware of an allegation at least in one case. An order was made for the production of documents for the benefit of a particular person who was engaged in personal litigation. That is not the sort of reason why an upper House should require the production of documents. The first point of wariness is one has to be quite careful that the process is not used in an abusive way, and in a way that is damaging to the public interest.*[175]

The Hon Keith Mason AC QC expressed his concerns over the volume of documents that are being produced under the current arrangements in the New South Wales Legislative Council:

> *I'm seeing the sheer volume of documents that are being produced and having to be sorted out with claims of privilege and then disputes. I'm trying to tighten it to the extent of anything within my control, but the obvious expense involved in the processing at DPC level is a matter of concern: the number of people under Mr Blunt's supervision who are having to number each of these documents - each of these documents is given a separate number, we are talking about 150 boxes and each document is number-stamped - and then searching them out and finding them. Hopefully, people will get smarter about it but at the moment, with the current parliament or in the run-up to an election, there is a spike in these calls for papers. I don't know why.*[176]

Professor Twomey shared the Hon Keith Mason AC QC concerns regarding the cost and resources involved:

> *… I do know that in New South Wales, an extraordinary number of these calls for the production of documents regarding very large numbers of documents have been made. This means that you have public servants who are permanently tied up with dealing with these requests for documents. I would have thought that particularly in Tasmania, where you have quite a small public service, the amount of time and resources given to this may well be disproportionate to the value that you get. You have the cost of requiring public servants to spend their time on this rather than doing their substantive work, but you also have other costs as well. In particular, one is storage. I know that sounds ridiculous, but there are warehouses full of these documents in relation to New*

[175] Professor Anne Twomey, op. cit., p. 32.
[176] The Hon Keith Mason AC QC, op. cit., p. 38.

South Wales requirements. In fact, the Parliament has found it very expensive to pay for the warehouses to hold these documents, because each call for documents may end up with 20 or 30 boxes, and this stuff mounts up over time. There is actually a direct cost involved in the process.[177]

Further, Professor Twomey added:

There was one other thing I was going to mention, and this is perhaps the most shocking thing about the whole process in New South Wales. Those original sets of documents that I went through and did all the checks on privilege for - when they were actually handed over in the very many boxes, nobody actually went and looked at them. There were some cases where one person looked and they only looked at some of them, and there were other cases when nobody looked at them at all. It seemed that the politics of it was the fight to get the documents and the drama involved in the fight, and it wasn't actually using the documents in a way that resulted in changes in law or greater accountability.

I have often said there would be a great Ph.D in someone trying to look at what documents were actually produced, who looked at them, and how they were actually used, if at all, in the Legislative Council - and what connection that then had through to the basis upon which the courts say they needed to be produced, that is, that it was reasonably necessary for the functioning of the Legislative Council. Was it reasonably necessary, and how can we establish that it was? So far, we still do not have a very satisfactory answer in relation to that.[178]

Professor Twomey shared her experience in her role as a public servant when dealing with controversial requests for orders, and indicated that limitations were placed on written information and that oral information was preferable:

... is the damage to processes of government in relation to matters that are politically sensitive. One of the first things that happened in New South Wales after Egan v. Willis and Egan v. Chadwick, when the Legislative Council started making more and more of these orders, was that whenever a brief was sent up to the head of the department, or on to the Premier, if there was something controversial about it, it would come back with the letters 'PSM' written on it ('please see me'), and then the controversial thing was all dealt with orally, so that there wasn't a record of it, so it wasn't going to be then produced in the Legislative Council.

From a governance point of view, that's actually a terrible result. It means that whenever you're dealing with things that are particularly controversial in nature, everything is done orally. You end up with Government-by-Chinese-whispers, which is never very reliable - and, more to the point, there is no historical record, even in 10-30 years' time. You have no record of why people did particular things. In terms of governance, this is very dangerous, because governments that feel there is no safety in terms of the confidentiality of particular issues will then deal with them in a way that

[177] Professor Anne Twomey, op. cit., p. 32.
[178] Ibid., p. 33.

doesn't produce written documents, and that undermines the whole governmental system. You have to be quite wary about that, even with things like legal advice, because the legal advice would also be required to be produced in the Legislative Council. So, we got to the absurd point where you had to ring the Solicitor-General, find out orally what the Solicitor-General's advice was likely to be, before you then asked the Solicitor-General to put it in writing. If the Solicitor-General's advice is one you didn't want, you never got it in writing. That is not really a very good outcome.[179]

Professor Twomey also described a potential risk of non-legitimate claims of cabinet confidentiality noting the freedom of information legislation contains checks and balances that may mitigate this risk:

There is a risk, but the flip side is in relation to the New South Wales legislation regarding freedom of information - which is now described as Government Information something or rather act - in relation to that cabinet confidentiality only lasts 10 years and so if you were doing that on a persistent basis it would be revealed at least 10 years after the original date, so people would know that you are doing it illegitimately. It would be a bit of a dangerous game to play because ten years might take the heat out of the particular document but it would not take the heat out in relation to misusing cabinet confidentiality.

I would hope that the people who do make claims in relation to cabinet confidentiality do so on a legitimate basis and, probably, the criteria upon which they assess it is the same as the criterion that they use in the freedom of information legislation. There is stuff at the back of that act that says that just stapling it on is not going to make it a cabinet document, et cetera, there are some quite detailed provisions in there to make clear what falls within the category of cabinet documents or not. Yes, you are blind, to a certain extent, until that ten years is up, at least.[180]

Effectiveness

The Committee received evidence from witnesses on the overall effectiveness of Standing Order 52 with varying opinions.

Former Clerk, Mr John Evans provided a balanced assessment:

Those that support the actions of the House would say it is doing a good job and making the government accountable to the Council. Of course, those in government probably do not like what the House does calling for papers. I think in most cases the resolutions of the House requiring the production of papers were sensible and there were various reforms introduced while I was there which have worked well. There may have been some occasions where the call for the order of papers might have been a bit excessive and, in hindsight, probably on some occasions, we could have used a staged process for the order of production of documents; get some initial ones and, once having done that, perhaps ask for some more … The system introduced an independent arbiter and the

[179] Professor Anne Twomey, op. cit., p. 32.
[180] Ibid., 36-37.

subsequent requirements have worked in ensuring that those papers the government thinks are subject to legal privilege or public interest immunity are certainly made available for inspection by members and ultimately, through an independent person assessing those documents, deciding whether they should be public or not. In general I think that whole process has worked fairly well.[181]

The Hon Michael Egan AO provided an opinion as to the effectiveness of the arrangements in the New South Wales Legislative Council:

It has made no difference to the quality of the public discourse. I can't recall one single instance when any of those papers has caused any controversy or found the government out, or found the bureaucracy out. It is a[n] harassment of the Queen's ministers.

…

***…** In all of those, certainly the ones where the government was ordered to the [sic] table when I was a minister, what used to happen was that truckloads of documents would be delivered to the Clerk's office and very often no-one looked at them. It was really harassment of the executive government. That is all it was.*

***Mr WILLIE -** Do you have any thoughts on the cost?*

***Mr EGAN** - An enormous cost, no doubt, but in the scheme of things it is not a lot of money. It would be interesting for someone to tally up the cost but it is not going to get you anywhere.*[182]

Current independent legal arbiter, the Hon Keith Mason AC QC stated:

… it has led to an incredible amount of additional accountability of the executive arm. From my perspective, it's not so much relevant to legislation, although that obviously comes into it; the bulk of the disputes and the papers relate to what we call the accountability arm of government.[183]

Mr Walker SC stated:

The independent arbiter system that operates under order 52 of the Council's Standing Orders in Sydney has to be understood as not, as it were, becoming a new and binding regime. It is really only a helpful procedure for the House, and it can go no further than the offering of advice. It has been - I think no doubt because of the identity of the arbiters over the years - very successful in Sydney in 'lowering the temperature' and assisting in the production of and access to documents. [184]

[181] John Evans cited in David Clune, op. cit., pp. 35-36.
[182] The Hon Michael Egan AO, op. cit., 70.
[183] The Hon Keith Mason AC QC, op. cit., p. 29.
[184] Mr Bret Walker SC, op. cit., p. 3.

Sessional Order 40 – Order for the Production of Documents by Committees in the New South Wales Legislative Council

The New South Wales Legislative Council is less experienced when ordering the production of documents by committees. In the 57th Parliament the New South Wales Legislative Council adopted *Sessional Order 40 — Orders for the production of documents by committees.* To date, Sessional Order 40 is yet to be used. It is intended only as a last resort, when the usual committee process of inviting or requesting witnesses to appear and provide documents have failed.[185] (See Appendix 4 – *Sessional Order 40 – Orders for the production of documents by committees*).

Background

New South Wales Legislative Council Standing Order 208(c) states committees have the power to 'send for and examine, persons, papers, records and things.'[186] Sessional Order 40 affirms the power outlined in Standing Order 208(c).

Government agencies complied with Standing Order 208(c) in the years immediately following the Egan cases. However, in 2001 the Crown Solicitor advised government agencies against complying with Standing Order 208(c) and recommended that committees pursue the production of documents through the House under Standing Order 52. This was the position taken by the Government and was reflected in the guidelines for public servants appearing before parliamentary committees. This position continued until 2018.[187]

Mr Blunt explained the process used by members to obtain information from 2001 until 2018 as follows:

> *Often what committees did in those circumstances where committees agreed to resolutions that notwithstanding the view of the committee that they have the power to order the production of documents, the committee requested the chair to go to the House and give a notice of motion, et cetera. The committee still has access to information, but in a roundabout way.*[188]

In 2018 this position changed, Mr Blunt in his submission provided an account of the key events that led to this:

> *… In part, the change was precipitated by an observation by Bret Walker SC in an earlier advice regarding the power of the Council to order documents from statutory agencies. Mr Walker suggested that the reference in section 4 of the Parliamentary Evidence Act (the power to summons a person to attend and) to "give evidence" was likely to include not only oral evidence but also the production of documents during their attendance. A carefully worded summons could therefore potentially be used by a committee to require the production of a document.*

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185 Mr David Blunt, op. cit., *Submission #12,* p. 4.
186 Legislative Council, Parliament of New South Wales, *Legislative Council Standing Rules and Orders,* 5 May 2004, p. 74.
187 Mr David Blunt, op. cit., *Submission #12,* p. 4.
188 Mr David Blunt, op. cit., *Transcript of Evidence,* p. 24.

The Legislative Council's Portfolio Committee No. 5 was conducting an inquiry into the proposed replacement of Windsor Bridge. Faced with repeated refusal by Transport for NSW to produce a business case for the replacement, in May 2018 the committee issued a summons for the Secretary to attend and produce the document. In due course the Secretary attended and indicated that he was producing the document voluntarily "without any concession to the Committee's power."

Although the result was somewhat ambiguous (the committee asserting that it had compelled the production of the document, the witness asserting it had been produced voluntarily), unbeknown to the committee, the actions of the committee in this matter apparently prompted the provision of significant legal advice, which was revealed indirectly.

Amongst those apparently concerned about the assertion of committee powers was the Auditor- General, who faced with likely requests to assist two other Legislative Council Committees inquiring into particularly controversial government projects (Sydney Stadiums and the CBD and South East Light Rail) sought the advice of the Crown Solicitor. The Auditor-General is required to include as an appendix to the annual financial audit report on the total state sector accounts, any legal advices received during the preceding 12 months from the Crown Solicitor. Consequently, two very enlightening advices were made public.

In those advices the Crown Solicitor deferred to the apparently recent opinion of the Solicitor-General to the effect that "it is more likely than not that if the question were to be the subject of a decision of a court, a finding would be made that a committee of the New South Wales Parliament has the power to call for a witness to attend and give evidence, including by production of a document." Furthermore, the Solicitor-General had advised that he preferred the view that the power would be found to reside in Standing Order 208 (c) and reasonable necessity rather than the Parliamentary Evidence Act, but that the true source of the power would likely emerge in any court proceedings regardless of the power actually relied upon by a committee which precipitated the proceedings. The position asserted by Legislative Council committees (but resisted by the executive government) for 17 years had been vindicated.

During the remaining months of 2018 two Legislative Council committees confidently asserted their powers to order the production of documents. In one case successfully, obtaining a Gateway Review document in relation to the CBD and South East Light Rail project. The other case, involving a request and then a summons under Section 4 of the Parliamentary Evidence Act for a draft report of the Inspector of Custodial Services proved to be more complex. The refusal of the Inspector to produce the draft report led to the committee obtaining, through the Clerk, verbal advice from Bret Walker SC and the Inspector obtaining (and providing to the committee) advice from the Acting Crown Solicitor and Ms Anna Mitchelmore SC. A redacted version of an opinion from the Solicitor-General was also provided. Each of these advices have subsequently been published by the committee in its report. Ultimately, the committee decided in all of the circumstances not to seek to enforce the provisions of the summons or the Parliamentary Evidence Act in respect of the Inspector. However, as the committee made plain in its report, the firm but judicious assertion by Legislative Council committees of their powers

over recent months has led to legal advice being provided, which now binds public servants into the future, apparently accepting the long held position of the Legislative Council and its committees.[189]

In response to the mixed results for the production of documents by committees, a motion to establish Sessional Order 40 was moved by Mr David Shoebridge MLC, Member of the Greens, whereby he sought to progress an agreed process immediately in the 57th Parliament.

> ***Mr SHOEBRIDGE -*** *This motion relates to and affirms the power of committees to order the production of documents. This is a privilege of the House. The House has always said that its committees have this power, having been delegated that power, amongst other ways, under Standing Order 208. I think Standing Order 208 (c) expressly delegates that power to committees. There has been some legal contest at different times between the House asserting these powers of committees and the Executive of the day. More recently—one can see the details in the motion—the advice from the Crown Solicitor and the Solicitor General has affirmed the power of committees to order the production of documents. But we do not have a very good and clear process to manage that demand for documents, the receipt of documents, members' access to documents, questions of privilege and contested questions of privilege.*
>
> *This motion does two key things. Firstly, it affirms the power of committees—and it sets out why—to order the production of documents. Secondly, it puts in place a very clear practice entirely consistent—except for some tiny necessary variations—with the now well-established practice for the production of documents under calls for papers by the House. The only minor variation—this is relevant because we are talking about powers of the committee—is that only committee members can contest questions of privilege or the like, because obviously it was the committee that made the call for papers in the first place. But all members of the House, subject to the privileges and confidentiality, will be able to inspect documents that come from committees.* [190]

On 8 May 2019, in the 57th Parliament, Sessional Order 40 was adopted and is yet to be used. Mr Blunt stated:

> *… We have had committees getting close in a couple of instances. The committees are seeing with the sessional order now in place, setting up that mechanism as a last resort. A committee will request the information through the relevant minister, will even make a request a second time. There are a few instances at the moment where committees have made one or two requests and we will have to see what happens over the next few months.*
>
> *Sessional Order 40 outlines the process by which documents can be ordered and received and privilege claims made, and also includes the process by which members may dispute claims of privilege made over documents returned. The provisions are based on those of standing order 52.*

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189 Mr David Blunt, op. cit., *Submission #12*, pp. 4-5.

190 Parliament of New South Wales, *Hansard — Legislative Council,* 8 May 2019, p.50.

… It is intended only as a last resort, when the usual processes of inviting or requesting witnesses to appear and provide documents have failed.[191]

[191] Mr David Blunt, op.cit., *Submission #12,* pp. 5-6.

LEGISLATIVE COUNCIL OF THE VICTORIAN PARLIAMENT

Standing Order – Chapter 11 – Production of Documents, Committees

This section examines the Victorian Legislative Council Standing Order *Chapter 11 – Production of Documents,* which includes an independent arbitration mechanism, however, this mechanism is yet to be used.

Committees of the Victorian Legislative Council are also explored in relation to the production of documents. Committees have the power to call for the production of documents but non-compliance can only be dealt with by the Victorian Legislative Council. Guidelines are in place to assist when claims of privilege may arise within committee proceedings.

Source of the power to order production of documents

The Victorian Constitution was proclaimed in 1855 and is now set out in the *Constitution Act 1975* (Vic). Section 19 of the Act provides that the Victorian Legislative Council and the Legislative Assembly have the same privileges, immunities and powers as the House of Commons in 1855.[192]

Nineteenth century editions of Erskine May's text on parliamentary practice confirm that the House of Commons had the power to order the production of documents in 1855.[193]

Background to and introduction of Standing Order

The 56th Parliament was the first Parliament under the reconstituted format of the Legislative Council. Clerk of the Victorian Legislative Council Mr Andrew Young in his submission explained what changes occurred:

> *Following changes to the Victorian Constitution in 2003, a proportional representation voting system was introduced to the Legislative Council for the 2006 state election. This led to a non-government controlled Upper House in the 56th Parliament.*[194]

In this reconstituted 56th Parliament, a motion was agreed to establishing a sessional order formalising a process to regulate the existing power of the Council to order the production of documents in the House.[195]

Mr Young in his submission stated that the Leader of the Opposition, when moving the motion, argued:

- *power already exists under the Constitution*
- *Sessional Order was formalising a mechanism to regulate this existing power*
- *power already exists in Standing Orders in relation to Committees (in that "a select*

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192 Parliament of Victoria (2017) *'The Constitution'*, Parliament of Victoria website; A. Walsh (2010) 'Orders for Documents: An Examination of the Powers of the Legislative Council of Victoria', *Australasian Parliamentary Review*, vol. 25, no. 1, p. 194.

193 Walsh (2010) op. cit., pp. 195-196; Victorian Legislative Council (2016) *Victoria Legislative Council Hansard, 9 March,* Parliament of Victoria website, p. 1040.

194 Mr Andrew Young, Clerk of the Victorian Legislative Council, *Submission # 8,* p. 1.

195 Ibid.

committee may send for persons, documents and other things").[196]

In evidence to the Committee, Mr Wayne Tunnecliffe, who was Clerk at the time of adoption of the sessional order explained why the sessional order was agreed to as follows:

> *… I think it is significant to note that the Sessional Order came about because the government of the time did not have a majority in the Legislative Council. I think, from memory it was 19 government to 21 non-government. This was the first parliament under the reconstituted format of the Legislative Council.*
>
> *… I think it is fair to say that probably if the government had a majority, there probably would not have been the move to do it with the enthusiasm that the non-government parties showed. … it was introduced unanimously, but there has been a great deal of contention and dispute ever since. I know that the committee is principally looking at the best means to resolve disputes. Victoria, as the committee is aware, has provision for an independent arbiter, but the position in 2019 is pretty much exactly the same as it was back in 2007 or thereabouts, when I was Clerk.*[197]

Further, Mr Tunnecliffe provided information as to how the sessional order was adopted as a standing order as follows:

> *The move to introduce a sessional order for the production of documents was in 2007. At the time, the then leader of the opposition who moved the motion argued that the power already existed in the constitution. That is a view I share. As I think the committee is aware, in Victoria, the powers of the House of Commons as at 21 July 1855, in relation to the privilege, powers and immunities of the Houses, do apply. There is no explicit constitutional provision other than that.*
>
> *In relation to select committees and standing committees, they have had the power to call for persons, papers and documents for as long as I can remember. There was certainly a view that the Council already had the power to require documents, and that the move to introduce a sessional order was the first step in formalising this process. As is often the case with something new, it is introduced firstly as a sessional order and the privileges committee will have a look at it down the track and often, ultimately, the sessional order then becomes a standing order. That, as you know, is certainly the case at the moment.*
>
> *This was the first formalisation of the rules underpinning the production of documents in the Council and it remained for the rest of that parliament, that is the Fifty-sixth Parliament. In the Fifty-seventh Parliament there were no standing or sessional orders for the production of documents, none at all. Nevertheless, the Council agreed to 38 orders for documents, based on the inherent right of the Council under section 19 of the Constitution Act I referred to earlier, to produce documents. At the end of the Fifty-seventh Parliament, the leader of the government moved for the introduction of the new*

[196] Mr Andrew Young, op. cit., p. 1.
[197] Mr Wayne Tunnecliffe, op. cit., pp. 34-35.

chapter in the standing orders for production of documents, which was agreed to, and that is still in the standing orders to this day.[198]

The Victorian Standing Order was modelled on the New South Wales Legislative Council *Standing Order 52 – Production of Documents.* Mr Tunnecliffe stated:

Back in 2007, when the sessional order was first introduced, we had a look at models for resolving disputes because it is inevitable with things of this nature that government and non-government parties will not necessarily take the same view. The New South Wales model, which provided for the independent arbiter, was particularly attractive because, as I heard you say before, Sir Laurence Street had been the arbiter. He was previously the chief justice of New South Wales and he had been the independent arbiter for quite some time. He had been particularly busy because the House up there was ordering the production of documents quite regularly. He also had a great deal of - and I will use Mr Rich-Phillips' word - credibility, apart from the fact that he was independent, he was impartial, he was a former chief justice with a significant knowledge of the constitution and a pretty good knowledge of parliamentary practice. With him in charge, the system worked very well. That was the advice we had.

We consulted with the Clerk and others in the New South Wales Legislative Council and they certainly recommended that approach. No-one else had a simpler model, not even the Senate…

In New South Wales, that system had worked for some time and, as far as I know, was accepted by all sides of the House as being a good system for the resolution of issues…[199]

The Victorian Standing Order differs to the New South Wales Legislative Council Standing Order 52 where-by the mover of the motion for the order is the only member who can view the document and dispute the claim of privilege. Mr Tunnecliffe explained why the Victorian Legislative Council adopted this process:

I think the best way to describe it is that it was the cautious approach. We were certainly, as I said earlier, attracted to the New South Wales model. As you say, there'd been no leaks. I think there'd been no leaks because there was acceptance across both sides of the House that this was a good system. In Victoria we were introducing something that was quite new. It was certainly suggested by some people that confidentiality could be compromised and that almost, I suppose, a compromise position that might be acceptable to all sides of the House was that you limit the disclosure to the mover of the motion rather than everybody.[200]

Production of Documents processes

Mr Young in his submission described the processes that *Chapter 11 – Production of Documents* prescribe as follows:

198 Mr Wayne Tunnecliffe, op. cit., p. 35.
199 Ibid., pp. 35-36.
200 Ibid., p. 41.

1. *The House agrees to a motion. The order must contain a date for the provision of the documents. Documents must actually exist at the time of the request.*
2. *The Clerk advises the Secretary of the Department of Premier and Cabinet of the terms of the resolution.*
3. *A preliminary reply without documents is a common response (for instance, the Government indicating that they require additional time to access the terms of the request).*
4. *Documents may or may not be received by the Clerk. All return to orders are tabled in the House (a return to order includes any correspondence relating to the order).*
5. *All returns must include an indexed list of all the documents tabled, showing the date of creation of the document, a description of the document and the author of the document (Standing Order 11.02(3)).*

Claims of Executive privilege, appointment of legal arbiter

Standing Order 11.03 outlines the process for claims of Executive privilege. It outlines that where Executive privilege is claimed, the documents should be delivered to the Clerk and they will be available for examination by the mover of the motion only. They may not be published or copied without an order of the Council. The mover may dispute the claim in writing and the Clerk may release documents to an independent legal arbiter to assess the claim of privilege within one week.

Standing Orders 11.04 and 11.05 discuss the role of an independent legal arbiter in the process. The arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge. The arbiter's report must be lodged with the Clerk and made available only to members of the Council.[201]

See Appendix 5 – Chapter 11 – Production of Documents.

Mr Young in his submission to the Committee provided the following Table which included the number of orders for production of documents agreed to by the House in each Parliament and the total number of documents produced in relation to these orders.

Parliament	***Original orders***	***Documents produced in full and/or in part***
56th	*39*	*1382*
57th	*38*	*467*
58th	*35*	*1586*
59th (2018 -)	*5*	*133*

202

No Government since the introduction of the sessional/standing order has fully complied to produce documents that were subject to a claim of privilege to enable the legal arbitration process to be practiced. Mr Young in his submission stated:

[201] Mr Andrew Young, op. cit, pp. 1-2.
[202] Ibid., p. 2.

Governments have adopted the practice of claiming Executive privilege and withholding the material subject to their claim, rather than following the process set out in Standing Orders. Given this procedure has not been utilised in Victoria, how it would transpire in practice is unknown.

The current Government provided detailed advice setting out its view of how Executive privilege claims should be made and the grounds that may constitute such claims.. This advice was conveyed to the House as correspondence and formed part of a return to a specific order. The Government has continually referred to this letter when making subsequent Executive privilege claims.

I do not agree with the Attorney-General's assertion in the attached letter that the Council's powers are trumped by a Government's claim of Executive privilege. While there are legitimate reasons to withhold certain documents from publication, the powers and privileges of the Council mean that it is for the House to decide this on a case-by-case basis, aided by an independent arbiter.

This practice, of claiming Executive privilege and withholding documents, is problematic as there is no independent assessment as contemplated by the House, meaning the Government regards itself as the sole arbiter of its own claim.[203]

See Appendix 6 – Attorney General Correspondence dated 14 April 2015.

Resolving disputes arising from the non-compliance to orders for production of documents

There is no agreed upon process in the House to resolve disputes around non-production of documents. Mr Young stated in his submission:

> ***The House has no agreed upon process to resolve disputes that arise from production of documents requests.*** *Some common practices have emerged in both the House and in Committees, however, there has been no formalised agreement of these.*
>
> ***For document requests in the House****, motions that escalate the matter have been common. Following an initial documents request which has not been complied with, further motions have been moved and debated in the House that have:*
> - *reasserted the power of the House to request documents*
> - *required the documents by a new date*
> - *censured the Leader of the Government and/or found them guilty of contempt*
> - *suspended the Leader of the Government for a set period of time.* [204]

The Victorian Legislative Council's submission provided instances of these practices in the House and its committees. In 2016, the Leader of the Government in the Victorian Legislative Council, the Hon Gavin Jennings MLC, was suspended from the Council for six months. Mr Young commented on the events in his submission:

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[203] Mr Andrew Young, op. cit., p. 2.
[204] Ibid., pp. p. 3.

During 2015 and early 2016, 14 orders for the production of documents were made in the Council, with the Government providing some documents requested in full and claiming Executive privilege over others. Some documents were provided in part (with redactions) and others were not provided at all.

On 25 May 2016, the Council agreed to a motion:

1. *noting the continuing failure of the Leader of the Government to comply with production of documents orders*
2. *noting the failure of the Government to comply with the further resolution of the Council reaffirming the requirement for the Leader of the Government to table the documents*
3. *reaffirming the privileges, immunities and powers conferred on the House by section 19 of the Constitution Act 1975, which includes the right to require the production of documents, and the power to make Standing Orders under section 43 of that Act*
4. *finding the Leader of the Government* ***guilty of a contempt*** *of the Council for his failure, on behalf of the Government, to comply, to the satisfaction of the Council, with the resolutions of the Council*
5. ***suspending the Leader of the Government*** *from the service of the Council from 12 noon on the next Tuesday the Council sits following the adoption of the resolution* ***for six months***
6. ***requiring a further resolution of the House to 'lift the suspension'*** *should the specified documents be subsequently lodged with the Clerk.*

…

During the suspension, the major parties discussed mechanisms for appointing a legal arbiter, however, agreement was not reached.[205]

Further, Mr Young stated:

… The House itself has a significant practice, developed over the past thirteen years, of ordering documents and reasserting its power to adjudicate any claims of Executive privilege. The House, through Chapter Eleven of its Standing Orders has chosen to use an independent arbiter for this purpose. The defiance of this Standing Order by successive governments has led to a clear and consistent view of the House that this is a contempt of the House, made evident by its actions to suspend Leaders of the Government.[206]

Effectiveness

Mr Tunnecliffe described the Standing Order as being partially successful:

I think it is fair to say that the order for the production of documents has certainly been partially successful because there is at least a mechanism for calling for documents. A number of documents were being provided during my time as Clerk and are still being provided. If it comes to the crunch, there is still no effective process in Victoria for

[205] Mr Andrew Young, op. cit., pp. 5-6.
[206] Ibid., p. 7.

resolving disputes. To that extent, I do not know how useful we can be, except in my view, the independent arbiter is still potentially the best way of resolving the issue. It has been accepted for a long time in New South Wales, but the culture in Victoria seems to be quite different.

I know in the Legislative Council in New South Wales, back in the early 1900s almost running through, I think, until the 1960s or 1970s, it was quite routine for the House to call for documents. The practice was then not used for a while, then, of course, in later years, it has been used regularly. That was not the case in Victoria. Whilst the House had the power to require documents to be tabled, most of the documents that were tabled were relatively routine. Ministers can be called upon to table documents at any time by way of a return to order but there were no actual orders for the executive to produce the document.[207]

Former Minister and current MLC in the Victorian Legislative Council, the Hon Gordon Rich-Phillips MLC described the process as being a political process rather than a legal or constitutional process:

We really got to a situation of the parliament, or the parliamentary committee, asserting that it had the authority to ask for documents and the government denying that. Frankly, that is a political call of government.

Probably the best demonstration of that is to look at the fact that our Audit Act makes it very clear that the Auditor-General can call for whatever documents he wants. Under the Audit Act, any claim of privilege, any claim of cabinet-in-confidence, is overridden by the Audit Act. That has not been disputed. In fact, those provisions were changed by an amendment to the Audit Act this year, brought in by the government but those basic tenets still remain.

That is important because the Audit Act and the Auditor-General, as an officer of the parliament, is subordinate to the parliament. The parliament could not give the Auditor-General the power to obtain cabinet documents if it did not itself have that power. By the very existence of the Audit Act, which makes it clear the Auditor-General can access Cabinet documents, and that overrides claims of executive privilege or cabinet-in-confidence, and the fact that the government has accepted that and has provided documents as the Auditor-General has required them over the years, and in the most recent interpretation of the act as well…[208]

The Hon Gordon Rich-Phillips MLC stated:

… It comes back to the basic politics of the way governments operate, their interests and the relationship between government and parliament.

The reality, the current government may dispute it, my colleagues may dispute it, but, for members of a government, parliament is largely a peripheral issue. Most ministers

[207] Mr Wayne Tunnecliffe, op. cit., pp. 36-37.
[208] The Hon Gordon Rich-Phillips MLC, op. cit., pp. 15-16.

don't bring a lot of legislation through parliament. The Attorney-General does but most ministers don't. Ministers are charged with administering their departments and the acts of parliament that are assigned to them. The vast majority of their work is not related to parliament. Parliament is, in many respects, a distraction for a minister. They have to attend 30 days, 50 days, whatever. They front up to question time. Most of the rest of the time, unless they have a bill themselves, they'll be in their office working on their ministerial administration. Parliament is not front and centre for ministers unless they have a lot of legislation to put through, so it's a distraction. It's a risk to the extent that its exposure. When a committee or the Legislative Council suddenly bowls up with an audit, they want all these documents related to something in your portfolio, there's going to be a natural reluctance or resistant to expose the minister, to expose themselves or their department to that scrutiny.

***CHAIR** - Do you believe that governments, current and in the past, accept that the executive is answerable to the parliament and the parliament has every right to ask for that information?*

***Mr RICH-PHILLIPS -** That is a good question because it goes to the fundamental issue we are talking about. In theory, yes, but in practice there is resistance. The reality is a government can be far more nimble in the way in which it responds to orders for documents than the House can be in responding to the government. That is something we particularly find in the Legislative Council in Victoria. It is a House of 40 members. Currently, the government is close to a majority but doesn't have a majority, it only requires two crossbench members. Opposition has 11 of 40. There are 11 crossbench members and the rest are government. The government is close to a majority. The House moves much more slowly and even in the previous parliament, where the numbers were closely balanced between government and opposition, neither had a majority. They still needed to work with the crossbenchers.*

The government can move far more nimbly in dealing with documents and requests for documents and refusing those than the House can respond, which I think is part of the problem with documents orders. If it was a court, for example, that wanted discovery of documents, a judge presiding in a court can move very quickly in making orders and enforcing those orders. A House can't.[209]

Mr Young also raised concerns about whether the arbitration process in practice would be as effective as the New South Wales arbitration process:

There may be a view that the Victorian model ensures a lesser risk of breach of confidentiality. On the other hand, I am concerned that the Victorian model, if the arbiter process were ever activated, may not be as effective as New South Wales. In both Houses, it remains the case that the Arbiter reports to the House and it remains for the House to decide if it agrees with the Arbiter and to proceed or not at its own discretion. If an Arbiter's report is cautious in how much detail it provides because it could be published, the Members of the House, other than the mover of the motion, may not be well informed in deciding to accept or vary from the Arbiter's view.

[209] The Hon Gordon Rich-Phillips MLC, *op. cit.,* p. 20.

There remains one obvious, but highly contentious option and that is to prescribe in Standing Orders that the Arbiter's decision is binding. This would raise many questions about the rightful place of the House as the ultimate arbiter of the exercise of its powers.[210]

Mr Tunnecliffe stated:

I think I agree with Andrew Young's comment; I think if you accept the principle that members should be as informed as possible in debating an issue, it is a potential shortcoming in the system if all you have in front of you is the independent arbiter's report. I tend to agree with that. We are speaking a bit hypothetically because we haven't seen it work. We have never even thought about whether the arbiter should have guidelines as to what they can put in the report. I don't know what they do in New South Wales. I think they have pretty much left it to the arbiter. Of course all members can see - any member who is interested - the document anyway. I accept that is a possible problem.

It also raises the other issue - I know I am digressing - as to whether or not the independent arbiter's report should be final.

...

There are two sides to that argument. If you take the view that it has to be a matter for the House to determine, then you don't accept the view that the determination of a matter of this nature should be given to an outside body. On the other hand, if you have appointed an independent arbiter on the basis that they are independent, skilled, expert, there is an argument for saying, 'Their report should be final', and I have to say I don't really have a firm view as to which is the better way to go there.[211]

Committees of the Victorian Legislative Council

Chapter 23.19 of the Victorian Legislative Council Standing Orders provides for Victorian Legislative Council committees to send for documents as follows:

23.19 Power to send for persons, documents and other things. A committee may send for persons, documents and other things.[212]

The Victorian Legislative Council's Committees do not have the power to deal with non-compliance over the production of documents, Mr Young in his submission stated:

In Victoria, a parliamentary committee has the unequivocal power to summons both persons and documents.

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210 Mr Andrew Young, op. cit., pp. 7-8.

211 Mr Wayne Tunnecliffe, op. cit. p. 42.

212 Victorian Legislative Council, *Legislative Council Standing Orders* – *Chapter 23 – Council Committees*, Parliament of Victoria website, accessed May 2019.

However, if the Executive or any other person refuses to comply with a summons, the ultimate place for the dispute to be resolved is in the House…[213]

Further, Mr Young stated:

> ***For document requests by Parliamentary Committees**, where the Government has refused initial requests and attempts to reach a negotiated solution have failed, practice has usually involved the Committee issuing a summons for the documents. Where this action fails, the Committee's strongest avenue is to report back to the House and/or utilise a House procedure to progress the process.*[214]

A summary of the processes followed by the Joint Investigatory Committee — Inquiry into the CFA Training College at Fiskville when dealing with non-compliance to requested documents is provided in Mr Young's submission as follows:

> *On the first sitting day of the 58th Parliament, the Government referred an inquiry relating to the CFA Training College at Fiskville to a Joint Investigatory Committee. Part of the terms of reference required a "historical study" of what happened at the College including "a study of the role of past and present executive management at Fiskville". To achieve this, the Committee sought access to 40 years' worth of documents.*
>
> *In November 2015, the Committee tabled a Special report on production of documents. The purpose of the report was to notify the Parliament that the Committee was experiencing obstacles in its Inquiry relating to the non-disclosure of documents requested from the CFA by summons under the Parliamentary Committees Act 2003. The documents requested involved CFA Board papers which were deemed essential in assessing the executive management at Fiskville.*
>
> *A summary of the actions taken by the Committee to request and resolve the non-production of documents dispute are outlined below. Further details can be found in the reports tabled by the Committee.*
>
> *The Committee:*
>
> - *Requested documents, summonsed documents, affirmed the right of the Committee to call for documents and advised that it was for the Committee to assess the claims of Executive privilege over documents*
> - *Took a variety of other actions, including —*
> - *writing to the Premier*
> - *reporting publicly to Parliament (via the special report described above)*
> - *questioning the CFA about production of documents at public hearings*
> - *detailing the CFAs production of documents process in the final report (see pages 39 to 57 of the Committee's final report)*
> - *recommending changes to the Government's guidelines to agencies for cooperating with committee inquiries*
> - *Negotiated other solutions regarding documents, for example, the Committee*

[213] Mr Andrew Young, op. cit., p. 1.
[214] Ibid. p. 3.

undertook not to disclose documents or their contents that were unrelated to Fiskville and not to refer to any content in documents at public hearings or in any report that could prejudice court proceedings.[215]

Lecturer in Law at La Trobe University Dr Anita McKay and Independent Researcher Mr John Aliferis in their joint submission to the Committee provided information in relation to the Government's guidelines, they stated:

The challenges faced by that Committee in accessing documents led them to include a recommendation in their final report that the government amend the guidelines for how government agencies interact with parliamentary committees. The guidelines were subsequently substantially revised and our article evaluates the revisions, and concludes that while they are a significant improvement, the revised guidelines may not completely solve the problems faced during the Fiskville inquiry. …[216]

See Appendix 7 –Guidelines for appearing before and producing documents to Victorian inquiries, December 2017.

Dr Anita McKay suggested the following reforms:

I think having a combination of guidance in place, for want of a better word. … having the guidelines is useful, having a standing order is useful; probably the only other addition that could be made is to amend the legislation that allows parliamentary committees to call for documents.

There are probably differing views about the advantages and disadvantages of putting more detail into that legislation because some would say it is a very broad power and that leaving it broad would be better. I think there could be some scope for adding more detail and that is where I have looked at the Audit Act and its provisions which were amended in June this year. They are quite detailed now and refer to the Auditor-General being able to serve an information-gathering notice. They clarify that can include access to cabinet-in-confidence documents. There is also an offence provision, so it is an offence not to comply; so, whether introducing some sort of legislative offence would be helpful.
…

Those types of offence provisions probably do not lead to any criminal charges in reality, but they are there to act as a deterrent. There is an offence provision in the Commonwealth's Royal Commissions Act, section 3. That makes it an offence to refuse to comply with a royal commissioner's request for someone to appear or to provide a document. That is just another example of an offence. But I do not know that that actually gets used in practice to prosecute. It increases the indication of how serious it is to not provide the document.[217]

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[215] Mr Andrew Young, op. cit., p. 6.

[216] Dr Anita McKay, Lecturer in Law and Mr John Aliferis, Independent Researcher, La Trobe Law School, La Trobe University, *Submission #1,* 28 June 2019, p. 1.

[217] Dr Anita McKay, Lecturer in Law, La Trobe Law School, La Trobe University, *Transcript of Evidence,* 25 September 2019, p. 9.

The Committee noted in evidence received from the Tasmanian Auditor-General, Mr Rod Whitehead that the *Audit Act 2008* does not prescribe a specific power for the Auditor-General to access 'cabinet documents':

> ***Mr DEAN*** *- Mr Whitehead, your ability to access cabinet documents is not provided for within your act. Does it specifically say the term 'cabinet documents'?*
>
> ***Mr WHITEHEAD*** *- No.*
>
> ***Mr DEAN*** *- What does it say?*
>
> ***Mr WHITEHEAD*** *- Within my act it says that I have a broad power to demand people to produce documents and other records for me. I would make that request in writing and it says that if someone fails to comply with that direction without having a reasonable excuse, they can be guilty of an offence. The fact that the act contemplates that there might be a circumstance where there is a reasonable excuse does contemplate the fact that there will be situations where they don't have to or it's not appropriate for them to provide that information. Certainly, documents that might be subject to public interest immunity would be an example where there would be a reasonable excuse not to have to provide documents.*[218]

[218] Mr Rod Whitehead, Auditor-General, Tasmanian Audit Office, *Transcript of Evidence,* 6 September 2019, p. 49.

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY PARLIAMENT

Standing Order 213A – Order for The Production of Documents held by the Executive

Committees – Continuing Resolutions — Public Interest Immunity — 8B

This section examines the ACT Legislative Assembly's *Standing Order 213A – Order for the production of documents held by the Executive.* The Standing Order includes an arbitration mechanism for documents subject to a claim of privilege, however, unlike the New South Wales and the Victorian Legislative Council Standing Orders, this standing order differs in that the power to resolve claims of privilege is solely provisioned with the independent legal arbiter.

In addition, this section examines committees of the Assembly. No mechanism exists for committees to resolve disputes, this has to be dealt with by the Assembly. To provide guidance to committees and governments for when claims of public interest immunity arise, there exists: *Continuing Resolutions - Public Interest Immunity – 8B*.

Source of power to order the production of documents

The source of power to order the production of documents in the ACT Legislative Assembly and its committees derives from the *Australian Capital Territory (Self-Government) Act 1988*. Section 24(3) prescribes:

> *Until the Assembly makes a law with respect of its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.* [219]

Background

In February 2009, *Standing Order 213A — Order for the production of documents held by the Executive* was adopted. Clerk of the ACT Legislative Assembly, Mr Tom Duncan provided information as to how and why this standing order was agreed to:

> *… the Sixth Assembly, which was the only majority Assembly, the government commissioned what they called a functional review. They got some outside person to review the whole of the functions of government. As a consequence of that, some big changes were made. The government closed 23 schools in the ACT which, even though were small, 23 schools is a lot of schools to close, and all based on this functional review.*
>
> *The Greens and the opposition were very keen to see this functional review and, in the Sixth Assembly, they called for that document to be made available to them and the Executive refused to provide it. When the Seventh Assembly was elected and the Greens held the balance of power, one of the first things they did as part of their procedural reforms was that they wanted a standing order for the production of documents. … they*

[219] *Australian Capital Territory (Self Government) Act 1998.*

adopted that standing order and the very next item of business was calling on that document…[220]

On 10 December 2008, a motion was moved by the opposition requesting the functional review be tabled by the end of the sitting day.[221] The Greens moved an amendment to the motion that if the functional review was not tabled by the end of the sitting day that:

> ***Ms HUNTER -*** *… this Assembly undertakes to refer the question of the public release of the Strategic and Functional Review of the ACT Public Sector and Services to the independent legal arbiter to be created by this Assembly during the February sitting.*[222]

The motion, as amended, was agreed to.[223]

The Attorney-General, Mr Corbell who voted for this amendment advised that the government and Greens had agreed that the New South Wales Legislative Council Standing Order 52 would be the best mechanism moving forward in resolving the dispute over the release of the functional review.[224]

On 12 February 2009, the motion moved by the Government for the adoption of a possible standing order did not include the same processes as the New South Wales Legislative Council Standing Order 52, the Government and Greens views had changed. During debate on the motion, the opposition moved amendments to the motion replicating the wording included in New South Wales Legislative Council Standing Order 52. [225]

The Attorney-General, Mr Corbell commented on these amendments proposed by the opposition as follows:

> *The reason why the Government has changed its position is because there have been further discussions between the government and the crossbench members on this matter. …*
>
> *…*
>
> *The government recognises that there would be a range of issues associated with including the mechanism that Mrs Dunne proposed, in particular the mechanism that provides for documents which may be found to be privileged being viewed by members of this place. Obviously, I am sure, members of the opposition would be very keen to view*

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220 Mr Tom Duncan, Clerk of the Legislative Assembly for the ACT, *Transcript of Evidence,* 1 November 2019, p. 8.

221 Mr Seselja, Leader of the Opposition, *Strategic and Functional Review of the ACT Public Sector and Services,* Debates Weekly Hansard, 7th Assembly, Legislative Assembly for the ACT, 10 December 2008, p. 216.

222 Ms Hunter, Parliamentary Convenor, ACT Greens, *Strategic and Functional Review of the ACT Public Sector and Services,* Debates Weekly Hansard, 7th Assembly, Legislative Assembly for the ACT, 10 December 2008, pp. 223-224.

223 The Assembly voted, *Strategic and Functional Review of the ACT Public Sector and Services,* Debates Weekly Hansard, 7th Assembly, Legislative Assembly for the ACT, 10 December 2008, p. 239.

224 Mr Corbell, Attorney-General, *Strategic and Functional Review of the ACT Public Sector and Services,* Debates Weekly Hansard, 7th Assembly, Legislative Assembly for the ACT, 10 December 2008, p. 232.

225 Mrs Dunne, *Executive Documents—release, Proposed new temporary order,* Debates Weekly Hansard, 7th Assembly, Legislative Assembly for the ACT, 12 February 2009, p. 793.

documents that had been found to be privileged whilst they were held by the clerk for the duration of the arbitration by the independent arbiter.

But I think the point is well made, and I imagine Mr Rattenbury will raise this in his comments later in the debate, that that does create some fairly obscure and unusual circumstances. It is recognised that if a document is claimed to attract some form of privilege and that privilege is waived, even in the most minor of circumstances, the privilege is waived in an ongoing manner. Once privilege is waived, privilege is waived. That is, I guess, the quandary that Mrs Dunne's amendment presents to us, that the claim of privilege may be upheld, but it will have been waived to allow non-executive members to view the document for the period of time that that arbitration is occurring.

That is indeed an unusual circumstance. It is the circumstance in the New South Wales upper house, that is true, and that is why the government proposed the mechanism, consistent with the agreement between us and the Greens, to simply adopt the mechanism in the New South Wales upper house. But we do have to have regard to mechanisms that are suitable for this place and which members in this place are comfortable with. I agree that it does create some unusual circumstances. It was indeed the matter that the government had most concern over in our own deliberations. Given that the concern is now shared … by the Greens, it is appropriate that we respond to that accordingly.

So the government will not be supporting the amendment proposed by Mrs Dunne, for those reasons. I think it is important to reiterate that this amendment is not the most important part of the standing order. The most important part of the standing order is that there is an independent arbiter to determine whether or not a claim of executive privilege is valid and that the arbiter's decision is binding on all parties in this place.[226]

Ms Hunter, Parliamentary Convenor, ACT Greens stated:

This significant reform is modelled on the New South Wales Legislative Council reform following the Egan v Willis case. Since the introduction of the New South Wales Legislative Council standing order, the council has reasonably frequently used its power to call for papers and a range of issues have been considered by the independent arbiter there. In fact, this new Assembly standing order is actually better than the New South Wales version. It creates a clearer and, we feel, very appropriate process to resolve contentious issues over the legitimacy of government claims of executive privilege. Given the controversy over the release of the strategic and functional review, it is particularly appropriate that the Assembly develop a mechanism and continuing means to resolve such disputes.

…

Whilst it will not overcome the problems experienced under majority government we hope that it is part of a cultural shift towards disclosure and openness and away from

[226] Mr Corbell, Attorney-General, *Executive Documents—release, Proposed new temporary order,* Debates Weekly Hansard, 7th Assembly, Legislative Assembly for the ACT, 12 February 2009, pp. 795-796.

government secrecy. If the people of the ACT are not aware of the basis upon which decisions are made they cannot fairly judge the competence of the government and therefore representative democracy suffers.

…

This uncertainty necessitates independent arbitration. It is fundamentally offensive to our system of government to have a person affected by a decision making the decision. To rely on the government or the cabinet to make such a decision that manifestly affects them is simply not appropriate. A determination on the facts of the particular case is required and it is appropriate that an independent arbiter and not the government make the determination.

…

The Greens recognise that certain privileges are in the public interest and that it is important that they be maintained. Whilst we would argue that this privilege only applies to a very limited class of documents, that does not mean that it should not be properly protected. We accept that there are documents where it is appropriate that confidentiality is maintained. It is not appropriate that those with a vested interest in the outcome, be it the government, the opposition or the crossbench, be responsible for the determinations of privilege or, indeed, as this amendment provides for, be given access to the document before such a claim can be objectively assessed.

As a society we entrust independent arbiters to assess the validity of the competing claims according to an established body of law, and there is a body of international, as well as Australian jurisprudence, that clearly establishes the role of courts and tribunals in assessing these types of claims. The person appointed as legal arbiter will be suitably well qualified to properly resolve disputes and provide defensible and impartial reasons for their decision. The Greens believe that this is the most appropriate way to resolve these disputes. It is not appropriate that these documents be viewed if they should legitimately be protected by privilege. If there is no valid claim of privilege members and the public will be able to view the documents. If there is a valid claim then it is appropriate that members do not see the documents.[227]

The amendments moved by the opposition to adopt a standing order to replicate the New South Wales Legislative Council Standing Order 52 did not pass.[228]

Standing Order 213(A) was modelled on the New South Wales Legislative Council Standing Order 52. Mr Duncan explained the main difference between the two standing orders, he stated:

We didn't adopt the full NSW model in that once the documents are provided by the Executive, it goes straight to the independent legal arbiter and members can't access the documents, whereas in the system that operates in NSW, they actually get to see the

[227] Ms Hunter, Parliamentary Convenor, ACT Greens, *Executive documents—release, Proposed new temporary order, Debates* Weekly Hansard, Seventh Assembly, Legislative Assembly for the ACT, 12 February 2009, pp. 797-800.

[228] The Assembly voted, *Executive documents—release, Proposed new temporary order, Debates* Weekly Hansard, Seventh Assembly, Legislative Assembly for the ACT, 12 February 2009, p. 803.

documents. Here in the ACT, they don't see the documents unless the independent legal arbiter doesn't uphold the claim of privilege made by the Executive.

There was some discussion at the outset when we adopted the standing order as to whether we should adopt the NSW model in full. We have a version of the NSW model but not quite as transparent and open in terms of members being able to see the documents that have been provided.[229]

Standing Order 213(A) processes

The main processes prescribed under Standing Order 213(A) are detailed as follows. Standing Order 213(A) is provided at Appendix 8.

Submissions to the independent legal arbiter

Standing Order 213(A)(h) stated:

The Clerk is also authorised to provide to the independent legal arbiter and to all Members, submissions from any Member in relation to the claim of privilege.

Mr Duncan explained how this provision allows for submissions from both parties to be provided to the independent legal arbiter:

***Mr DUNCAN** - ... I can say the first one was moved the day we adopted the standing order. We adopted the standing order and then the Assembly called for a document straight away. No submissions were made by other members of the Executive; they simply provided me with the document and it went off to the retired Supreme Court judge.*

...

I think the second one started off where the government, when it provided the document, also provided a submission saying why the document should not be made public. I do not think the member who disputed the claim was able, in the short time available, to get her own submission.

I think in the third and fourth claims, both the Executive and the member who was disputing the claim were able to provide a submission arguing their respective cases about whether the document should be made public or whether the claim of privilege should be maintained.

There is provision for them to do that, but, again, there is a time constraint - the arbiter has to do it within 10 calendar days. ...

***Ms WEBB** - If there were submissions from the Government elaborating further in that interaction with the legal arbiter, would they be made available too, to the members?*

[229] Mr Tom Duncan, op. cit., pp. 1-2.

Mr DUNCAN *- Yes, absolutely, for both sides. Both sides are able to make submissions and they are made available to the other members.*[230]

Independent legal arbiters qualifications

Standing Order 213(A)(i) stated:

> *The independent legal arbiter is to be appointed by the Speaker and must be a retired Supreme Court, Federal Court or High Court Judge.*

Mr Duncan provided detail on the independent legal arbiters that was so far utilised:

> *The first two were a retired chief justice of the New South Wales Supreme Court and a retired Supreme Court judge of New South Wales. Both had been fairly regularly used by the New South Wales Upper House and so we tapped into their experience. They were well versed in arbitrating these sorts of decisions. The third one we used is a recently retired ACT Supreme Court justice; he'd only retired about six months beforehand. I don't know what his experience was in arbitration, but he is certainly a very experienced Supreme Court judge in the ACT.*[231]

Further, Mr Duncan detailed the costs incurred for the provision of this process:

> *Luckily, we've only had the four independent legal arbiters so that's one thing. Broadly speaking, the cost is between $6000 and $10 000 each time. We enter into an arrangement with these retired judges who have a daily or an hourly rate. Luckily for us, because the documents, haven't been voluminous, as I've indicated, it hasn't taken them a long time to go through the documents and then make their assessments. It hasn't been too costly an exercise for us to undertake since the implementation of this standing order.*[232]

Reports of the independent legal arbiter

Standing Order 213(A)(j) stated:

> *A report from the independent legal arbiter is to be lodged with the Clerk and:*
> *(i) made available only to Members of the Assembly; and*
> *(ii) not published or copied without an order of the Assembly.*

In his submission, Mr Duncan advised the Committee:

> *This process has been invoked on three occasions in the current Assembly. On all three occasions, the Speaker tabled the Report of the Independent Arbiter and a motion was passed authorising the publication of those reports. …*[233]

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230 Mr Tom Duncan, op. cit., *Transcript of Evidence,* p. 5.
231 Ibid., p. 2.
232 Ibid., p. 4.
233 Mr Tom Duncan, op. cit., *Submission #2,* 3 July 2019, p. 2.

Further, Mr Duncan's submission provided details on the decisions by the independent legal arbiter, which are briefly outlined below:

1. *The Chief Minister claimed a privilege over a two-volume report, the ACT Health Infrastructure Asset on Condition report and Minor Works Priorities, on the basis that it:*

   "was prepared solely to Cabinet and decision by Cabinet. It was presented to Cabinet in circumstances of complete confidentiality and its contents underpinned the choices presented to Cabinet and the substantive reasoning upon which the decisions of Cabinet were based. Disclosure of the Report will inevitably disclose the reasoning that Cabinet adopted in making its decisions."

Whilst acknowledging that the documents could disclose the position adopted by a single minister in such a ways as to lead to the identification of the competing stances taken by ministers in an ensuing Cabinet decision, and could to a degree, disclose the longer term strategies of the present government regarding health, the independent legal arbiter did not uphold the claim of privilege.

2. *The Chief Minister claimed privilege over a number of documents prepared by the Public Housing Renewal Steering Committee because, among other things, the committee's deliberations were directed to the task of Cabinet in its oversight and approval of the Public Housing Renewal Program, and to the preparation of business cases for approval by the portfolio minister and the consideration of Cabinet for decisions.*

In this case, the independent legal arbiter upheld the claim of privilege in respect of the documents that were produced in response to the Assembly's resolution.

3. *The Assembly was advised that the Executive was not able to compel the production of certain Icon Water contracts because they were not in the Executive's possession. A more comprehensive motion was moved to direct Icon Water to produce the documents, and in the event that a claim for privilege or public interest immunity was made, that the claim be referred to an independent legal arbiter along the lines of Standing Order 213A.*

Icon Water provided the documents to the Clerk and claimed public interest immunity, which was disputed by the Leader of the Opposition. Given Icon Water is a Territory-owned Corporation, the independent legal arbiter considered whether the procedure applied in this situation. He decided that it did.

The independent legal arbiter found that certain parts of the documents were immune for production on the ground of public interest immunity as claimed by Icon Water, but that other parts for which that immunity had been claimed were not immune as claimed.[234]

[234] Mr Tom Duncan, op. cit., *Submission #2,* pp. 2-3.

Further, Mr Duncan stated:

> *In all the cases we have had, the decision has been accepted both by the Executive and the Assembly.*[235]

Claim of Privilege not upheld

Standing Order 213(A)(l) states:

> *If the independent legal arbiter does not uphold the claim of privilege, the Clerk will table the document or documents that has been the subject of the claim of privilege. In the event that the Assembly is not sitting, the Clerk is authorised to provide the document or documents to any Member upon request, however, the document or documents do not attract absolute privilege until tabled by the Clerk at the next sitting of the Assembly.*

Mr Duncan provided comment on the process when the independent legal arbiter doesn't uphold a claim of privilege as follows:

> ***Mr DUNCAN*** *- … Standing order paragraph (l) says that if the independent legal arbiter does not uphold the claim of privilege, the Clerk will table the document or documents that are being subject to a claim of privilege. In the event the Assembly is not sitting, and I think all these occasions happened when we weren't sitting, the Clerk is authorised to provide the document or documents to any member upon request, so I would inform members that the document is available and they would come back to me and say, 'Can I please get a copy of it?'*
>
> ***CHAIR*** *- It does go on to say in that standing order though that the document or documents do not attract absolute privilege until tabled by the Clerk at the next sitting. It assumes there that you do need to table them when the Assembly next sits.*
>
> ***Mr DUNCAN*** *- Yes, that's correct.*
>
> ***CHAIR*** *- Then they're privileged. If it were received out of session and the members requested it, got a copy of it and had a look, it wouldn't actually attract privilege until it's tabled formally in the Assembly?*
>
> ***Mr DUNCAN*** *- That's correct, yes.*
>
> ***CHAIR*** *- Interesting point.*[236]

[235] Mr Tom Duncan, op. cit., *Transcript of Evidence,* p. 4.
[236] Ibid., p. 3.

Effectiveness

Standing Order 213(A) has been used four times over a ten-year period. Mr Duncan stated:

> *We have had it in operation for about 10 years. We've only had four requests for documents in that time. I think there was some nervousness that the legislature would run amok and be calling for documents once a week or once a month, but it's certainly the case that they've used it very sparingly. ...*[237]

Further, Mr Duncan stated:

> *... We have a very active committee system in the Assembly; we have a very active questions on notice process in the Assembly. We have 48 questions without notice every sitting day, so the Executive is well used to responding to requests for information from the legislature. That is, as a minority in almost 25 years of minority government, the Executive is used to not always getting its way on every single issue.*[238]

The ACT Legislative Assembly is a unicameral parliament which can be controlled by the executive, possibly resulting in governments refusing to comply with Standing Order 213(A) in the future. Mr Duncan stated:

> *... we're in our ninth Assembly since we were created in 1989? We've only had one majority government. That was the sixth Assembly. Every other government has been a minority government, although the current Opposition would say that the combination of the Greens and the Labor Party having a parliamentary agreement is not the usual form of a minority government. But when it's all said and done, the governing party only holds 12 seats out of 25 so it relies on the Greens to support them on confidence and supply.*
>
> *The first thing that has to happen, though, is the Assembly must order the documents to be tabled. So if the Government opposes it and then refuses to abide by the Standing Orders, I guess we're in a situation where the Executive is in contempt of the Assembly There is a whole range of things you can do in relation to contempt, which I'm sure you, as members, would be well aware of. It relies on the cooperation of the Executive, I think.*[239]

Standing Order 213(A) can be viewed as constraining the powers of the ACT Legislative Assembly, however, this constraint produces comity between the executive and the legislature. Mr David Skinner, Director of the Office of the Clerk, ACT Legislative Assembly provided comment as follows:

> *The difference between the model that's been adopted here and the one that's used in New South Wales is that in some respects the procedure that's adopted here gives the Executive two bites at the cherry. If the order is passed, it then has another process by*

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237 Mr Tom Duncan, op. cit., *Transcript of Evidence,* p. 2.
238 Ibid., p. 12.
239 Ibid., p. 6.

which it can end up denying access to members of the document, whereas in the New South Wales model, when an order is passed, members will nonetheless get access to the documents. The question is really one about whether they are more publicly available.

In some respects our standing order is a limitation on the powers of inquiry that our parliament would normally enjoy. As I said, I think the Executive could, in essence, get two goes at trying to prevent production, first through the political process and then, second, through a procedural process.[240]

Further, Mr Skinner stated*:*

The only comment I would make, notwithstanding I have mentioned that it may be regarded as somewhat of a diminution of the powers of the Assembly in some respect around powers of inquiry and production, is that it still has taken the heat out of some of these issues in a way that perhaps if we didn't have this procedure there would have been additional conflict. It would be political might that would determine these matters, I suppose, rather than perhaps having a principle-based discussion about how these matters should be raised. So, it's not all a bad story. I think it is a good story as well, but I think if we were revisiting this again, the model in New South Wales skews more closely to preserving all the powers that we would all regard the legislature as having.[241]

Mr Duncan also noted:

… once the arbitration has occurred, the Assembly is then accepting that as a final arbitrated outcome the document will not see the light of day, even to members, whereas in New South Wales, irrespective of what the arbitrator has to say, it is my understanding that members will still have access to the document and the power of the Council is untrammelled. The power of the Council to exercise its inquiry powers remains untouched. Whereas with our standing order we have a constraint. We would regard it as operating in a way that reduces the prerogatives of the legislature in a way that is in the interests of trying to have some sense of comity between the Executive and the legislature, but it does strengthen the hand of the Executive in some respects. It also keeps these sorts of things out of courts because, when it is all said and done, you don't want legislatures or executives going off to the courts to try to get documents. This is a handy mechanism that has a judicial flair to it, but, as David said, it is a balance between the Executive's needs and the legislature's needs.[242]

Mr Duncan views the most effective dispute resolution process in place to be the New South Wales Legislative Council Standing Order 52, he stated:

I work for the legislature. I am all for the legislature's powers and members' ability to be able to scrutinise the executive and I think the NSW model provides the best model. Used responsibly, it provides the best model. I am somewhat amazed that of all these orders in the NSW Legislative Council, that all members, as I understand it, get to see the

[240] Mr David Skinner, Director of the Office of the Clerk, ACT Legislative Assembly, *Transcript of Evidence,* 1 November 2019, pp. 6-7.
[241] Ibid., pp. 11-12.
[242] Mr Tom Duncan, op. cit., *Transcript of Evidence,* p. 6.

documents, yet none has ever been leaked. It is a trusting process on behalf of the Executive and the legislature but it seems to work quite well.

We have not gone that far. There was some discussion at the outset as to whether we should adopt the NSW model in its entirety but it was slightly tweaked. You will see, if you go back to the debates, there were some amendments moved to give us the NSW model but those amendments were defeated. We ended up with the model we have that has worked, but if you are after a process that allows members the ability to fully scrutinise the Executive and be able to see all the documents that the Executive has to fulfil that role, the NSW model is the one to go for.[243]

There has been no move to review Standing Order 213(A). Mr Duncan stated:

... When the Standing Orders were originally put in, there was some talk in that debate that they would review the operation of the Standing Orders within a year or a couple of years. In fact, we do a major review of our Standing Orders within [inaudible] resolutions once in an Assembly, and we just did one last year. I must say that, surprisingly, no-one has suggested a change to model more closely the New South Wales version. They seem quite content. We write to all members asking for submissions on the review of Standing Orders and we write to former members, and no-one has come forward to suggest that standing order should be looked at to make it more in line with the New South Wales model.[244]

In terms of overall effectiveness, Mr Duncan noted:

I think a general observation is that it has worked pretty well here in the ACT. I am surprised it hasn't been utilised more often but it's certainly been accepted by all the Clerks in the ACT.[245]

Committees of the ACT Legislative Assembly

Standing Orders 239 of the ACT Legislative Assembly provides committees of the ACT Legislative Assembly to send for documents as follows:

Power to send for persons, papers and records

239. A committee shall have power to send for persons, papers and records.[246]

Committees of the ACT Legislative Assembly do not have a standing order to resolve a dispute over the production of documents within committees. If a dispute arises, the ultimate place for the disputed adjudication is in the ACT Legislative Assembly utilising Standing Order 213(A).

Committees of the ACT Legislative Assembly have a process in place for when claims of public

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243 Mr Tom Duncan, op. cit., *Transcript of Evidence,* pp. 7-8.

244 Ibid., p. 8.

245 Ibid., p. 11.

246 Legislative Assembly for the Australian Capital Territory, *Standing Orders and Continuing Resolutions of the Assembly,* 21 May 2020, p. 67.

interest immunity arise: *Continuing resolution — Public Interest Immunity —8B.* This resolution provides guidance to committees and public officials when raising public interest immunity claims during committee proceedings (see Appendix 9). This resolution was agreed to on 30 June 2011.

Mr Skinner provided comment on this resolution as follows:

> ***Mr SKINNER*** *- We have a standing order in that we have borrowed it, if you like, from the Senate around where claims of public interest immunity or executive privilege have been made in committee. There is a procedure that requires the relevant minister to advance those claims in fairly specific terms and not just under the broad rubric of executive privilege. There is a means by which the committee and then later the Assembly can determine the matter.*
>
> …
>
> *It is [a] continuing a [sic] resolution 8B of our Standing Orders … It is titled 'Public interest immunity', and it states that it is provided for guidance for ministers and public officials around the process for raising public interest immunity claims. Essentially it is asking them to specify grounds as to what sorts of matters may fall within that meaning of 'public interest immunity'. The sorts of general claims around commercial-in-confidence and other things will not be accepted necessarily by committees or the Assembly, nor can the tactic of ministers and senior officials saying, 'That is something we are not willing to provide', without any sense that there needs to be a proper ground upon which to deny a committee or the legislature access to those documents.*
>
> *It is really trying to become specific about the nature and the rationale for such a claim and allow it to be interrogated by the legislature rather than accepting on face value what the executive may wish to argue. At the end of the day, the resolution at paragraph (4) says that if the minister provides reasons as to why they are withholding the document from the committee, the committee has the option under this continued resolution to report the matter to the Assembly. It goes on to say that a decision by a committee, even if it does not report to the Assembly, does not prevent the member from raising the matter in the Assembly in accordance with other procedures of the Assembly.*
>
> *If the same situation you were faced with in Tasmania came here and the committee was trying to get documents from the Executive, and the Executive, even if it used this continued resolution to detail the reasons why it was withholding the document, it would not stop a member or the committee reporting back to the Assembly and the Assembly then moving a motion under standing order 213 to formally call for the document.*
>
> ***Mr DEAN*** *- If I am hearing you clearly, the committee goes back to the Assembly, the Assembly would then debate the issue and if it saw a reason to go to the Executive, it would make that determination, that decision, and it would follow from there.*

> ***Mr SKINNER*** *- Yes, and if the Executive still refused, the independent legal arbiter's process would be triggered.*[247]

Mr Skinner provided comment on the effectiveness of this process being available to committees:

> *Perhaps one of the advantages of this type of standing order is that they allow the articulation and the ventilation of the legal principles and the underlying interactions between the executive and the legislature to be put out there in a way that raw political numbers in a Chamber probably do not. So, having a quasi-judicial eye and legal reasoning being brought to bear on these sometimes complicated issues is seen as being a rational process rather than what might be construed as a political process. People from all sides of politics may be more willing to subject themselves to that sort of process, irrespective of which side of the Treasury benches they might happen to occupy.*[248]

[247] Mr David Skinner, op. cit., pp. 9-10.
[248] Ibid., pp. 10-11.

PARLIAMENT OF WESTERN AUSTRALIA

Section 82 – Financial Management Act and Related Provisions

This chapter examines the Parliament of Western Australia's legislative model: section 82 of the *Financial Management Act 2006* and related provisions. The model is unique in that unlike other jurisdictions examined so far, this model has legislation underpinning its operation, and secondly, Western Australia is the only jurisdiction that legislates for the Auditor General to issue an opinion on a Minister's decision not to provide information to the Parliament.

Background

Clerk of the Western Australian Legislative Council Mr Nigel Pratt provided context as to why this legislation was enacted:

> *I suppose the origin of all of this was from the WA Inc. royal commission and the subsequent commission on government, which looked in depth into the whole system of government in Western Australia. I suppose the observation made in those royal commissions was the power of the executive over the parliament. The fact that party discipline had resulted in members, I suppose, who have an obligation to bring the government to account, and perhaps those members who supported the government weren't effective in doing that.*
>
> *One of the issues was: how do we deal with ministers of the Crown who refuse to provide information to the parliament? The outcome in Western Australia's case was amended in 2006, the Financial Management Act (sections 81 and 82) was combined with the Auditor General Act which was an act that came out in the same year, in 2006, in section 24.*
>
> *That's a rough outline of how we came to the place we are now. Originally, I think it was a recommendation of the Estimates committee, wasn't it?*[249]

Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations Committee, Western Australia Legislative Council, Ms Anne Turner continued:

> *It was. Just going back a bit, if I may, back to the 1980s and then to 1987 when the market crashed. That was the context. We need to go back to the 1980s. We had, as Nigel said, WA Inc.; we had government dealing with big business, large corporations that eventually, after the 1987 stock market crashed, became insolvent. There are some quite interesting figures in the cost of that and they range from $600 million up to $877 million. They are scholarly comments on what the actual cost to [the] state was. A very significant amount of money was lost.*
>
> *As a result of that, the first royal commission came along in 1992 and then we had the Commission on Government - COG - in 1995. What also came out of that was our first Freedom of Information Act, in 1992, and we also got the modern day parliamentary*

[249] Mr Nigel Pratt, Clerk of the Western Australian Legislative Council, *Transcript of Evidence,* 1 November 2019, p. 1.

committee system, the system we are running with now. I have been here 20 years and I came into that system.

You will recall that the bailout of Rothwell's was $115 million, so these were quite substantial sums of money. When the financial management bill came to the former Estimates committee, …, that particular committee made a recommendation that the Auditor General assess whether the decision by the minister not to give certain information was both reasonable and appropriate. That is the context. That particular amendment came out of a committee system in 2006. …[250]

Mr Pratt provided comment on the intent of the legislation as follows:

I think the origin was expected to be the difficulties with commercial-in-confidence, withholding documents on that basis. … Originally, the idea was that this was going to be about commercial-in-confidence, but when the financial management legislation was drafted, it wasn't drafted to restrict it to those claims. It was a much broader provision relating to pretty much anything to do with the operation or financial management of a department or an agency, which is a broad definition.[251]

Financial Management Act 2006 and Auditor General Act 2006 provisions

Section 82 of the *Financial Management Act 2006* cannot be understood separately and must be read in conjunction with section 81 and further, combined with subsection 24(2)(c) of the *Auditor General Act 2006*.[252] Extracts of these relevant sections are reproduced as follows:

Sections 81 and 82 of the *Financial Management Act 2006* states:

81. Actions etc. inhibiting etc. Minister's parliamentary functions prohibited

The Minister and the accountable authority of an agency are to ensure that —

(a) no action is taken or omitted to be taken; and
(b) no contractual or other arrangement is entered into,

by or on behalf of the Minister or agency that would prevent or inhibit the provision by the Minister to Parliament of information concerning any conduct or operation of the agency.

82. Ministerial decisions not to give Parliament certain information about agency to be reported to Parliament etc.

(1) If the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of an agency, then within 14 days after making the decision the Minister is to cause written notice of the

[250] Ms Anne Turner, Advisory Officer, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Legislative Council of Western Australia, *Transcript of Evidence,* 1 November 2019, p. 2.
[251] Mr Nigel Pratt, op. cit., p. 3.
[252] Ibid., pp. 45-46.

decision —

> *(a) to be laid before each House of Parliament or dealt with under section 83; and*
> *(b) to be given to the Auditor General.*

(2) A notice under subsection (1)(a) is to include the Minister's reasons for making the decision that is the subject of the notice.[253]

Subsection (24)(2)(c) of the *Auditor General Act 2006* prescribes the Auditor General to:

> *(c) is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate.*[254]

Section 82 provisions

The Parliament of Western Australia's Joint Audit Committee on the *Review of the Operation and Effectiveness of the Auditor General Act 2006* noted section 82 of the *Financial Management Act 2006* prescribes:

> *… an explicit obligation on the Minister to notify each House of Parliament and the Auditor General if the Minister decides that it is 'reasonable and appropriate' not to provide 'certain information' to the Parliament. These notices to the Parliament and the Auditor General are referred to as 'section 82 notices'.*[255]

Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Western Australia Legislative Council, Mr Andrew Hawkes provided further information on the provision as follows:

> *What you basically have is a provision that says it is up to the minister to decide whether certain information can be provided to the parliament. If the minister decides it is not reasonable or appropriate to provide that information to parliament, that triggers the minister to produce a notice. Having produced the notice, that means the Auditor General is then required to analyse whether that decision was reasonable and appropriate.*[256]

The Estimates and Financial Operations Committee noted that section 82 notices require ministers to undertake the following sequential steps:

- *determine whether the requested information relates to an 'agency'*

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253 Legislative Council Western Australia, Thirty-Ninth Parliament, Standing Committee on Estimates and Financial Operations, Report 62, *Provision of Information to the Parliament,* May 2016, pp. 45-46.

254 Report 62, *Provision of Information to the Parliament,* op. cit., p. 46.

255 Parliament of Western Australia, Thirty-Ninth Parliament, Joint Audit Committee, Report 7, *Review of the Operation and Effectiveness of the Auditor General Act 2006,* p. 22.

256 Mr Andrew Hawkes, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Legislative Council of Western Australia, *Transcript of Evidence,* 29 November 2019, p. 2.

- *engage in a decision making process*
- *assess whether certain information concerning conduct or operation of an agency is of a type that should be withheld from the Parliament*
- *make a reasonable and appropriate (composite) decision permitting only one decision*
- *prepare a written notice*
- *lay the written notice in the Parliament within 14 days of making the reasonable and appropriate decision*
- *give the notice to the Auditor General within 14 days.*[257]

Auditor General Act 2006 provisions

The *Financial Management Act 2006* has a corresponding section under the *Auditor General Act 2006*. Section 24(1) prescribes for a report to be produced at least once a year to both Houses of Parliament.[258]

Subsection 24(2)(c) prescribes:

> *… is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate.*[259]

Mr Hawkes provided comment on these provisions:

> *In practice, that has meant the Auditor General in Western Australia produces reports more frequently than that, but they will tend to combine several at [sic] notice[s] in a single report. Because of the Auditor General doing their analysis of whether the minister's decision was reasonable or appropriate, the Auditor General focuses on the public administration component. Their audit practice statement sets out how they deal with that particular aspect. In particular, that section sets out when it is considered commercial-in-confidence is appropriate and it also considers when that methodology would be in the public interest…*
>
> ***…** The Auditor General will assess whether a notice is required, then they will review the documentation and have discussions with agency staff over that decision-making process. Having done that review, they will form an opinion on whether it was reasonable and appropriate, or not reasonable and therefore not appropriate. Once the Auditor General has made that decision, they will table a report in parliament.*[260]

The Committee questioned whether the abovementioned legislation applies to committees of the Western Australian Parliament:

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257 Report 62, *Provision of Information to the Parliament,* op. cit., pp. 51-52.
258 *Auditor General Act 2006 [WA],* section 24(1), p. 15.
259 Ibid.
260 Mr Andrew Hawkes, op. cit., p. 2.

Mr DEAN *- That would be the same with committees? Where a committee makes a demand … or is there a different process for a committee requiring a document?*

Mr HAWKES *- It's the same process.*

Ms TURNER *- It's the same process. In the previous parliament a committee did write to the minister and ask about a section 82 notification, and we just get a copy of the report saying what the outcome is. In this parliament that has not happened because we discontinued our practice of reminding ministers of their obligations under section 82.* [261]

The Auditor General's reports provide detail on the following:

- *identify the process a Minister has gone through to get advice*
- *identify what policies were referred to*
- *assess whether the agency involved gave good advice*
- *assess whether the agency obtained legal advice and how they responded to that advice.*[262]

Upon tabling of the Auditor General's reports, the legislative process is complete and there are no further provisions under the *Financial Management Act 2006* and the *Auditor General Act 2006.* However, Members of the Western Australian Parliament have the option to follow-up on information by utilising processes in the House. Mr Hawkes explained:

The other thing to say is, certainly in our House, I cannot recall where the House has ordered the production of documents. That option still exists. In the case where an Auditor General has found that the decision is not reasonable and not appropriate, the House could then take the next step and order the production of that document. In fact, even if the Auditor General found it reasonable and appropriate not to provide it, the House could still use its powers and say, 'Regardless of what you have said, we would like the production of the document'. I am not aware of any orders for the production of documents in our House in the short time I have been here…[263]

Limitations under the model

As noted in the Auditor General's Annual Report 2018-19, the following table shows a doubling of the number of ministerial notifications received from 2014-15 to 2018-19 which consequently doubled the costs to the Auditor General's Office.[264]

[261] Mr Andrew Hawkes, op. cit., p. 10; Ms Anne Turner, op. cit., p. 10.
[262] Report 62, *Provision of Information to the Parliament,* op. cit., p. 30.
[263] Mr Andrew Hawkes, op. cit., pp. 7-8.
[264] Office of the Auditor General, Western Australia, *Annual Report 2018-2019,* p. 54.

	2014-15	2015-16	2016-17	2017-18	2018-19
Number of ministerial notifications received	14	10	50 (1)	27	26
Being assessed at 30 June	6	0	0	8	11
Total cost for opinions issued	- (2)	$232,483	$527,561	$393,277	$483,927
Total hours for opinions issued	- (2)	1,013	2,174	1,962	2,459

(1) Includes 41 notifications relating to the same question directed at 41 entities administered by 14 Ministers.

(2) We have not calculated the costs and hours of section 82 work prior to 2015-16.

Table 18: Ministerial notifications received in last 5 years

The Auditor General's Office does not have a particular budget line. Ms Turner stated:

> *This is another interesting thing. There are no particular budget line items for the Auditor General to assess these notices, but we know that in 2015, when she first started recording the costs, it was $232 000. This year it was $483 000. They are quite expensive and she has to find that money within her normal appropriation.*[265]

Mr Hawkes provided comment on why there was an increase in section 82 notices as follows:

> *… The number of ministerial notifications crept up prior to the Estimates Committee doing its report into the provision of information to parliament.*
>
> *Once that report came out, it really highlighted in members' minds powers that they had to - not force the material to be provided but it reminded them of the minister's obligations under the act. I think the awareness aspect is partly the reason for an increase.*
>
> *Also, the previous Estimates Committee had a particular compliance aspect to it. It would follow up a lot when it did not receive information it had requested.*
>
> *There was a point where it became a table in the Estimates annual report, and it is a table that we have in those reports even now, even though the committee hasn't that same compliance focus.*
>
> **…**
>
> *What happens in the budget Estimates hearings and the annual report hearings is, if a minister decides not to provide information, that will often be collated into a table with the instance and the issue, as a reminder to the House of those instances.*[266]

[265] Ms Anne Turner, op. cit., p. 6.
[266] Mr Andrew Hawkes, op. cit., pp. 12-13.

Mr Hawkes provided comment in relation to there being no particular budget line for the Auditor General's role in reporting upon section 82 notices as follows:

> *The other thing is these requests tend to be sporadic. It's very difficult to plan to deal with certain things.*
>
> *I think, in the case of the Auditor General or whichever body has to deal with it, not only will they have to reallocate their resources internally, it may also mean that other products have a lesser priority to deal with these matters. …*[267]

Mr Hawkes suggested there needs to be an appropriate funding mechanism:

> *I think the other thing to consider is how this third party review - regardless of who does it - is paid for. In the case of our model, the Auditor General has had to refocus their efforts to deal with section 82. That means that in 2018-19, the reallocation of audit resulted in a lower number of broad and narrow scope performance audit tables. If it were done by a different body and the funding was not supplementary, that might require them to reallocate their resources. I think one thing to be cognisant of is that regardless of who does it there should be an appropriate funding mechanism in place for that work to be done.*[268]

The Estimates and Financial Operations Committee reviewed the provision of information to the Parliament and found that improvements to the *Financial Management Act 2006* and *Auditor General Act 2006* were required:

> *... section 82 of the Financial Management Act 2006 and section 24(2)(c) of the Auditor General Act 2006 are adequate for purpose but require some enhancements. Recommendations, if agreed to by Executive Government, will have the effect of increasing Ministerial and departmental awareness of section 82 for the benefit of Parliament as well as contributing to the robustness of the section 82 process.*[269]

Recommendations from this Report are provided as follows.

Section 82 notices

The Estimates and Financial Operations Committee noted there was a lack of understanding amongst Ministers:

> *The question: do Ministers comply with section 82? is dependent on their personal knowledge of the section; the guidance and advice they receive from both the relevant agency and their ministerial office staff. The small sample of Ministers the Committee examined revealed varying degrees of exposure to both section 81 and 82 as well as experience in the information that should be in the notice. Their examinations reveal a significant gap in ministerial knowledge despite the recently discovered 2011*

[267] Mr Andrew Hawkes, op. cit., p. 12
[268] Ibid., p. 11.
[269] Report 7, *Review of the Operation and Effectiveness of the Auditor General Act 2006,* op. cit., pp.22-23.

'Guideline to Ministers withholding information or documents when asked a parliamentary question' prepared by the State Solicitor's Office.[270]

The Estimates and Financial Operations Committee recommended that:

> *… the Premier, as part of induction, provide new Ministers with formal education, training and mentoring about their responsibilities under sections 81 and 82 of the Financial Management Act 2006.*[271]

This recommendation was supported by the government.[272]

The provisions under section 82 notices do not prescribe provisions to compel compliance within committees, this can only be done within the Parliament and the standing orders do not allow for debate upon tabling of a section 82 notice, the Estimates and Financial Operations Committee noted:

> *The Committee is of the view that its internal practice has contributed to raising ministerial consciousness of section 82. However, a limitation is that committees cannot compel compliance with it. Being unable to compel or penalise means the effectiveness of section 82 is reduced. Only the Parliament has the capacity to insist that Ministers comply with the procedural obligation and whether that occurs is essentially a political decision of Executive Government.*
>
> *Other than tabling a notice, section 82 does not garner attention in parliamentary proceedings and Legislative Council Standing Orders are absent any opportunity for debate after tabling.*
>
> *The Committee is of the view that the profile of section 82 notices should be elevated in the Legislative Council. Permitting debate on them after tabling would elevate their importance in parliamentary proceedings …*
>
> *…*
>
> *The decision of a Minister not to provide certain information to the Parliament is significant for transparency and accountability of Executive Government. Further, there can be considerable delays between each step in the section 82 process which diminishes the currency of the requested information. …*[273]

The Estimates and Financial Operations Committee recommended that the Procedure and Privileges Committee inquire into amending Legislative Council Standing Orders, to provide for debate around Opinions on Ministerial Notifications under section 24(2)(c) of the *Auditor General Act 2006* to be considered under Standing Order 15(3).[274]

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[270] Report 62, *Provision of Information to the Parliament,* op. cit., p. 69.

[271] Ibid.

[272] *Government response* to the Legislative Council Standing Committee on Estimates and Financial Operations, Report 62, Provision of information to the Parliament, Western Australia, p. 3.

[273] Report 62, *Provision of Information to the Parliament,* op. cit., pp. 77-78.

[274] Ibid., 78.

Section 82 notices not provided by the Minister

The Estimates and Financial Operations Committee recommended that legislation be amended to expressly allow the Auditor General to report opinions where section 82 notices are not provided:

> *The Treasurer amend section 24 of the Auditor General Act 2006 to expressly allow the Auditor General to provide an opinion in all circumstances where the Minister decides not to provide certain information to the Parliament or its committees whether or not a section 82, Financial Management Act 2006 notice is tabled in the Parliament.*[275]

The Government did not support this recommendation citing adequate measures are in place to deal with Minister's decisions not to provide information to the Parliament.[276]

Audit Compliance by the Auditor General

The Auditor General does not routinely audit compliance with section 82 notices. The Standing Committee on Estimates and Financial Operations recommended a regulation pursuant to section 82 of the *Financial Management Act 2006* as follows:

> *... prescribing that the Auditor General may provide a written reminder to a Minister after the 14 day notice period has lapsed for advising the decision not to provide certain information to the Parliament.*[277]

The Estimates and Financial Operations Committee noted:

> *The Committee will continue its own internal practice of reminding Ministers about section 82 notices and will introduce a new practice of advising the Auditor General when certain, requested information has not been provided. The Committee is of the view that all committees of the Parliament could, by resolution, adopt such a practice. The Committee particularly encourages those surveyed committees identified at paragraphs 2.19 and 2.20 that experienced difficulties with obtaining requested information, to consider such a resolution.*[278]

The Government did not support this recommendation preferring to include the information in the induction package to ministers and departments.[279] The Joint Standing Audit Committee on the Review of the Operation and Effectiveness of the Auditor General's Act supported this recommendation.[280] The Government's response to this report noted their position had not changed.[281]

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[275] Report 62, *Provision of Information to the Parliament,* op. cit., p. 77.
[276] Government response, op. cit., p. 3.
[277] Report 62, *Provision of Information to the Parliament,* op. cit., p. 80.
[278] Ibid., p. 80.
[279] Government response, op. cit., p.4.
[280] Report 7, *Review of the Operation and Effectiveness of the Auditor General Act 2006,* op. cit., p.24.
[281] Ibid., p.3.

The Auditor General's powers to compel public interest immunity claims

The Auditor General's role in determining claims that are subject to public interest immunity, is unique to the Western Australian jurisdiction. The Auditor General commented:

> *… that when the legislation was passaging through the Parliament it became clear to him that though section 82 started life as a commercial-in-confidence information matter it had morphed into something much broader by the end. The boundaries were unrestricted and any information could be captured. The Auditor General expected a flood of section 82 inconsequential matters but with the passage of time, this never eventuated.*[282]

Mr Hawkes stated:

> *This is one of the sections which the Auditor General was probably least comfortable with, given that it requires them to be in the public domain in a way they are not typically asked to, so this provision is unique and this responsibility on the Auditor General is unique to Western Australia. Whether it is a commercial-in-confidence or a public interest based request, they still apply their audit and assurance standards to the best of their ability. It is part of their audit practice statement. They set out the criteria they use for commercial-in-confidence… Their other items are not captured in their practice statement.*[283]

The Auditor General has developed assistance tools which relate specifically to commercial-in-confidence. The Estimates and Financial Operations Committee noted:

> *An absence of statutory guidance in either the FMA or section 24(2)(c) of the Auditor General Act 2006 prompted the Auditor General to develop his own audit methodology so the Parliament could have confidence in the independence and reliability of his opinions. The Auditor General relies on:*
>
> - *a guidance note from the Australian National Audit Office (to assist with the commercial-in-confidence reason for withholding information)*
> - *a self-developed Audit Practice Statement…*[284]

See Appendix 10 — Auditor General Criteria for Commercial–in–Confidence — Audit Practice Statement.

The Auditor General has the ability to view Cabinet-in-confidence documents but not compel Cabinet-in-confidence documents. The Auditor General stated that difficulty arises when requested to report on a section 82 notice, when ministers withhold documents that are subject to legal professional privilege or cabinet-in-confidence.[285]

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[282] Report 62, *Provision of Information to the Parliament,* op. cit., p. 47.
[283] Mr Andrew Hawkes, op. cit., p. 3.
[284] Report 62, *Provision of Information to the Parliament,* op. cit., p. 75.
[285] Ibid., p.80.

In his 2014-15 Annual Report, the Auditor General stated:

> *The Auditor General Act 2006 is still relatively contemporary audit legislation but it does have some deficiencies that are impacting the efficiency and effectiveness of our audits.*
>
> *In particular, access constraints to documents protected by Cabinet-in-confidence or legal professional privilege have impacted recent audits. The ability to gather sufficient and appropriate evidence is a fundamental audit requirement and in worst case scenarios can prevent an auditor from issuing an audit opinion.*[286]

The Department of Premier and Cabinet Handbook, sets out a process for the Auditor General to follow to view 'cabinet records' but not compel them. The Estimates and Financial Operations Committee noted:

- *The Auditor General writes to the Director General of the department specifying those Cabinet records he requires and outlines the reasons for the request.*
- *The Director General contacts the Minister responsible for the required records outlining the Auditor General's request and informing the Minister that she or he must obtain a Cabinet decision on whether Cabinet agrees to waive privilege and make the records available.*
- *The Minister must then prepare a one page item for discussion at Cabinet, outlining the Auditor General's request and providing a recommendation on whether Cabinet should allow the Auditor General to view the records. If Cabinet waives privilege and makes the records available, the Auditor General and his staff may make notes but not take any copies.*[287]

Further, the Estimates and Financial Operations Committee noted:

> *… the subsequent use the Auditor General can make of that information is not covered in the handbook."*[288]

The Auditor General, cited in the Estimates and Financial Operations Committee Report, noted he had used the facility on several occasions and outlined the requirements when viewing cabinet records as follows:

- *requesting access to cabinet information is a step only taken if the view is it will provide important and necessary evidence for an audit*
- *staff notes of the information become audit evidence and can be used without any limits to reach a financial audit opinion or a performance audit conclusion. That evidence can form part of an opinion*
- *to date, cabinet information has not been disclosed in an Audit Report. If this were to occur, its disclosure would need to be assessed as being in the public*

[286] Report 62, *Provision of Information to the Parliament,* op. cit., 81.
[287] Ibid., pp.81-82.
[288] Ibid. p. 82.

interest and would only occur after appropriate consultation.[289]

Mr Hawkes described this as an administrative arrangement and not a legal one:

> *It very much depends on the government at the time. If the government gives them the access, they can access it. … There is an administrative arrangement that allows for the provision, but it is not a legal one.*[290]

Mr Hawkes provided evidence in relation to a refusal. In 2015, the Auditor General reviewed three decisions by the Minister for Sport and Recreation, who refused to provide information to the Parliament on the new Perth Stadium. The Auditor General requested a copy of the legal advice that the Department of Sport and Recreation had obtained and used in informing the minister, the department declined on the basis that it was subject to legal professional privilege.[291]

Mr Hawkes provided evidence as to how the Auditor General reported on this non-compliance as follows:

> *Accordingly, the Auditor General reported -*
>
> > *Because this legal advice was crucial to DSR's advice to the minister, my inability to view this material meant that I was unable to reach an opinion on those decisions.*
> >
> > *The inability of an auditor to access the information they need to meet their obligation is a serious matter for the auditor and for those who rely on their opinions.*
> >
> > *The state solicitor's office had previously advised me that the Auditor General Act did not provide my office with the authority to demand access to legal advice, so this is the first time I have been unable to fulfil my legislative obligation.*
> >
> > *In the event that an auditor is unable to obtain sufficient appropriate audit evidence, auditors have few options. One of these is to issue a disclaimer of opinion.*
>
> *In that case, the Auditor General issued a disclaimer of opinion on the grounds that the information that was not provided was commercial-in-confidence, and the legal advice for that was also not provided.* [292]

Further, Mr Hawkes stated:

> *The Joint Audit Committee, in its review of the relevant acts, has recommended that the Auditor General be given an explicit power to access those documents. We understand that the Treasurer has agreed to that. We were actually expecting that*

[289] Report 62, *Provision of Information to the Parliament,* op. cit., p. 82.
[290] Mr Andrew Hawkes, op. cit., p. 5.
[291] Ibid. pp. 3-4.
[292] Ibid., p. 4.

the Financial Management Amendment Bill would be presented halfway through the year, but I think they are still working on it. We expect that amendment bill to include a provision to that effect.[293]

The recommendation from the Joint Standing Audit Committee reviewing the *Auditor General Act 2006* stated:

> *… the Treasurer urgently amend the Auditor General Act 2006 to clearly provide the Auditor General with the power to compel a person to provide any information required, including documents subject to legal professional privilege, Cabinet confidentiality or any other public interest immunity.*[294]

Mr Hawkes suggested another possible option for determining claims of public interest immunity as follows:

> *Another model could be that the freedom of information commissioner or the Information Commissioner is given the responsibility for making these assessments. Arguably, that is what they do already and they will do that in the context of freedom of information requests from members of the public. Often members of parliament will use that mechanism to obtain information from a department. Arguably, members shouldn't need to use that mechanism to obtain information; they should be able to obtain it through the normal parliamentary business.*
>
> *…*
>
> *If you were looking for an independent arbiter, an information commissioner could be one, given that it is really within their existing remit in determining whether a document should be subject to public interest immunity.*[295]

Effectiveness

The Estimates and Financial Operation Committee Report provided the following table. The data provides numbers on section 82 notices 'received and accessed as reasonable' between 1 February 2007 (when the *Financial Management Act 2006* became operational) and 4 February 2016. Over this period, 93 notifications were received and 73 were accessed as 'reasonable.' However, of the 73 accessed as 'reasonable', this included 55 that related to 2007 decisions not to provide information to the Parliament because the cost was prohibitive.[296]

Year Received/ Notices	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016 To date	Total To date
No. Received	55	1	4	2	2	1	4	11	11	2	93
No. Assessed as Reasonable	55	1	0	0	2	1	2	9	3		73

[293] Mr Andrew Hawkes, op. cit., p. 5

[294] Report 7, *Review of the Operation and Effectiveness of the Auditor General Act 2006,* op. cit., p. iii.

[295] Ibid., p. 7.

[296] Report 62, *Provision of Information to the Parliament,* op. cit., p. 75.

Further, the Estimates and Financial Operations Committee Report noted:

> *Since 2008 the Auditor General has received 38 notifications. Six have not yet been finalized. The 32 finalised have resulted in*
>
> - *18 'reasonable' opinions*
> - *15 'not reasonable' opinions*
> - *three occasions when the Auditor General was unable to form an opinion.*
>
> *Some notifications have resulted in more than one opinion. Hence, the number of opinions issued is greater than the number of notifications received. Of the statistics, the Committee is of the view that 'reasonable' opinions are fairly evenly balanced with the 'not reasonable' category.*[297]

Data is not available to provide a breakdown of the different types of documents specifying their particular claims of privilege, Ms Turner commented:

> *We don't have that data, but anecdotally we can tell you that legal professional privilege is uncommon. Probably the vast majority are commercial-in-confidence, I would assume. There is the odd statutory secrecy provision, but that is pretty uncommon as well. It is Cabinet-in-confidence on occasions, but overall it's commercial in-confidence.*[298]

The Joint Standing Audit Committee reviewing the *Financial Management Act 2006* noted:

> *This is an important accountability mechanism because it requires the Minister to justify their decision and provides for third party review.* [299]

This model removes political assessment. Mr Hawkes stated:

> *I think the mechanism we have is beneficial in that it does provide for a third party review. I think the question is: who is the most appropriate person to do that third party review? The third party review provides that buffer for the parliamentary involvement, when it may move along particular lines.*[300]

The Auditor General acknowledged that there has been an improvement in the administration processes within departments and stated:

> *With this being in operation for some period now we have seen improvement as people get used to the idea. Initially they did not have good answers to our questions when we asked them what process they went through to get advice and how they documented things, but we have been back now to agencies and found that they have improved. Much of what we put into those reports is our endeavour to try to improve practice within the*

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297 Report 62, *Provision of Information to the Parliament,* May 2016, op. cit., pp. 75-76.

298 Ms Anne Turner, op. cit., p. 4.

299 Parliament of Western Australia, 40th Parliament, Report 1, Joint Audit Committee, *Second review of the Financial Management Act 2006, May* 2019, p. 22.

300 Mr Andrew Hawkes, op. cit., p. 11.

sector as distinct from the analysis that was used to determine whether the minister's decision was reasonable or not.[301]

Ministerial review of the *Financial Management Act 2006*

Section 85(1) of the *Financial Management Act 2006* requires the relevant minister to carry out a review of the operation and effectiveness of the *Financial Management Act 2006* after the first five years of operation and every five years thereafter. The Treasurer tabled the Report in both Houses of Parliament on 8 September 2015.

In relation to section 82 notices, the Review recommended that an amendment be made to:

> *… limit its application to situations where the Minister declines to provide information on the basis of commercial confidentiality.*[302]

The recommendation was not supported by the Estimates and Financial Operations Committee, the Report stated:

> *… on the basis of no reasons were given for this recommendation and in the absence of cogent reasons for limiting section 82, the Committee is of the view that the status quo should remain.*[303]

Further, the Joint Standing Audit Committee on the Review of the *Financial Management Act 2006* did not support the recommendation:

> *… that the justifications presented in this section to be weak and not sufficiently related to the proposed recommendation. If accepted the recommendation would limit the Auditor General's ability to scrutinise Ministerial decisions to withhold information from the Parliament. This, in turn, would affect the Parliament's ability to scrutinise the Government and diminish Government accountability to the Parliament. The Committee does not support Recommendation 25 of the Treasury Report.*[304]

The Second Treasury Report on the Review of the *Financial Management Act 2006* advised that the recommendation would not be progressed.[305]

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[301] Report 62, *Provision of Information to the Parliament,* op. cit., p. 74.

[302] Government of Western Australia, Department of Treasury, *Review of the Financial Management Act (2006) Report*, Perth, Western Australia, March 2014, recommendation 25, p 22.

[303] Report 62, *Provision of Information to the Parliament,* op. cit., p. 57.

[304] Parliament of Western Australia, Thirty-ninth Parliament, Joint Standing Committee on Audit, Report 6, *Review of the Minister's Report on the Financial Management Act 2006,* August 2016, p. 37.

[305] Report 1, *Second review of the Financial Management Act 2006,* op. cit., p. 23.

CONSIDERATIONS TO DETERMINE FUTURE PROCEDURE

Government response to this Inquiry

As noted, the Government did not support the establishment of the Select Committee. The Hon Leonie Hiscutt MLC stated on behalf of the Government during debate on the motion to establish the Committee that the Government expressed the view:

> *We also acknowledge that committee activities are an important means by which the parliament achieves accountability of executive government action. Tasmania's parliamentary committee system has long been underpinned by broad powers under the Parliamentary Privilege Act 1858. In the Legislative Council, this is further supported by the procedures and other guidance provided by the Council's Standing Orders.*
>
> *This framework invests considerable power in the Council to exercise its review functions and it is a matter for the Council to delegate these powers to its committees accordingly and where appropriate.*
>
> *Furthermore, this framework has existing procedures for inquiry and options to resolve disputes between committees and ministers or other members of the government in relation to the production of documents and what will ultimately serve the public interest.*[306]

The Government did provide a submission but declined the invitation to appear before the Committee to answer questions in relation to their submission and questions that arose throughout the Committee's Inquiry. The Government, through the Premier, did extend to the Committee the offer to answer any questions forwarded to the Premier for a written response.

Accordingly, the Committee, wrote to the Premer, the Hon Will Hodgman MP and received responses that did not directly answer each question to the Committee's satisfaction. On the appointment of the new Premier, the Hon Peter Gutwein MP the Committee again invited the Government to appear before the Committee, again the invitation was declined. (See Appendix 11 — copies of correspondence to the Premier and copies of responses from the Premier).

Subsequently the Secretary of the Department of Premier and Cabinet, Ms Jenny Gale did appear before the Committee to answer questions. Her evidence is included in this Report.

Dr Gogarty acknowledged the Government's commitment to the provisions of the *Parliamentary Privilege Act 1858* and made the following comment on Government's submission:

> *… So much of our constitutional history is based on the supremacy of parliament over the executive branch. The very basis of Westminster governments is ministerial responsibility and responsibility to the houses and the committees. I read the Government's submission with some degree of surprise, in that there was a very clear*

[306] The Hon Leonie Hiscutt MLC, Leader for the Government, *MOTION – Appointment of Select Committee,* Parliament of Tasmania, Legislative Council, Report of Debates, 21 May 2019, pp. 47-48.

statement that it is committed to the Parliamentary Privilege Act and the notion of representative and responsible government, and yet what the Chair has talked about is actions and activities that completely contradict that position: the refusal to hand over documents, the refusal to recognise the unbounded nature of the Parliamentary Privilege Act. The privilege act has no restrictions on the type of document that can be called; it has no provision for executive privilege or any other form of executive immunity. There is something of a dissonance between the stated commitment to the constitutional privilege system of the government and the actual acts that are prevalent in each of the departments. As Dr Appleby said, one of the most powerful things this committee could do is make a clear statement reinforcing the very basic principles of responsible government and reinforcing what it means for the Government to commit to that constitutional system and the privileges system, and then go on to explain how it will resolve the disputes that continue to arise.[307]

Political Culture

Evidence was provided in relation to political culture and how it fits within parliamentary jurisdictions under the system of responsible government. The Committee explored the question of political culture in relation to the provision of documents and the development and acceptance of a procedure to address disputes related to the production of documents.

The Committee received evidence in relation to a lack of understanding by governments and public servants as to how the system of responsible government relates to the workings of Parliament.

Former Clerk of the Victorian Legislative Council, Mr Wayne Tunnecliffe provided evidence of his experience in relation to the lack of understanding by public servants of the role and functions of the Parliament required under the system of responsible government. Mr Tunnecliffe explained that he provided seminars to educate public servants on these issues:

... In my latter days as Clerk, the parliament here started running seminars for public servants, which were designed to try to educate the public servants and to help them in their roles assisting ministers and so forth. I was given the job of talking to them about privilege and their responsibilities to the parliament because it was something that I had a great deal of interest in. Of course, in Victoria we'd had the issue of ministerial advisers and the capacity of committees to summons them and the government at the time refusing to allow them to appear.

My message to the public service was pretty simple: if you don't appear before a committee or even the House, if you are required or summoned, or you don't provide material or information, you can potentially be in contempt of the House - it can be treated as a breach of privilege and you can be dealt with accordingly.

Now, the public service will say,' Well, we are only doing what the minister wants'. It's not quite as simple as that in my opinion. Under the Westminster system of responsible government, you are required to be accountable to the parliament and the parliament

[307] The Hon Leonie Hiscutt MLC, op. cit., p. 63.

has wide powers to deal with you if you're not. That's why we have privileges committees, to deal with potential issues of contempt.

I used to take great delight in stressing the point. I used to have a little bit of fun, but the message was pretty clear that everybody has an obligation. Parliament is the grand inquest of the nation. I know that's high-sounding but it's true. Parliament has the capacity to conduct inquiries either by way of committees or the House itself. It has the capacity to call for information and to call for individuals, and if you do not comply, you can potentially be in contempt. That's not a very difficult notion. There will always be grey areas, but this is the principle that underpins our system.

I think it fair to say the problem we now have with the public service - I don't say this in a derogatory sense at all, and I can go back to the days in the late 1960s when I started in the public service - is that it is more politicised than it used to be. The notion of permanent, impartial, independent people providing impartial, independent advice to the government has changed markedly. You now have, for example, people on contracts and short-term contracts, you've got people who are appointed -

***Mr WILLIE** - Ex-political staffers.*

***Mr TUNNECLIFFE -** Yes, all that sort of thing. The notion has changed a lot. With that goes this lack of understanding, recognition or acknowledgement that parliament has significantly wide powers. That's our system. I used to try to explain it to public servants and quite often they'd say, 'Well, I didn't realise that'.*[308]

Former Secretary of the Department of Premier and Cabinet, Mr Rhys Edwards also commented on the understanding by public servants of their role within the system of responsible government:

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*

[308] Mr Wayne Tunnecliffe, op. cit., pp. 44-45.

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.[309]

Professor of Law at University of New South Wales, Professor Gabrielle Appleby referred to how political culture impacts on the doctrine of responsible and representative government.

Professor Appleby suggested that assessment of the current political culture was important to ascertain whether governments will comply with measures to resolve disputes. Professor Appleby noted that in New South Wales, there had been some progress due to the Egan decisions, she stated:

The New South Wales system put in place came from a political culture that came out of the Egan litigation. It came from a situation where there had been an attempted use of a hard power and it was referred to the courts in an unusual exercise of jurisdiction by the courts. There was a [sic] very much an awareness of the limits of the legal power of the Legislative Council. So, you have a government willing to come to the table in terms of being involved in a process for the resolution of future disputes.

Contrast that to the situation in Victoria where I understand that while there has been the introduction of standing orders, they require the government to submit to those standing orders and to produce the documents to allow them to be reviewed for a dispute to be crystallised and then referred to an independent legal arbiter. The question for Tasmania right now is: where is the political culture? It sounds like you have a situation where you have ministers appearing before committees but you do not have a culture in which there is respect for the powers of the Council to require the production of documents.

Does that mean that if you went straight to standing orders, you would get stuck in Victoria's situation? I think that requires an assessment of where the Government stands and whether it would be willing to be involved. If the current situation is that it is not, what can the Legislative Council do to convince the Government to be involved?

***CHAIR** - I chaired a committee a number of years ago when the now Opposition was in government and we requested a document through that committee. We were given a response from the premier at the time - it might have been the minister for Health - … they basically said that the power was not there …. This is a letter that was referred to and excerpts from which were put into a letter under the current Government to a committee that I am sitting on refusing to release the document on the basis that this is what the previous government said.*

…. It almost becomes the precedent so maybe you have to look at a deadlock for that sort of approach. …. How do you resolve that? Do you have to then push the point and exert the power?[310]

[309] Mr Rhys Edwards, *Transcript of Evidence,* 30 September 2019, p. 9.

[310] Professor Gabrielle Appleby, Professor in Law, University of New South Wales, *Transcript of Evidence,* 24 September 2019, p. 58.

Professor Appleby stated that change could possibly occur to the current political culture in the Tasmanian Legislative Council by the use of the soft and hard powers that are available to the Council:

> *Again to come back to this point, it depends where you are at the point of the relationship between parliament and the government, between the House and the government. If you are in a situation where the government is not even willing to give it over to the Clerk for it to be referred to an independent legal arbiter then, yes, the point you are making, which is then maybe it is time for the House to ramp up its responses to the government refusal. The government will be aware the Council is not just going to quietly assert its power, but actively assert its power if they will not comply with the process. To a point where the government sees the process is a better outcome than simply having to comply with the motion being passed by the parliament.*
>
> *If you are in a situation where the government has not come to that point yet, then, yes, I think there is. Brendan referred to the fact there is the tiering within the legislation itself, getting to a point of summons, even if a summons is responded to, there is the soft response, there is the hard response. If that is needed to get the government to a point where it realises coming on board with a process that involves an independent legal arbiter is a good thing for it as well, maybe then, yes, it is required.*
>
> *If you are in a situation where you are in New South Wales, where this does not need to be asserted every time because the government is in a different headspace in terms of accepting the process, when there is a call for production of documents, this is the process we follow.*
>
> *It sounds like in Tasmania you are at a point where the Government has not yet accepted that, or for whatever reason you are at a point where the Government is not accepting that over the course of the last few years, I would say a political cultural change needs to happen before you can just plonk a new process in place and think it will be complied with.*[311]

Senior Law Lecturer from the University of Tasmania, Dr Brendan Gogarty added to Professor Appleby's comments, he noted:

> *… It seems and Dr Appleby is saying the culture is now pushing towards the government getting the most benefit from the uncertainty. The parliament can move against this by setting up some procedural rules now. It does not need to be aggressive. It can always say at the very end of this process, 'We will [inaudible] but prior to that, here are the rules we have developed to create some clarity because of the vagueness and nebulous nature of these claims is undermining public confidence and the constitutional role of this House'.*[312]

Comments were also made by witnesses in relation to the executive's understanding of the doctrine of responsible and representative government in relation to Right to Information laws.

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311 Professor Gabrielle Appleby, op. cit., p. 61.

312 Dr Brendan Gogarty, Senior Law Lecturer, University of Tasmania, *Transcript of Evidence,* 24 September 2019, p. 60.

While the Parliament or a committee of the Parliament, may recognise some of the grounds set out in the Act as similar to public interest immunity grounds, it must be noted that just because the Act includes these grounds as exempting certain information from release to persons, this Act has no application to the Parliament or Committees of the Parliament.

The Parliament is not a person or a body of persons and holds inherent power to call for the production of papers and information.

Former Administrative Law/Public Law Lecturer at the University of Tasmania, Honorary Associate Professor Rick Snell commented on the past and current political culture. Associate Professor Snell suggested the culture within government with regard to sharing of and access to information publicly had not changed in Tasmania, even with freedom of information legislation and more recently, the *Right to Information Act 2009* being in place, he stated:

> *… What intrigues me is the inability to trigger what is necessary to make that cultural change, especially in Tasmania, and Australia in general. Taking a comparative approach, I hold the view that the Australian approach to government information is retrospective, retrograde and hopeless in terms of the way it treats it.*
>
> *With the passage of an RTI act or FOI act in any jurisdiction, it really should be a question of almost flicking a switch - a complete change in ideology and approach that takes place. That switch happened in New Zealand. It happens in many other jurisdictions, such as Norway and so on. In Australia, and Tasmania in particular, it has never taken hold. Even people I have taught in my admin. law classes … haven't realised what is necessary with that switch. They talk the talk, but have never really advocated the actual real intent of that legislation. If you read the object sections of the old FOI Act, you would have said we would have been here by now. We would have had 20 to 30 years of actual practical experience of transforming the culture of government decision-making with a high degree of openness.*
>
> *With the RTI Act as it was redesigned in 2009, the whole intent and purpose of that redesign was to flick the switch. For a very brief time, you had the possibility for it. Since that time, no. I have spoken quite publicly about some of the reasons for backing that particular process. The FOI Act, or the RTI Act, and that general question about open government is, I think, a public good that just doesn't seem to be wanted in this jurisdiction from the powers that be. It is seen as disruptive, as ineffective, as time wasting. You only have to go back and look at Mr Egan's comments when he was delivering his in-person thing - 'What a waste of time, truckloads of documents, it's just a waste of space' et cetera. I have heard Tasmanian public servants at senior levels talk about the whole transparency RTI aspect in that process - that it is a lot of effort for only a very few dilettantes like myself who are interested in this type of thing so why should we go to all that time and effort to go through that process?*
>
> *If you can achieve that cultural change, that would be fantastic. I think this committee has the prospects of doing so, if you go back to those basic principles and say that, almost as a right, parliament has the right to access all information - making a decision that*

there may be times where a degree of confidentiality is required. That kind of thing sets the tone for the rest that takes place.

I think you also have to be assertive about it. Professor Appleby talked about that. You need to stand your ground and assert the right to access that information, and put the pressure on the government and the departments to come up with a better way of doing things - a much more collaborative, much more productive way of making that information available.[313]

It was noted within a previous chapter detailing the experiences of parliamentary committees whereby in all three refusals, amongst other claims, the executive laying claim to refuse to produce documents on the basis of right to information laws. This claim is misconstrued as these laws do not legislate to include the Parliament. The intent of the *Right to Information Act 2009* (the Act) is described below.

Section 7 of the Act provides a person a legally enforceable right to be provided with official information in the possession of a public authority, unless the information is exempt information. A public authority is defined in the Act and includes government departments, Ministers, local government and the like.

The objects of the Act relate to improving democratic government in Tasmania. Section 3 of the Act includes this statement of the object of the Act as follows:

1. *The object of this Act is to improve democratic government in Tasmania*
   a) *by increasing the accountability of the executive to the people of Tasmania;*
   b) *by increasing the ability of the people of Tasmania to participate in their governance; and*
   c) *by acknowledging that information collected by public authorities is collected for and on behalf of the people of Tasmania and is the property of the State.*[314]

Essentially it is an Act that allows persons to apply for information and it does not apply to relations between the Government (the Executive) and the Parliament.

As noted in the Ombudsman's Manual:

The word "person" is to be understood by reference to the definition of this word in s 41(1) of the Acts Interpretation Act 1931, where it is said to include "any body of persons, corporate or unincorporate, other than the Crown".[315]

The grounds set out in the Act to exempt information from release, while these may be relevant to persons applying for information held by public authorities, such as a government department or Minister, they have no application to the Parliament or a committee of the Parliament.

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313 Associate Professor Rick Snell, op. cit., pp. 20-21.

314 *Right to Information Act 2009 [Tas].*

315 Ombudsman Tasmania, *Right to Information Act 2009 Tasmania, Ombudsman's Manual,* First published July 2010, p. 5.

NEXT STEPS — MATTERS FOR CONSIDERATION

This chapter examines:

- the Senate of the Australian Parliament's considerations of the possible implementation of an independent arbitration mechanism to resolve disputes over the production of documents; and

- evidence received in relation to implementation of additional dispute resolution procedures in the Tasmanian Legislative Council and related resourcing and administrative matters are also considered.

Senate of the Australian Parliament

In 1994, The Senate Committee of Privileges considered a private senator's bill, the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.* The motion referring the Bill to the Privileges Committee noted the government's continued failure to comply with orders for the production of documents to the Senate and its Committees on the basis of executive privilege or public interest immunity. There being no mechanism available to the Senate in adjudicating claims of executive privilege or public interest immunity, the Bill included the following provisions:

> *(i) the enforcement by the Federal Court of the lawful orders of the Senate and its Committees, particularly orders for the production of information and documents,*
> *(ii) avoidance of any imposition of a penalty on a public servant for acting under the directions of a minister, and*
> *(iii) the adjudication and determination by the Court of any claim of executive privilege or public interest immunity, through the examination of the disputed evidence or documents by the Court.*[316]

The Senate's submission stated the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994* if passed:

> *… would have significantly amended the law of parliamentary privilege by allowing the courts to adjudicate disputes between the Parliament and executive regarding the giving of information or the production of documents. The Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 provided that failure to comply with a lawful order of either House or a committee would be a criminal offence prosecuted in the Federal Court. If an offence were proved, the Court would make orders to ensure future compliance with the order. The bill provided that, where the government raised a claim of executive privilege or public interest immunity during proceedings on a prosecution, the court would be able to examine the disputed evidence or documents in camera prior to determining whether the claim was sustained.*[317]

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316 Australian Senate, Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994,* (49th Report), September 1994, pp. 1-2.

317 Australian Senate, *Submission #5*, p. 1.

The Privileges Committee recommended that the bill not proceed:

> *…citing evidence by virtually all witnesses that it would be unwise for the Parliament to allow the courts to adjudicate claims of executive privilege or public interest immunity for a House or its committees. The committee considered that such claims should continue to be dealt with by the House concerned, noting that the Houses possessed the necessary powers to protect their rights.*[318]

The Senate's submission provided a summary of previous considerations by the Senate regarding the introduction of an arbitration mechanism as follows:

> *In 1995 the Privileges Committee commended the use of an independent arbiter to evaluate claims of executive privilege against public interest criteria. It noted that in the particular case of refusal to provide the Senate with documents about government property leases on commercial confidentiality grounds, the dispute had been appropriately adjudicated by the Acting Auditor-General.*
>
> *In 2001 the Senate agreed to an order of continuing effect for the production of information about contracts entered into by government agencies and whether they contained inappropriate confidentiality provisions, with the Auditor-General to review a selection of such contracts at regular intervals to assess progress in reducing the number of inappropriate claims of confidentiality. While there is often initial resistance from the executive to such orders of continuing effect, they have generally been accepted over time. In this case, the government claimed that the order for entity contracts was beyond the power of the Senate; however this claim was later tacitly abandoned. The order, as amended, remains in place with the Auditor-General now producing biennial reports.*
>
> *In 2010 the Finance and Public Administration References Committee recommended against the Senate adopting a process of independent arbitration over public interest immunity claims. However, later that year the agreements for parliamentary reform entered into at the beginning of the 43rd Parliament indicated renewed support for such a mechanism, using the Australian Information Commissioner as arbiter, but no action was taken to implement this proposal.*
>
> *The idea of independent arbitration was again canvassed in 2014 by the Legal and Constitutional Affairs References Committee, with the committee recommending that the Procedure Committee again examine the issue. The Procedure Committee reported that it had considered the independent arbitration mechanism utilised in the New South Wales Legislative Council, but had concluded that the mechanism was not readily adaptable to the Senate and that the Senate's current procedures which involve a range of solutions were preferable.*[319]

Further, the Procedures Committee concluded the order of 13 May 2009 that applies to committees in prescribing guidance to ministers in determining public interest immunity claims,

[318] Australian Senate Submission, op. cit., p. 2.
[319] Ibid., pp. 2-3.

should also apply to the Senate with returns to orders. The report stated:

> *It agrees that a standard process for raising claims of public interest immunity, as embodied in the order of 13 May 2009, has been beneficial in encouraging greater awareness among officers appearing before committees and in improving the responsiveness of minsters, although there is much room for improvement. In addition, the committee encourages the Government to make every effort to ensure that senior public servants are familiar with and comply with the Government Guidelines for official witness appearing before parliamentary committees and related matters, issued in February 2015.*
>
> *While the order of 13 May 2009 applies specifically to committees, expectations of ministers in responding to orders of the Senate are either explicit or implicit in other orders and practices of the Senate. For example, the order of 30 October 2003 requires a minister to include in any claim to withhold information on the ground that it is commercial-in-confidence, a statement setting out the basis for that claim, including a statement of any commercial harm that may result from the disclosure of the information.*
>
> *The Committee agrees that there is value in consolidating guidance for responses by ministers to orders for documents and commends the following, drawn from existing practices, to the Senate for endorsement:*
>
> - *Under standing order 164, orders for production of documents are transmitted by the Clerk to the Leader of the Government in the Senate. A copy is provided to the Senate minister representing the relevant minister.*
> - *Ministerial responsibility to the Senate is reflected in arrangements for Senate ministers to represent portfolios of House ministers, as well as having direct responsibility for their own portfolios.*
> - *Responses to orders for documents are therefore provided to the Senate in the name of the Leader or the responsible Senate minister.*
> - *Returns – meaning documents provided in full compliance with an order – may be provided to the Clerk for tabling.*
> - *Any other response, including responses seeking more time to comply or claiming that it would not be in the public interest to produce all or some of the documents sought, should be presented to the Senate either by the Leader or the Senate minister responsible for the matter. This can take the form of a letter to the President from the Leader or relevant Senate minister for tabling by a Senate minister, or a statement to the Senate by the Leader or relevant Senate minister for tabling or oral presentation.*
> - *Subject to the determination of any proper claim that it would not be in the public interest to comply in part or in full with the order, ministers are obliged to produce documents to the Senate.*
> - *Any claim that it would not be in the public interest to comply in part or in full with an order must be accompanied by a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the production of the document to the Senate.*

- *The provisions in standing order 164(3) giving senators procedural rights to seek explanations for non-compliance with orders once 30 days have passed after the deadline, and to take other action subsequently, do not amount to an implied extension of time for compliance.*
- *Further action on any claim that it would not be in the public interest to comply in part or in full with an order is a matter for the Senate, on the initiative of any senator.*[320]

Further, the Procedure Committee concluded that adherence to these guidelines may address the dissatisfaction felt by Senators with non-compliance with returns to orders without the need to resort to a general arbitration mechanism that does not have all party support. Further, the Committee proposed to monitor responses to orders for documents and report to the Senate thereafter.[321] On 24 June 2015, the Senate agreed to adopt these recommendations.[322]

The Senate Procedure Committee's First Report of 2017 - Tracking public interest immunity claims noted:

> *… there had been some improvement in adherence to guidance in the committee's second report of 2015 about practices which should be followed in making public interest immunity claims.*
>
> *However, the committee also noted that rates of compliance with orders were reasonably low and considered that there may be scope for compliance efforts to be sharpened by an order of continuing effect requiring governments to report to the Senate every 6 months on orders that remain on the Notice Paper.*[323]

Further, the Senate Procedure Committee made the following recommendation and was adopted by the Senate on 7 December 2017:

> ***Report on outstanding orders for documents***
> *(1) That there be laid on the table by the Leader of the Government in the Senate, not later than 2 calendar months after the last day of each financial year and calendar year, a list showing details of all orders for the production of documents made during the current Parliament which have not been complied with in full, together with a statement indicating whether resistance to them is maintained and why, and detailing any changing circumstances that might allow reconsideration of earlier refusals.*
> *(2) the order is of continuing effect.*[324]

[320] Australian Senate, Procedure Committee, *Third party arbitration of public interest immunity claims,* Second Report of 2015, June 2015, pp. 15-16.
[321] Ibid., p. 16.
[322] Commonwealth of Australia, Parliamentary Debates, *Senate – Official Hansard, No. 7 of 2015,* 24 June 2015, p. 4490.
[323] Australian Senate, Procedure Committee, *Tracking public interest immunity claims,* First Report of 2017, December 2017, p 6.
[324] Ibid.

Tasmanian Legislative Council

The Committee explored with witnesses and received evidence in support of the introduction of a procedure, including by way of a sessional or standing order to resolve disputes. The consideration included the introduction of a procedure utilising an independent arbitration mechanism. The introduction could be seen as an effective mechanism to resolve disputes.

Clerk of the Tasmanian Legislative Council, Mr David Pearce stated:

> *It's another tool, an additional tool that we don't have at the current time and haven't had in the history of the upper House of the Tasmanian Parliament at least.*[325]

Constitutional law expert, Mr Bret Walker SC stated:

> *If it is thought appropriate to have a lack of procedure so that the politics of the moment will govern production then I suppose one would leave things as they are. Coming from New South Wales and having been closely involved for a quarter of a century now in these matters here in Sydney, I emphatically regard a pre-existing procedure made in general terms and not devised for particular political controversies to be a much superior way for Chambers to proceed. Otherwise there is obviously the risk of inconsistent approach in a series of different cases, suggesting that the Chamber is not applying a principled approach, which would detract from the authority and dignity of the Chamber.* [326]

Former Tasmanian Solicitor-General Mr Leigh Sealy SC provided supporting evidence:

> *… with the existence of a standing order, which has the appearance of a settled rule about how people are to play the game, it might be felt to make it somewhat more difficult for the government of the day to be seen to be breaking the rule and therefore it might visit a bit more political odium on them than otherwise.*
>
> ***…** would enhance not only the authority, but also the role of parliament in its proper function of holding the government to account. That is why we call it responsible government because the government is responsible to this place.*[327]

Professor Richard Herr OAM provided similar evidence:

> *The point is the two larger state parliaments in Australia have accepted this is a way forward because it will reduce the tension between the parliament and the executive. I cannot see why we would have more difficulty as a consequence.*[328]

Former Administrative Law/Public Law Lecturer at the University of Tasmania, Honorary Associate Professor Rick Snell stated:

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325 Mr David Pearce, op. cit., p. 28.
326 Mr Brett Walker SC, op, cit., p. 2.
327 Mr Leigh Sealy SC, *Transcript of Evidence,* 6 September 2019, p. 9.
328 Professor Richard Herr, *Transcript of Evidence,* 6 September 2019, p. 32.

That is why I'd be a strong supporter of what's been proposed to you for, say, an independent arbitrator to be involved in the process. It's the same type of role, that the ombudsman plays in the RTI process.

I think in all these processes, there are legitimate claims for secrecy or confidentiality, whether they be short term, medium term or long term. You need a body or an organisation or an individual that effectively can give their imprimatur to that claim. I think a claim being made by one side, such as the Department of the Premier and Cabinet, and a committee on the other side is a frustrating experience, especially when you can't know what information one side holds compared to the other.

Having someone independently say, 'In my view, this is Cabinet-in-confidence and it ought to be confidential because the release of information could have serious consequences', allows those claims to be validated. In a sensible system, both sides would accept, if you like, the umpire's decision in that process.[329]

Former Secretary Department of Premier and Cabinet, Mr Rhys Edwards commented:

Whilst the Legislative Council undoubtedly possesses the power to require the production of documents, and at the same time acknowledging some information held by Government ought not to be disclosed (widely referred to a public interest immunity) I consider it 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 claim.[330]

Further, Mr Edwards stated:

I think that an important part of resolving this issue between the Legislative Council and the Government must be some clear indication that Committees will not accept a claim for PII based only on the grounds that the document in question has not been publicly released, is confidential or is advice to or internal deliberations of government but that the Minister must also specify the harm to the public interest that may result from the disclosure of the information or document. A recent report from the House of Commons (HC1904) puts it nicely "Ministers are responsible for putting before the House their arguments against the disclosure of information which they believe requires protection".

…

I would however point towards the process outlined in the NSW Parliament under Standing Order 52 of the Legislative Council. The Government in this case may make a claim of privilege, and must articulate the nature of that claim. Privileged documents are available for inspection by members of the Legislative Council only. Any member may dispute the validity of a claim of privilege. In these cases, the validity of the claim is

[329] Honorary Associate Professor Rick Snell, op. cit., 10 March 2020, p. 19.
[330] Mr Rhys Edwards, *Submission #15,* 1 August 2019, p. 3.

considered by an independent legal arbiter. Importantly, it is ultimately for the House to determine the validity of the claim.[331]

The Hon Sue Hickey MP, Member for Clark, current Speaker of the House of Assembly expressed support in her submission for an alternate dispute resolution procedure utilising an independent arbitration process:

> ***Thus in summary*** *the attention to detail in regard to the claims for Executive Privilege becomes able to be tested, and such claims are tested by an independent legal arbiter appointed by the Parliament.*
>
> *Therefore this provides context in which the Government of the day has to make administrative decisions by the Secretary of the Department of Premier and Cabinet, who will be the single point of focus for the orders issued by the Parliament for the production of documents.*
>
> *This proposed change to the standing orders of both the Legislative Council and the House of Assembly will clarify the requirements that the Parliament lays down absolutely, while at the same time safeguarding the issue of Executive Privilege.*[332]

Tasmanian Labor Party Shadow Attorney-General Ella Haddad MP in her submission to the Committee stated:

> *… The arbiter's report is strictly advisory, and they have no legal power to force the publication of a tabled document. This remains the responsibility of the Legislative Council.*
>
> *There are a number of potential problems with this process:*
>
> - *The Government might simply refuse to supply the documents for tabling in the first place, as occurred in Victoria in 2007 following the introduction of a similar procedure.*
> - *Where requests are made for a category of documents, rather than a specific document, the Legislative Council will have no way of knowing if any relevant documents have not been provided.*
> - *If the Government does not accept the need for arbitration, it might simply refuse to accept the validity of the entire process. This also occurred in Victoria in 2007.*
>
> *The process therefore still relies on the good faith of the Government. If the process is designed to resolve situations where the Legislative Council believes the Government is not acting in good faith, questions remain about the likely efficacy of the New South Wales model.*

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331 Mr Rhys Edwards, *Submission #15,* op. cit., pp. 2-3.

332 The Hon Sue Hickey MP, Member for Clark, House of Assembly Tasmania, *Submission #3,* p. 2.

On the other hand, an arbitration process could:

- *Allow the Government to establish the validity of its privilege claims, as occurred in the ACT in May 2009.*
- *Increase the political pressure on a Government that refuses to release a public document.*
- *If an arbitration process is recognised as being complementary to the Legislative Council's current powers, rather than a replacement of them, the proposal might have merit.*[333]

Professor Gabrielle Appleby, Dr Brendan Gogarty and Professor George Williams AO in their joint submission to the Committee supported the introduction of an independent legal arbiter for resolving disputes between the government and the Tasmanian Legislative Council and outlined what the arbiter's role should include:

> *For the reasons we have given above, our recommendation is that the arbiter be appointed with extensive legal experience, whose primary role is to provide a legal view as to whether the documents fall within the claimed category of privilege. We also recommend that the arbiter be asked to report to the Council as to whether any public harm caused by disclosure outweighs the public interest in such material being made publicly available, with particular consideration for the principles of representative and responsible government and the rule of law within which the government and Council are established upon and from which they draw their powers and duties. We believe that it is useful for the arbiter to provide the Legislative Council with his or her views on this issue, acknowledging that the final decision on all of the issues, and particularly those involving the public interest, will lie with the Council itself. A report from the arbiter, however, allows for the Council to be better informed in that decision. To address some of the concerns raised by Twomey, we have also recommended greater guidance be given to the independent arbiter in relation to the questions on which he or her is to report than is currently the case in New South Wales.*[334]

The Government submission did not support any change to the current processes in place, citing them as adequate. The Government submission stated:

> *The Tasmanian Government is not supportive of any change to the existing framework concerning the production of papers, documents and records between the Government and the Legislative Council and its Committees, including Joint Committees where Members of the Legislative Council have membership. The Government considers that the existing mechanisms for the production of documents appropriately balances the need for parliamentary scrutiny and transparency against ongoing public interest concerns.*
>
> *It is submitted that there are adequate mechanisms in place to order the production of*

[333] Ms Ella Haddad MP, op. cit., pp. 4-5.

[334] Professor Gabrielle Appleby, Dr Brendan Gogarty and Professor George Williams AO, op. cit., p. 6.

documents, and moreover, hold the Executive to account. …[335]

Administrative Considerations

The introduction of a possible standing order to facilitate an arbitration process would require additional resourcing and administration.

The Clerk of the Tasmanian Legislative Council, Mr Pearce advised the Committee:

> ***Mr PEARCE*** *– Certainly, funding for the independent arbiter. There would be some paper handling, document handling, in terms of storage and indexing of papers being provided by the executive. It is difficult to say - depending on the number of orders and responses or returns to those orders that are made - in terms of providing those documents, but there would be some administrative activity in terms of indexing documents, making them available in a register for others to view, et cetera, storage, housekeeping type matters, on top of the cost of engaging an independent legal arbiter.*
>
> ***CHAIR*** *- … we have not had a large number, to date, of documents being requested that have been contested. There have been a few. I can recall we have had at least a couple of experiences on the Public Accounts Committee, another in a subcommittee of Government Administration Committee A. So, not a common occurrence. If that was to be the similar sort of approach, would that be an onerous burden on your office?*
>
> ***Mr PEARCE*** *- No, I do not believe so. I think we could handle that with the resources we have through the Clerk's Office and Table Officers we have in place at the moment.*
>
> ***CHAIR*** *- Do you believe there would be any additional training or upskilling of your staff required for this, or is it really just more a procedural process once it was in place?*
>
> ***Mr PEARCE*** *- My understanding is that it would be more procedural and administrative than anything else.*
>
> ***…***
>
> ***Mr WILLIE*** *- Do you have a view about members' access? Would that be an issue, given the office arrangements and things like that?*
>
> ***Mr PEARCE*** *- I don't think so. I do not believe that would be an issue for us in terms of making documents available for inspection, if that was the way the committee decided to go and it was agreed to by the House. We have disclosure interest returns that I keep that are viewed by others, various tabled papers that members of the public come in and want to inspect and view. We provide that service and provide that in a confidential way. There wouldn't be a huge difference to what we do now, I don't believe.*
>
> ***CHAIR*** *- In terms of the workload around that, do you get many requests to view tabled papers and members' disclosures?*

[335] Tasmanian Government, op. cit., p. 1.

Mr PEARCE *- No, few and far between.*

CHAIR *- How many of those are you able to provide electronic access to or do they need to come in and view them?*

Mr PEARCE *- They do. Our practice is that they need to be viewed, not copied or taken away but supervised examination of the documents. That is our practice and I don't think I would depart from that. It has been a good practice and it has served us well over time.*

CHAIR *- In terms of a document that a committee or an individual member had sought and had been contested, and later if the advice was that the claim of privilege was not warranted and that document was then subsequently made available, that would then become a public document generally anyway, wouldn't it? So, it wouldn't need to be held by your office.*

Mr PEARCE *- No. We would probably table the document. Our practice has always been if you want to make something public you table the document. Once it is tabled it is there for all and sundry to see.*[336]

The Tasmanian Government made the following comment in their submission:

It is also submitted that any changes to the existing conventions and process may not only create additional complexity and inefficiencies but also lead to unforeseen consequences, and critically, further administrative costs which cannot be estimated at this time. I also note this lack of certainty is somewhat exacerbated by the very broad term of reference of the committee, given that the resources available to the work of the committee is finite. These potential, additional costs may further undermine the public interest in pursuing, what are arguably, unnecessary and uncertain procedural changes.[337]

Professor of Law from the University of New South Wales, Professor Gabrielle Appleby stated in relation to the Government submission that:

I think that submission, in many ways, is a reordering of constitutional principle, which I find problematic. It is an ordering of constitutional principle that puts administrative costs and efficiencies at the top, and is dismissive of the constitutional principle of responsible government, and the responsibilities of the House.

To say that the existing conventions and processes are adequate, based on my understanding of what is happening in Tasmania, is a position in which the Legislative Council has been hamstrung in its ability to fulfil its constitutional role and it is holding the Government to account. That to me, has to be the most prioritised constitutional principle.

[336] Mr David Pearce, op. cit., pp. 25-26.
[337] Tasmanian Government, op. cit., p. 3.

Considerations around efficiency and administrative costs will come into it, but I think that is more a matter of how you design the process and who bears the cost et cetera, as opposed to a reason not to put in place a new process.[338]

Further, Dr Gogarty stated**:**

There would be no cost at all if the Government handed over all its documents. The cost created here is the result of the ambiguity. It's the other way around. It's a disingenuous statement.

***Mr DEAN** - It might be a cost to them, though.*

***Dr GOGARTY -** It might be a cost to them. It certainly needs a degree of trust between the branches, but the committees will regulate its own processes.*

As Gabrielle was saying, this in fact is a constitutional process, a very corporate statement that seems to confuse the role of the government as the director of a large corporation rather than responsible for parliament. Ironically, in terms of regulatory theory, most corporations would want greater clarity in the law. Uncertainty in the law, uncertainty in what the rules are and ambiguity really does create additional costs.

Here you have a situation where there is uncertainty on both sides, possibly being exploited by one over the other, … These committees have to go and get their own advice. I don't think this is a statement of some point. I think the opposite is true.[339]

Process of amending Legislative Council Standing Orders

The Clerk of the Tasmanian Legislative Council Mr David Pearce provided information on the approval process when changes had previously been made to Standing Orders of the Tasmanian Legislative Council:

1. *Changes to Standing Orders usually follow a report from the Standing Orders Committee.*

2. *Those proposed changes are usually considered and noted by the Council by way of a substantive motion.*

3. *The changes are then agreed by Resolution of the Council.*

4. *The Clerk of the Council or the President by direct letter to the Governor sets out the new Standing Order or recommended changes and requests in that letter the Governor's approval. There has not at any time been an Executive Council Minute prepared recommending approval of new or amended Standing Orders by the Governor-in-Council.*

[338] Professor Gabrielle Appleby, op. cit., pp. 64-65.
[339] Dr Brendan Gogarty, op. cit., pp. 65.

5. *The Governor responds directly to the President by letter giving approval.*

6. *That direct correspondence is read by the President to the Council and made part of the official Journals of the House.*

7. *The new Standing Order(s) or changes being approved by the Governor in this way become binding and of force.*

The last major review of the Standing Orders was undertaken in 2003 with the Council agreeing to those Standing Orders on 19 October 2004. They were approved by His Excellency the Governor on 6 January 2005.[340]

[340] Mr David Pearce, Clerk of the Legislative Council, Parliament of Tasmania, *Correspondence to the Committee,* dated 13 September 2019, pp. 1-2.

APPENDICES

Accountability

10 Public interest immunity claims

That the Senate—

1. notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;
2. reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;
3. orders that the following operate as an order of continuing effect:
    1. (0) If:
        1. (0) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
        2. (0) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

    the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.
    1. (1) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.
    2. (1) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provi the committee a statement of the ground for that conclusion, speci

the harm to the public interest that could result from the disclosure of the information or document.

3. (1) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.
4. (1) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
5. (1) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.
6. (1) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
7. (1) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

4. requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(13 May 2009 J.1941)

CHAPTER 9 – TABLING OF DOCUMENTS

52. Order for the production of documents

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

(2) When returned, the documents will be laid on the table by the Clerk.

(3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.

(5) Where a document is considered to be privileged:

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
(i) made available only to members of the Legislative Council,
(ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

(7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

(a) made available only to members of the House,
(b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

30 COMPLIANCE WITH ORDERS FOR PAPERS

Mr Searle moved, according to notice:

1. That this House notes that, on 5 June 2018, this House:

   (a) censured the Leader of the Government as the representative of the Government in the Legislative Council for the Government's failure to comply with orders for the production of documents under standing order 52 dated 15 March 2018, 12 April 2018 and 17 May 2018,

   (b) ordered that, under standing order 52, there be laid upon the table of the House by 9.30 am on 6 June 2018 certain of those documents not previously provided to the resolutions dated 15 March 2018, 12 April 2018 and 17 May 2018, and

   (c) ordered that, should the Leader of the Government fail to table the documents by 9.30 am on 6 June 2018, the Leader of the Government was to attend in his place at the Table at the conclusion of prayers to explain his reasons for continued non-compliance.

2. That this House notes that on 6 June 2018:

   (a) the Leader of the Government failed to table documents in compliance with the resolution of 5 June 2018,

   (b) the Clerk tabled correspondence from the Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet in relation to the order of 5 June 2018, which stated that "after considering advice from the Crown Solicitor, a copy of which is enclosed, I advise that there are no further documents for production", and

   (c) on the President calling on the Leader of the Government to explain his reasons for continued non-compliance, in accordance with the resolution of 5 June 2018, the Leader of the Government stated that "further to the earlier advice of Ms Karen Smith, the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday".

3. That this House notes that, on 8 June 2018, the Clerk received:

   (a) correspondence from the Secretary, Department of Premier and Cabinet, noting that:
      (i) "all of the documents referred to in the resolution are Cabinet documents",
      (ii) "the Legislative Council has no power to require such documents to be produced",
      (iii) "on this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production",

   (b) redacted documents relating to Sydney Stadiums and unredacted documents relating to the Tune Report on the out-of-home-care system, and

   (c) a submission identifying documents relating to Sydney Stadiums and the Powerhouse Museum relocation business case which have been "provided on a confidential basis for inspection by members of the Legislative Council only".

4. That this House notes that on 12 June 2018, the Clerk published redacted documents relating to the Powerhouse Museum relocation business case, received on 8 June 2018, which had been treated as confidential until separated by representatives of the Department of Planning and Environment.

5. That this House notes that:

   (a) the only established mechanism by which the Department of Premier and Cabinet may lodge documents with the Clerk directly, or by which ministers and government agencies may make a claim of privilege, is under standing order 52, in response to an order for the production of documents,

   (b) in response to the House ordering the Leader of the Government to stand in his place at the Table to explain his reasons for non-compliance with the order of 5 June 2018, the Leader of the Government advised the House that "the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday", and

   (c) the correspondence and documents provided by the Department of Premier and Cabinet and received by the Clerk on 8 June 2018 and 12 June 2018 were administered by the Clerk in accordance with, and under the authority of, the provisions of standing order 52, including by treating the documents "provided on a confidential basis" in the same manner as documents subject to a claim of privilege.

6. That this House rejects the statement made by the Secretary of the Department of Premier and Cabinet on behalf of the Government that the documents provided on 8 June 2018 and 12 June 2018 were provided voluntarily.

7. That this House notes with concern the following statements made by the Government regarding the power of the Legislative Council to order the production of documents:

   (a) on 1 May 2018, in response to a question without notice regarding the non-production to the House of the full business case in relation to the Powerhouse Museum, the Leader of the Government informed the House of the Government's position that "no Cabinet information will be produced or referred to in responding to a resolution made under standing order 52",

   (b) on 5 June 2018 during debate on the motion to censure the Leader of the Government, the Leader of the Government stated:
      (i) "I represent the Government's view as it relates to the order for production of Cabinet documents",
      (ii) "The majority judgement in Egan v Chadwick did decide the matter: the law is settled and it is well established",
      (iii) that the Government's view is based on "the very clear position at law that the Legislative Council cannot compel the [Government] to hand over Cabinet documents", and

   (c) in correspondence received by the Clerk on 8 June 2018, the Secretary of the Department of Premier and Cabinet stated that "the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production".

8. That this House notes that in the judgements of Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in Egan v Chadwick (1999), in relation to Cabinet documents:

(a) Spigelman CJ held that:

(i) a distinction has been made between documents which disclose the actual deliberations within cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet,
(ii) it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with the doctrine of collective ministerial responsibility by revealing the "actual deliberations of Cabinet",
(iii) however, the production of documents prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to Cabinet,

(b) Meagher JA took the view that the immunity of cabinet documents from production was "complete", arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government, but without exploring the distinction between different types of Cabinet documents drawn by Spigelman CJ, and

(c) Priestley JA noted that:
(i) a court has "the power to compel production to itself even of Cabinet documents",
(ii) the "function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity", and
(iii) " … notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy".

9. That this House notes that:

(a) the Government apparently relies on the broad definition of "Cabinet information" adopted in the Government Information (Public Access) Act 2009,

(b) the Legislative Council rejects the proposition that the test in the Government Information (Public Access) Act 2009 of what constitutes Cabinet information is applicable to Parliament,

(c) the Government's apparent reliance on the definition in the Government Information (Public Access) Act 2009 is likely to have led to a much broader class of documents being withheld from production to this House than that articulated by the majority of the NSW Court of Appeal in the judgments of Spigelman CJ and Priestly JA in Egan v Chadwick, the provision of which is necessary for the Legislative Council to fulfil its constitutional role, and

(d) the true principle from Egan v Chadwick concerning the power of the House to order the production of Cabinet documents is, at a minimum, that articulated by Spigelman CJ, and that the Government has failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ.

10. That this House asserts that it has the power to require the production of Cabinet documents such as those produced on 8 June 2018 and 12 June 2018 and that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick.

Debate ensued.

Question put.

The House divided.

Ayes 21

Mr Borsak	Mrs Houssos	Mr Secord
Mr Brown	Mr Mason-Cox	Ms Sharpe
Mr Buckingham	Mr Mookhey	Mr Shoebridge
Mr Donnelly *	Mr Moselmane *	Mr Veitch
Dr Faruqi	Mr Pearson	Ms Voltz
Mr Field	Mr Primrose	Ms Walker
Mr Graham	Mr Searle	Mr Wong

* Tellers

Noes 20

Mr Amato	Mr Franklin	Mr Martin
Mr Blair	Mr Green	Mrs Mitchell
Mr Clarke	Mr Harwin	Revd Mr Nile
Mr Colless	Mr Khan	Dr Phelps
Ms Cusack	Mr MacDonald	Mrs Taylor
Mr Fang *	Mrs Maclaren-Jones *	Ms Ward
Mr Farlow	Mr Mallard	

* Tellers

Question resolved in the affirmative.

40. Orders for the production of documents by committees

1. That this House notes that in 2018, the unredacted copy of the Government's Final Business Case for the Windsor Bridge replacement project was produced to Portfolio Committee No. 5 – Industry and Transport as part of its inquiry into the Windsor Bridge replacement project following assertion by the committee of the power of Legislative Council committees to order the production of State papers.

2. That this House notes that Portfolio Committee No. 4 – Legal Affairs in its report on the Budget Estimates 2018-2019, published the following legal advices in relation to the power of Legislative Council committees to order the production of State papers:

   (a) Crown Solicitor, "Section 38 Public Finance and Audit Act and powers of parliamentary committees", 10 August 2018,

   (b) Crown Solicitor, "Section 38 Public Finance and Audit Act and powers of parliamentary committees – Advice 2", 12 September 2018,

   (c) Acting Crown Solicitor, "Draft report of Inspector of Custodial Services", 24 October 2018,

   (d) Mr Bret Walker SC, "Initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees", 25 October 2018,

   (e) Acting Crown Solicitor, "Request by Committee for draft report of Inspector of Custodial Services", 29 October 2018,

   (f) Solicitor General, "Question of powers of Legislative Council Committees to call for production of documents from witnesses", Advice SG 2018/23 (redacted), and

(g) Ms Anna Mitchelmore SC, "Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019", 19 November 2018.

3. That this House notes that the Solicitor-General in her advice SG 2018/23 stated:

I should add, however, that it is more likely than not, in my view, that, if this question of the powers of a parliamentary Committee were to be the subject of a decision of a court, a finding would be made that a Committee of the NSW parliament has the power to call for a witness to attend and give evidence, including by the production of a document, subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness. There may be some argument as to whether such a power resides in the Parliamentary Evidence Act, Standing Order 208(c) of the Legislative Council or a power based on reasonable necessity but, if the power does exist, it would be likely to emerge in any court proceedings on the basis that such proceedings would be difficult to confine to the limited question of the construction of the Parliamentary Evidence Act.

4. That this House welcomes and endorses the opinion of the Solicitor-General as an acknowledgement of the power of Legislative Council committees to order the production of documents.

5. That this House further affirms that whilst in the first instance Legislative Council committees will seek to obtain access to necessary documents by request, they do possess the power to order the production of documents which may be exercised in the event a request is declined.

6. That this House calls upon the Premier to reissue Premiers memorandum C2011-27 "Guidelines for Appearing before Parliamentary Committees" and M2017-02 "Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees" in accordance with the Solicitor-General's opinion, and the procedures set out in this resolution.

7. That, notwithstanding anything to the contrary in the standing orders, for the duration of the current session:

(1) Whenever a committee resolves to order the production of documents under standing order 208(c):

(a) a copy of the order is to be communicated to the Department of Premier and Cabinet by the Clerk, and

(b) a summary of the terms of the order are to be reported to the House by the President on the next sitting day.

(2) The terms of the order agreed to by a committee must specify the inquiry to which the order relates, and the date by which the documents are to be returned.

(3) When returned, the documents will be lodged with the Clerk of the Parliaments and made available to members of the House.

(4) The committee may authorise the publication of documents received, subject to paragraphs (6) – (8).

(5) A return under the order is to include an indexed list of all documents returned, showing the date of creation of the document, a description of the document and the author of the document.

(6) Where a document is considered to be privileged:

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege, and

(b) the documents are to be delivered to the Clerk of the Parliaments by the date and time required in the resolution of the committee and not published or copied without an order of the committee.

(7) A member of the committee may, by communication in writing to the Clerk of the Parliaments, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk of the Parliaments is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report as to the validity of the claim.

(8) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(9) A report from the independent legal arbiter is to be lodged with the Clerk of the Parliaments and:

(a) made available only to members of the committee, and

(b) not published or copied without an order of the committee.

(10) Documents returned to an order of a committee under standing order 208(c), which are in the custody of the Clerk of the Parliaments, are documents presented to the committee and form part of the evidence of the inquiry to which they relate.

[adopted 8 May 2019]

Attachment A – Extract of Council Standing Orders – Chapter

11 CHAPTER 11 - PRODUCTION OF DOCUMENTS

11.01 Order for the production of documents

(1) The Council may order documents to be tabled in the Council.

(2) The Clerk is to communicate to the Secretary, Department of Premier and Cabinet, all orders for documents made by the Council.

(3) An order for the production of documents must specify the date by when the documents must be provided.

11.02 Tabling of documents provided in accordance with an order for the production of documents

(1) Documents provided in response to an order under Standing Order 11.01 will be delivered to the Clerk of the Council.

(2) Upon receipt, such documents will be laid on the Table by the Clerk at the earliest opportunity.

(3) A return under this Standing Order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If the Council is not sitting on the date specified in the resolution of the Council under Standing Order 11.01(3), the documents may be lodged with the Clerk, and unless Executive privilege is claimed, are deemed to have been presented to the Council and published by authority of the Council.

(5) Documents lodged under Standing Order 11.02(4) must be laid on the Table by the Clerk on the next sitting day of the Council.

11.03 Documents claiming Executive privilege

(1) Where a document is claimed to be covered by Executive privilege —

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of Executive privilege; and

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council and —

(i) made available only to the mover of the motion for the order; and

(ii) must not be published or copied without an order of the Council.

(2) The mover of the motion for the order may notify the Clerk, in writing, disputing the validity of the claim of Executive privilege in relation to a particular document or documents. On receipt of such notification, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

11.04 Appointment of independent legal arbiter

An independent legal arbiter required in accordance with Standing Order 11.03(2) is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

11.05 Report of independent legal arbiter

A report from an independent legal arbiter appointed under Standing Order 11.04 is to be lodged with the Clerk and —

(a) made available only to members of the Council; and

(b) must not be published or copied without an order of the Council.

11.06 Clerk to maintain register

The Clerk will maintain a register showing the name of any person examining documents tabled under this Standing Order.

Attachment B – Attorney-General correspondence of 14 April 2015

Attorney-General

Level 26
121 Exhibition Street
Melbourne Victoria 3000
GPO Box 123
Melbourne Victoria 3001
Telephone: (03) 8684 1111
Facsimile: (03) 8684 1100
DX 210022

Our ref: D15/47181

Mr Andrew Young
Acting Clerk of the Legislative Council
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Young

Production of documents – Cranbourne Pakenham Rail Corridor Project

I refer to the Legislative Council's resolution of 25 February 2015 seeking the production of certain documents in relation to the Cranbourne Pakenham Rail Corridor Project.

There are long-established principles governing the release of Government documents to a House of Parliament. Similar principles apply in Victoria, the Commonwealth and other jurisdictions whose powers are based on historical transfer from the United Kingdom. Central to these principles is the protection of the public interest.

Pursuant to section 19(1) of the *Constitution Act 1975*, the powers of the Legislative Council to call for the production of documents are determined by reference to those powers held by the United Kingdom House of Commons in 1855 (subject to any inconsistent Act).

In 1855, the House of Commons' power to call for the production of documents was subject to clearly established exceptions. One of those exceptions was Crown privilege (now known as executive privilege). If the Government asserted that documents were the subject of executive privilege, this was a sufficient reason for refusing production to the House of Commons.

Accordingly, section 19(1) of the *Constitution Act 1975* provides that this exception represents a limit on the Legislative Council's power to call for the production of documents and that it is for the Executive Government to determine the application of the privilege to documents subject to a call for production.

In considering a claim of executive privilege, the Government must assess whether release of the information in question would be prejudicial to the public interest. In doing so, the Government considers whether disclosure would:

- reveal, directly or indirectly, the deliberative processes of Cabinet;

State Government Victoria

- reveal high-level confidential deliberative processes of the Executive Government, or otherwise genuinely jeopardise the necessary relationship of trust and confidence between a Minister and public officials;
- reveal information obtained by the Executive Government on the basis that it would be kept confidential, including because the documents are subject to statutory confidentiality provisions that apply to Parliament;
- reveal confidential legal advice to the Executive Government;
- otherwise jeopardise the public interest on an established basis, in particular where disclosure would:
  - prejudice national security or public safety;
  - prejudice law enforcement investigations;
  - materially damage the State's financial or commercial interests (such as ongoing tender processes, or changes in taxation policy);
  - prejudice intergovernmental and diplomatic relations; or
  - prejudice legal proceedings.

These principles are consistent with the obligations imposed on the public sector under the *Code of Conduct for Victorian Public Sector Employees* (which is binding under the *Public Administration Act 2004*).

These principles exist to protect the Westminster system, including the confidentiality of the Cabinet process and the proper functioning of the public service, as well as to protect the interests of the State more broadly, including the integrity of its dealings with the private sector. They are not an unfettered power granted to the Executive Government – they are recognised, appropriate and limited exceptions to Parliament's ability to obtain documents.

The Executive Government has now assessed the documents sought by the Council against the factors listed above. The Government has determined that the release of one of the documents would be prejudicial to the public interest, as it would reveal the deliberative processes of Cabinet. Accordingly, the Government, on behalf of the Crown, makes a claim of executive privilege in relation to the document described, and on the ground set out, in the attached schedule.

The remaining documents sought by the Council's resolution have been produced by the Government. One of the documents contains the names of individuals, which have been excluded in the interests of personal privacy.

I have informed the Secretary of the Department of Premier and Cabinet of the Government's position in relation to executive privilege.

Yours sincerely

THE HON MARTIN PAKULA MP
Attorney-General

cc: *Gavin Jennings MLC, Special Minister of State, Leader of the Government in the Legislative Council*
Mr Chris Eccles, Secretary to the Department of Premier and Cabinet

Guidelines for appearing before and producing documents to Victorian inquiries

December 2017

VICTORIA State Government | Premier and Cabinet

Contents

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PART 1: INTRODUCTION

1.1 Overview

Scope of and application of these Guidelines

1. These Guidelines provide guidance to officials when they are required to **appear** before or **produce documents** to **Victorian**:
   - Parliamentary Committees;
   - Royal Commissions; and
   - Boards of Inquiry.
2. These Guidelines replace the *Guidelines for Appearing before State Parliamentary Committees* (October 2002).
3. Separate Guidelines are available on the DPC website about:
   - making written submissions and responses to inquiries; and
   - appearing before **Commonwealth** Parliamentary Committees.
4. These Guidelines are intended to have general application, and apply to all **government bodies**. For the purpose of these Guidelines, a government body is a Victorian public service body, or a public entity that is explicitly subject to ministerial direction or control. Whether a public entity is explicitly subject to ministerial direction or control is usually indicated in the documents creating an entity (e.g. its establishing legislation, or relevant Governor in Council documents). For the purpose of these Guidelines, a government body *does not* include exempt bodies and special bodies (except Victoria Police), such as the Victorian Auditor-General's Office, the Independent Broad-based Anti-corruption Commission and the Victorian Ombudsman.[1] For the purpose of these Guidelines, Victoria Police *is* considered a government body.
5. If these Guidelines do not apply because a body is exempt, that body is still responsible for appropriately briefing their Minister, public service body Head or a person with the functions of a public service body Head on the matter which is the subject of the request. Government bodies are expected to exercise judgment to ensure matters are considered and approved at the appropriate level.
6. For the purpose of these Guidelines, an **inquiry** refers to:
   - an inquiry undertaken by a Victorian Parliamentary Committee; and
   - a Royal Commission or Board of Inquiry established under the *Inquiries Act 2014* (Vic).
7. The Guidelines are not intended to apply to regular or periodic requests for information (such as from the Victorian Parliamentary Public Accounts and Estimates Committee, questionnaires or budgetary inquiries). They are also not intended to apply to Formal Reviews established under the *Inquiries Act 2014*, internal government inquiries or reviews established outside of the *Inquiries Act 2014*.

[1] Please refer to sections 4-6 of the *Public Administration Act 2004* for definitions of public service bodies, public entities, exempt bodies and special bodies.

Further information and contacts

8. For further information about these Guidelines, please contact the Office of the General Counsel, DPC.

9. Additional sources of information are also set out at Appendix C.

PART 2: TYPES OF INQUIRIES AND THEIR POWERS

2.1 Parliamentary Committees

What are Parliamentary Committees?

10. Parliamentary Committees are committees made up of Members of one or both Houses of Parliament. Parliamentary Committees inquire into particular issues and report back to Parliament with findings and recommendations.

11. In Victoria, Parliamentary Committees may be established under:

- the *Parliamentary Committees Act 2003*;
- the *Legislative Assembly of Victoria Standing Orders* (August 2016);
- the *Legislative Council of Victoria Standing Orders* (2017); or
- the *Joint Standing Orders of the Parliament of Victoria.*

12. The *Parliamentary Committees Act 2003* and the Standing Orders of the Houses of Parliament outline the membership requirements, purposes and powers of the committees.

Different types of Parliamentary Committee

Committee type	Description
Joint Investigatory Committees	• Made up of members of both Houses • Can either be: o Joint House Committees established under the *Parliamentary Committees Act 2003*, which are permanent committees; or o Specific Purpose Committees, which are established by a resolution of both Houses of Parliament for a specific purpose and whose functions are time limited.[2]
Standing Committees	• Made up of members of the Legislative Council. • Appointed at the commencement of each Parliament pursuant to Council standing orders.[3] • Government departments are allocated to Standing Committees of the Council for Committee oversight.
Select Committees	• Made up of members of one House. • Appointed by a resolution of either House.[4] • Established to inquire into specific issues within specified timeframes.

[2] *Joint Standing Orders of the Parliament of Victoria*, Joint Standing Order 15.

[3] *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.01.

[4] *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 201; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.10.

Domestic Committees	• Internal committee of either House, procedures or Parliament's administration (e.g. Privileges (Assembly/Council), Procedure (Council), Standing Orders (Assembly), and Dispute Resolution Committees). • Domestic Committees meet privately and usually do not ask for submissions or hold public hearings. • Domestic Committees are concerned with the operation and administration of Parliament and rarely hold public hearings.

Powers of Parliamentary Committees

13. Parliamentary Committees have the power to request persons, documents and other things.[5]

What are the consequences of failing to comply with a Parliamentary Committee request?

14. Failure to appear before a committee when summonsed, or to produce requested documents, may be a contempt of Parliament, which is punishable at the discretion of the relevant House.

15. Acts or omissions which obstruct or impede the work of a committee or any of its members or officers may also be treated as a contempt of Parliament.

2.1 Inquiries under the *Inquiries Act 2014*

2.2.1 Royal Commissions

What is a Royal Commission?

16. A Royal Commission is an ad hoc advisory body appointed by the Government to obtain information and report on findings about a particular matter. Royal Commissions are often required to make recommendations to the Government.[6]

17. The Governor, on the advice of the Premier, has a power to issue letters patent to establish a Royal Commission.[7] The letters patent define the scope and terms of reference of a Royal Commission and are published in the Government Gazette.

18. A Royal Commission may also issue practice directions, statements or notes in relation to its inquiry.[8]

19. Royal Commission appearances are similar to court proceedings. The functions and powers of Royal Commissions are set out in Part 2 of the *Inquiries Act 2014*.

Powers of Royal Commissions

20. A Royal Commission has the power to:[9]

- compel a person to attend to produce documents or give evidence;
- require a witness to give evidence on oath or affirmation;
- apply for a warrant to enter and search premises, and take documents or things relevant to the inquiry;

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[5] *Parliamentary Committees Act 2003*, section 28(1); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 214; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.19; *Joint Standing Orders of the Parliament of Victoria*, Joint Standing Order 15(9).

[6] Hallett, L, *Royal Commissions and Boards of Inquiry*, LBC, 1982, p 1.

[7] *Inquiries Act 2014*, section 5(1).

[8] *Inquiries Act 2014*, section 16.

[9] *Inquiries Act 2014*, sections 17, 21, 22, 24, 25, 26, and 30.

- prohibit or restrict the publication of information or evidence;
- compel a person to produce documents;
- retain documents for the purposes of its inquiry; and
- exclude or expel people from its proceedings.

What are the consequences of failing to comply with a Royal Commission request?

21. A witness commits an offence if they:[10]
    - do not, without reasonable excuse:
        - produce documents or give evidence when required to do so;
        - take an oath or make an affirmation when required to do so;
        - answer a question when required to do so;
    - contravene an order:
        - excluding a person from inquiry proceedings;
        - prohibiting the publication of information or evidence given to the inquiry;
    - intentionally or recklessly hinder, obstruct, or seriously disrupt proceedings of the inquiry; or
    - knowingly make a false or misleading statement, or provide a false or misleading document, to the inquiry.

2.2.2 Boards of Inquiry

What is a Board of Inquiry?

22. A Board of Inquiry is, like a Royal Commission, an ad hoc advisory body appointed by the Government to obtain information and report on findings about a particular matter.
23. The Governor in Council, on the recommendation of the Premier, may appoint any one or more persons to constitute a Board of Inquiry to inquire into and report on the terms of reference specified in the order.[11] The order defines the scope and terms of reference of the Board of Inquiry and is published in the Government Gazette.
24. A Board of Inquiry may also issue practice directions, statements or notes in relation to its inquiry.[12]
25. Board of Inquiry appearances are similar to court proceedings. The functions and powers of Boards of Inquiry are set out in Part 3 of the *Inquiries Act 2014*.

Powers of Boards of Inquiry

26. A Board of Inquiry has the same powers as a Royal Commission (see para 20 above), except for the power to issue a warrant to enter and search premises and take documents or things relevant to the inquiry.[13]

What are the consequences of failing to comply with a Board of Inquiry request?

27. The same offences for failing to comply with a Royal Commission (see para 21 above) apply to failing to comply with a Board of Inquiry.[14]

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[10] *Inquiries Act 2014*, sections 46-50.

[11] *Inquiries Act 2014*, section 53(1).

[12] *Inquiries Act 2014*, section 63.

[13] *Inquiries Act 2014*, sections 64, 68, 69, 71, 72 and 73.

PART 3: REQUESTS FOR DOCUMENTS

3.1 General information about requests for documents

What is a request for documents?

28. Inquiries often make requests for relevant documents to inform and provide evidence on the matter before the inquiry. These requests are often broad in scope. It is important to review the request as soon as possible after receipt to ensure that:

    - you understand the scope of the request, including the amount of time it will take to produce such documents;
    - you are aware of any privileges, immunities or secrecy provisions that are likely to apply to the request for documents; and
    - you consider whether you will need to seek assistance or input from other departments or branches.

29. It is recommended that government bodies engage with the inquiry at the outset, to foster cooperation throughout the document production process and to ensure timeframes can be met wherever possible.

Is there a difference between requests from a Parliamentary Committee and a Royal Commission or Board of Inquiry?

30. All inquiries considered in these Guidelines have the power to compel the production of documents relevant to the inquiry.

31. This section (para 28-43) sets out considerations and procedures of general application to a request for documents by a Victorian inquiry.

32. However, there are also specific considerations and procedures for responding to a request for documents from:

    - Parliamentary Committees (para 46-61); and
    - Royal Commissions and Boards of Inquiry (para 64-79).

Assessing which documents are relevant to the request

33. Documents created after the order is made are **not relevant.**

34. Drafts and duplicates of the same document need not be provided.

How do the Model Litigant Guidelines apply to a request for documents?

35. Victoria's Model Litigant Guidelines set standards for how the State should behave as a party to legal proceedings. The Model Litigant Guidelines include standards of conduct that should also be followed by government bodies when participating in an inquiry, including when responding to requests for documents.

36. Relevant principles in the Model Litigant Guidelines that should be followed when responding to requests for documents include:

    - acting fairly when responding to requests for documents;
    - dealing with requests promptly and without unnecessary delay; and
    - providing, to the extent practicable in the circumstances, documents to the inquiry in a way that does not unduly increase the inquiry's need for resources.

[14] *Inquiries Act 2014*, sections 86-90.

37. When an inquiry makes a request for the production of documents, government bodies should meet their obligations under the Model Litigant Guidelines by:

- engaging early with inquiries to establish expectations, minimise the potential for misunderstandings and foster cooperation throughout the document production process (see further para 45);
- not acting in an inflexible manner in an attempt to frustrate an inquiry's right to access to witnesses or documents;
- considering alternative options available to give inquiries the information sought, where documents are subject to a claim of executive privilege or public interest immunity (refer to paras 54-56 and 72-74); and
- ensuring timely provision of information to inquiries and communicating with inquiries early on about any potential difficulties in responding within the requested timeframe.

38. Timeframes for responding to requests for documents can be short. A government body should contact the lead department as early as possible to discuss a request for documents. Government bodies should always endeavour to meet the timeframes but can seek to negotiate the timeframes if they honestly believe they will not be able to meet them.

When to seek legal advice

39. In some cases, it will not be necessary to seek legal advice before releasing or withholding documents.

40. For example, it is not necessary to seek legal advice in respect of documents that are publicly available (e.g. reports published on a government body's website or transcripts of publicly broadcast radio interviews). These documents should be released in response to an order.

41. In contrast, some documents will clearly attract a claim of executive privilege (refer to **Appendix A**) or public interest immunity (refer to **Appendix B**). For example, documents that were prepared for consideration by Cabinet or Cabinet Committees will generally be subject to executive privilege or public interest immunity and should not be released. Where there is a clear claim it will not be necessary to seek the Victorian Government Solicitor's Office's advice in respect of these documents.

42. Where there is any uncertainty, to ensure that potential claims of executive privilege are not inadvertently waived, government bodies should always consult with their legal teams about whether to release or withhold a document.

Redacting documents to protect personal privacy

43. Government bodies should ensure that personal or private information (such as the names of junior VPS officers and personal contact details of all officers) are redacted from documents proposed for release to inquiries.

3.2 Parliamentary Committee requests for documents

Immediate steps following a request from a Parliamentary Committee

44. At the commencement of a Parliamentary Committee's inquiry, DPC will nominate a lead department that will be responsible for coordinating the Government's response to requests for documents made by the committee.

45. The Minister or Secretary of the lead department should write to the relevant inquiry, in consultation with DPC's Office of the General Counsel, and:

- offer assistance with formulating requests for documents, to ensure any potential issues with the requests are identified early;
- note that requests for documents will require government bodies to seek appropriate approvals;
- ask that sufficient time is provided to respond, including by suggesting achievable timeframes for responding to requests; and
- if appropriate, draw the inquiry's attention to publicly available documents that may assist the inquiry, or suggest documents available to the inquiry that would not be subject to a claim of executive privilege.

Do I have to produce a document if it might incriminate me?

46. While you may request not to produce a document to a Parliamentary Committee on the basis that it might incriminate you, there is no requirement for a Committee to grant such a request.[15] However, there are persuasive arguments to support the view that a Committee should carefully consider such a request, taking into account factors such as the principles of natural justice, merits of the request, significance of the information sought and any alternative means of accessing that information.

47. If you are asked to produce a document that you think may incriminate you, you should request that:
    - you not be compelled to produce the document on the basis that producing the document may potentially incriminate you, and it would be against the principles of natural justice to compel you to do so; and/or
    - your evidence be given in private; and/or
    - you be given an opportunity to seek independent legal advice. You can request this at the outset, or if a request not to produce a document on the grounds of self-incrimination is denied.

48. See further paragraphs 130-131, in respect of a request to answer a question as a witness that might incriminate you.

Can a claim of executive privilege be made over the documents requested?

49. Executive privilege is a privilege that can be asserted to resist the production of certain documents held by the Executive Government. It is similar to public interest immunity, but applies in the context of Parliamentary Committee inquiries (as opposed to litigation before courts and executive inquiries such as Royal Commissions).

50. The Government may claim executive privilege in response to a Parliamentary Committee request for information when it considers the public interest in withholding the information outweighs the public interest in providing it to the Committee.

51. Further information about executive privilege is at **Appendix A**. Government bodies should, at first instance, speak with their legal teams about executive privilege claims and consider the Government's position in respect of making these claims.

52. Government bodies should endeavour to redact privileged material from documents, so that the remaining material can be provided to the Parliamentary Committee.

Approval process for claiming executive privilege

53. The lead department must seek Cabinet approval where it proposes to claim executive privilege over documents.

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[15] Neither the *Parliamentary Committees Act 2003* nor the Standing Orders expressly allow a person to refuse to produce documents on the ground that doing so might incriminate the person.

54. The lead department should consider what other steps are available to give inquiries the information that they need to operate effectively, particularly where documents are subject to a claim of executive privilege.

55. This includes considering whether sensitive documents may be able to be presented in a way that provides inquiries with the information they need without revealing information that is subject to claims of executive privilege. For example, the lead department should consider whether it is possible to:

- make a presentation to the committee that excludes sensitive material;
- consider whether, due to the special circumstances, a request could be made to the committee to take evidence about sensitive information in private; or
- other means that are appropriate in the circumstances.

56. Government bodies should consult with their internal legal teams to ensure that the above measures do not constitute a waiver of executive privilege claims in each particular case.

57. Where departments propose to recommend that executive privilege be claimed over documents, they should detail in their Cabinet submission what other means they have considered to communicate the required information in an alternate form, and if there are no other feasible means of doing so, explain why this is the case.

58. Government bodies should engage with the lead department for further guidance about the Cabinet approval process.

Approval process for releasing documents that could be subject to executive privilege

59. Where a department considers that a document falls within one of the categories of document over which executive privilege could be claimed, but considers that the document should nonetheless be released to the Parliamentary Committee, the department must seek Cabinet approval to release the document.

60. Departments should detail in their Cabinet submissions the reasons why it is considered that the public interest in providing the document to the committee (e.g. transparent and open government, accountability of the Executive Government to Parliament, proper functioning of Parliament) outweighs the public interest in non-disclosure.

Approval process for releasing documents where there is no potential claim of executive privilege

61. Where a department considers that no claim of executive privilege can be made over a document, Cabinet approval is not required to approve the production of documents to a committee. However, before a document can be provided to a committee, the responsible Minister must be briefed on and approve the release of the documents.

3.3 Royal Commission or Board of Inquiry requests for documents

Immediate steps following a request from a Royal Commission or Board of Inquiry

62. At the commencement of a Royal Commission or Board of Inquiry, DPC will nominate a lead department that will be responsible for coordinating the Government's response to requests for documents.

63. The lead department will provide guidance on engaging with the inquiry.

Do I have to produce a document if it might incriminate me?

64. This will depend on the type of inquiry.

65. Boards of Inquiry. No. You may refuse to produce documents to a Board of Inquiry if doing so might incriminate you or make you liable to a penalty.[16]

66. Royal Commissions. No, **but only if** producing the documents might incriminate you or make you liable to a penalty **in relation to proceedings that are in progress and not yet finalised**.[17]

67. If you are asked to produce a document that you think may incriminate you, you should request that:

- you not be compelled to produce the document on the basis that producing the document may potentially incriminate you, and it would be against the principles of natural justice to compel you to do so; and/or
- your evidence be given in private; and/or
- you be given an opportunity to seek independent legal advice. You can request this at the outset, or if a request not to produce a document on the grounds of self-incrimination is denied.

68. See further paragraphs 127-131, in respect of a request to answer a question as a witness that might incriminate you.

Can a claim of public interest immunity be made over the documents requested?

69. Public interest immunity is a legal doctrine which allows the State to withhold information from production in legal proceedings or to executive inquiries including a Royal Commission or Board of Inquiry, if production of the information would be contrary to the public interest.[18]

70. Further information about public interest immunity is set out at **Appendix B**. Departments should, at first instance, speak with their legal teams about public interest immunity claims.

71. Consistent with the Government's commitment to transparency, government bodies should endeavour to redact privileged material from documents, so that the remaining material can be provided to the inquiry.

Approval process for claiming public interest immunity

72. The lead department must seek Cabinet approval to release documents where it proposes to claim public interest immunity over documents.

73. The lead department should consider what other steps are available to give inquiries the information that they need to operate effectively, particularly where documents are subject to a claim of public interest immunity.

74. This includes considering whether sensitive documents may be able to be presented in a way that provides inquiries with the information they need without revealing information that is subject to claims of public interest immunity. For example, the lead department should consider whether it is possible to:

- make a presentation to inquiries that excludes sensitive material;
- consider whether material can be provided to inquiries subject to an undertaking of confidentiality; or
- other means that are appropriate in the circumstances.

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[16] *Inquiries Act 2014*, section 65(2)(a).

[17] *Inquiries Act 2014*, section 33.

[18] See *Sankey v Whitlam* (1978) 142 CLR 1, 38-39.

75. Where departments propose to recommend that public interest immunity be claimed over documents, they should detail in their Cabinet submission what other means they have considered to communicate the required information to the inquiry in an alternate form, and if there are no other feasible means of doing so, explain why this is the case.

76. Government bodies should engage with the lead department for further guidance about the Cabinet approval process.

Approval process for releasing a document that could be subject to public interest immunity

77. Where a department considers that a document could be subject to public interest immunity but considers that the document should nonetheless be released to the inquiry, the department must seek Cabinet approval to release the document.

78. Departments should detail in their Cabinet submissions the reasons why it is considered that disclosure of the document or its content is in the public interest.

Approval process for releasing documents where there is no potential claim of public interest immunity

79. Where a department considers that no claim of public interest immunity can be made over a document, Cabinet approval is not required to approve the production of documents to an inquiry. Departments should follow the same process used for approving the release of documents to a court or tribunal.

PART 4: APPEARING BEFORE INQUIRIES

4.1 Before your appearance

Do I have to appear?

80. You may be called to appear before a Parliamentary Committee, Royal Commission or Board of Inquiry to provide evidence about the subject matter of an inquiry.

81. Generally, only employees with an employment classification of EO1 and above should appear. If you are below this classification, you should seek advice from senior officials.

82. You will usually be invited to appear voluntarily. If you do not appear voluntarily, you may be compelled by summons to appear.

83. Requests for an official to appear or to provide material should be made through the relevant Minister (who may delegate this responsibility to the relevant department or agency head).

84. It is not uncommon for officials to be required to appear before a Parliamentary Committee at short notice with, for example, only 2-3 days to prepare. This is ordinarily because the Committee has been asked to report to Parliament in a relatively short time frame and must commence hearings as soon as possible.

Immediate steps following a request for attendance

85. You should:

- seek advice, comment or direction from senior officials, DPC and, if necessary, your government body head;
- notify DPC of a proposed appearance;
- familiarise yourself with the composition of the committee or appointees of the inquiry and its procedures for witness appearances; and

- prepare for an appearance by:
    - having a clear understanding of relevant Government policy;
    - determining the amount of time for which you may be required to appear and, if possible, whether anyone else will be appearing before the inquiry;
    - anticipating probable lines of questioning;
    - familiarising yourself with these guidelines, particularly in relation to rules concerning when executive privilege or public interest immunity can be claimed; and
    - considering, in the case of a committee hearing, any interests of the committee members relevant to the inquiry.

86. Useful sources of information for appearing before a:

- Committee include the committee's terms of reference, Government submissions to the committee, transcripts of committee hearings, Hansard, and previous committee reports. The committee secretariat may also be able to answer questions you have about committee hearings.
- Royal Commission include the Letters Patent establishing the Royal Commission, and any Government submissions to the Royal Commission. Often the Royal Commission will have its own website, which is a further source of useful information.
- Board of Inquiry include the Order in Council establishing the Board of Inquiry, and any Government submissions to the Board of Inquiry.

Can I make an appearance in a personal capacity?

87. You are not restricted from appearing in your personal capacity. However, if you appear in a personal capacity, you should be aware of your obligations under:

- the *Constitution Act 1975* (Vic);
- the *Public Administration Act 2004* (Vic);
- the *Inquiries Act 2014* (Vic);
- the *Code of Conduct for Victorian Public Sector Employees 2015* (***2015 Code of Conduct***);
- your employment contract; and
- any other legislation or code of conduct that regulates your official functions and duties.

88. If you are considering a personal appearance, you should be aware that comments made to committees are likely to become public. Accordingly, you should be aware of the following confidentiality requirements:

- clauses 6.2 and 6.3 of the *2015 Code of Conduct*, which require public sector employees with access to confidential information to ensure that the information remains confidential;
- clause 3.5 of the *2015 Code of Conduct*, which requires public sector employees to only make public comments when specifically authorised to do so in relation to their duties, a public sector body, or government policies and programs, and to restrict such comments to factual information only;
- section 95 of the *Constitution Act 1975*, which prevents a person employed in the service of the State of Victoria from using information obtained during their employment except in the performance of duties;
- any confidentiality requirements that apply under your employment contract; and

- any legislation that defines your functions, duties or professional obligations, or imposes restrictions on the disclosure of information you have received in your official capacity.

89. If you are appearing before a Royal Commission, you should be aware that section 34 of the *Inquiries Act 2014* overrides other legislation which imposes duties of confidentiality or secrecy. Witnesses can therefore be compelled to provide information to a Royal Commission, despite confidentiality provisions in other legislation. However, section 34 does not apply in certain situations, for example, where the other Act specifically deals with the giving of information to Royal Commissions.

90. If you are a senior official, you should consider the impact, by virtue of your position, of any comment that you might make. Heads of agencies and other senior officials should consider whether it is possible or realistic to appear in a "personal" rather than an "official" capacity (particularly if you are likely to be asked to comment on matters that relate to your responsibilities as an employee). If you make a personal appearance, you should make it clear to the committee that your appearance is not in an official capacity.

When to consult with Ministers

91. Depending on the importance of the inquiry, you should consider consulting with the relevant Minister (including Ministers representing the relevant Minister in the other House of Parliament) prior to your appearance. You should consult with senior officials and/or your government body head to determine whether and how you should consult with the relevant Minister.

92. You should always consult with the relevant Minister/s and DPC if you are considering making a claim of executive privilege or public interest immunity (see paras 49-61 and 69-79).

When to prepare a written statement

93. It will generally be useful to prepare a written statement on which your oral evidence will be based. You may wish to provide this statement to the Parliamentary Committee, Royal Commission or Board of Inquiry.

94. Written statements should be approved by the appropriate levels within the department and usually by the Minister, in accordance with any arrangements approved by the relevant Minister.

95. You should be aware that all inquiries can compel the production of any written statement or material that you rely on, although it is unusual for inquiries to exercise this power. Materials should be prepared with this possibility in mind.

96. For further information, refer to the *Guidelines for Submissions and Responses to Inquiries*, which are available at: http://dpc.vic.gov.au/index.php/policies/governance/guidelines-for-submissions-and-responses-to-inquiries.

When evidence may be given in private

97. Parliamentary Committees, Royal Commissions or Boards of Inquiry generally hear evidence in public.[19] However, they can choose to hear evidence in private.[20]

98. A request for a private hearing may be made when:

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[19] *Parliamentary Committees Act 2003*, section 27(1); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22.

[20] *Parliamentary Committees Act 2003*, section 28(2), (3); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22; *Inquiries Act 2014*, sections 24 and 71.

- a claim of executive privilege or public interest immunity could be justified, but the Minister considers that the balance of the public interest lies in making the relevant information available (see further paras 49-61 and 69-79);
- similar or identical evidence has been previously given in private; or
- there is another reason for giving evidence in private.

99. If your evidence is sensitive and you would like to give it in private, you should consult with senior officials so that a Minister (or departmental Secretary on the Minister's behalf) can make the request prior to your appearance.

100. If, when giving evidence, you believe that your evidence should be heard privately, you should:

- make a request if the possibility has been foreshadowed with the Minister; or
- ask to postpone giving the evidence until the Minister can be consulted.

Will my evidence be made public?

101. Transcripts of evidence to a Parliamentary Committee, Royal Commission or Board of Inquiry are generally public documents unless declared otherwise. This means that your evidence may be published and/or may be quoted in reports.

102. The particular publication rules applying to different types of committee are that:

- A Joint Investigatory Committee must make a transcript of oral evidence available to a member of the public on request, unless the committee informed the person who gave the evidence that the evidence was received on the basis that it remain private.[21]
- Evidence given to Legislative Council Standing and Select Committees may be published unless the Legislative Council or relevant committee determines otherwise.[22]
- Evidence taken by a Legislative Assembly Select Committee in public may be published unless the Legislative Assembly or Select Committee determines otherwise.[23] Evidence that is not taken in public will not be disclosed unless it is reported to the Assembly.[24]

103. A Royal Commission or Board of Inquiry will publish transcripts of evidence unless it makes an order prohibiting publication. An order prohibiting publication may be made on a number of grounds, including if publication would cause prejudice or hardship to any person, or if the evidence is sensitive.[25]

104. If your evidence is sensitive and you would like it to be kept private, you should request this before your appearance.

105. If the committee, Royal Commission or Board of Inquiry decides that your evidence will be confidential, you should obtain a written statement confirming this.

106. If the committee, Royal Commission or Board of Inquiry seeks your permission to publish confidential evidence, you should consult senior officials, your government body head or the Minister.

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[21] *Parliamentary Committees Act 2003*, section 37.

[22] *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22(3).

[23] *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217(1).

[24] *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217(4).

[25] *Inquiries Act 2014*, sections 26 and 73.

4.2 During your appearance

Conduct and behaviour during an appearance

107. When making an appearance before a committee, Royal Commission or Board of Inquiry, you should:
    - listen carefully to the question that is asked;
    - answer carefully and precisely;
    - be courteous;
    - be cooperative and frank in giving factual information;
    - be measured and patient; and
    - only answer questions within your expertise, knowledge or authority – if you do not know the answer to a question, you should say so.
108. You should provide accurate and truthful evidence as:
    - giving false or misleading evidence to a Parliamentary Committee may constitute a contempt of Parliament for which an individual may be punished;
    - giving false or misleading evidence to a Parliamentary Committee, Royal Commission or Board of Inquiry may constitute grounds for disciplinary action under the *2015 Code of Conduct*; and
    - serious penalties, including imprisonment, can apply for intentionally providing false or misleading information to a Parliamentary Committee, Royal Commission or Board of Inquiry.[26]

Do I need to provide evidence on oath or affirmation?

109. A committee, Royal Commission or Board of Inquiry can choose to have evidence heard before it on oath or affirmation.[27] When a witness is called to the stand, they may be asked to either take an oath on a religious text, or to make a solemn affirmation to tell the truth.
110. A witness before a Royal Commission or Board of Inquiry commits an offence if he/she refuses to be sworn when required.[28]
111. A failure to tell the truth on examination under oath or affirmation may constitute:
    - a contempt of Parliament (if before a Parliamentary Committee); and/or
    - a criminal offence punishable by imprisonment (if before a Parliamentary Committee, Royal Commission or Board of Inquiry).[29]
112. Even if you haven't been asked to provide your evidence under oath or affirmation, you should give your evidence as if you had. Being found guilty of a criminal offence punishable by imprisonment constitutes express grounds for termination of any non-executive employee and will typically be grounds for termination of an executive

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[26] *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 200; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 17.11; *Inquiries Act 2014*, sections 50 and 90.

[27] *Constitution Act 1975*, section 19A(3); *Parliamentary Committees Act 2003*, section 28(4); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 194; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22(8); *Inquiries Act 2014*, sections 21 and 68.

[28] *Inquiries Act 2014*, sections 47 and 87.

[29] *Constitution Act 1975*, section 19A(8); *Crimes Act 1958*, section 314.

employee.[30] It is also highly likely that a failure to give truthful evidence under oath (even if it does not result in a conviction) may constitute grounds for dismissal of an employee.

Do I have to answer all questions, and to what extent?

113. You should generally be as open as possible with the committee, Royal Commission or Board of Inquiry and provide the information sought (consistent with these Guidelines).

114. If you are:

- unsure of the facts, or do not have information at hand, you should qualify your answers as necessary (if appropriate, you should give undertakings to provide further information); or
- asked questions that fall within the administration of another department or agency, you should request that:
  - the questions be directed to that department or agency; or
  - your answers be deferred until that department or agency has been consulted.

115. You may not be able to provide a committee, Royal Commission or Board of Inquiry with all the information they seek, or you may need to request restrictions on providing information if the information:

- involves matters of policy (see further paras 118-122);
- is subject to public interest immunity or executive privilege (as applicable), which includes the disclosure of Cabinet-in-confidence material (see further paras 123-126); or
- should be kept confidential (where, for example, giving evidence in private is desirable) (see further paras 97-106).

116. You should also be aware of relevant:

- secrecy provisions of Acts; and
- court orders or sub judice issues.

117. You should seek legal advice if these considerations apply. If these matters emerge during your appearance, and you need to seek legal advice, you should ask the inquiry for an opportunity to seek that advice.

Dealing with "policy" or opinion questions

118. You should provide factual and background material to a Parliamentary Committee, Royal Commission or Board of Inquiry.

119. Under the *2015 Code of Conduct*, you are not expected to answer questions from a Parliamentary Committee that:

- seek your personal views on government policy;
- seek details of matters considered in relation to ministerial or government decisions, or possible decisions (unless those details have already been made public or the giving of evidence on them has been approved); or
- would require a personal judgement on the policies or policy options of the Victorian or other governments.

120. The *2015 Code of Conduct* should also be used as a guide when appearing before a Royal Commission or Board of Inquiry.

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[30] *Public Administration Act 2004*, section 33(1)(c). Termination of executive employees are dealt with differently under section 34, where the starting point is that the relevant decision-maker may terminate an executive's employment 'for any reason consistent with the terms and conditions of [the executive's] contract of employment'.

121. If you are directed to answer questions relating to your views on policy, you should:

- advise that you are unable to provide the information sought because it involves an assessment of the merits of the policy;
- offer to answer questions of fact relating to the policy; and/or
- defer your answers until you have obtained further advice and/or approval from the relevant Minister.

122. Agencies that are not bound by the *2015 Code of Conduct* may wish to contact DPC for further advice, as these restrictions may not necessarily apply to those agencies.

Evidence that may be subject to executive privilege or public interest immunity

123. You should not give evidence containing information that may be subject to public interest immunity or executive privilege (see further **Appendices A and B**).

124. Decisions to claim public interest immunity or executive privilege are typically made well in advance of a public hearing. It is therefore unlikely that you would be asked a question subject to public interest immunity or executive privilege suddenly in the course of the hearing.

125. However, if you are asked a question and believe that your answer may reveal information subject to public interest immunity or executive privilege, you should:

- advise that you are unable to provide an answer because it involves information that may be subject to a claim of public interest immunity or executive privilege; and/or
- request a postponement of the hearing, or the relevant part of the hearing, until the Minister can be consulted.

126. Before making a claim of public interest immunity or executive privilege, a Minister may explore with a Parliamentary Committee, Royal Commission or Board of Inquiry the possibility of providing the information in a form or under conditions which would not require the claim to be made.

Do I have to answer a question if it might incriminate me?

127. This will depend on the type of inquiry . Further information is set out below.

128. Boards of Inquiry. No. You may refuse to answer a question if doing so might incriminate you or make you liable to a penalty.[31]

129. Royal Commissions. No, **but only if** doing so might incriminate you or make you liable to a penalty **in relation to proceedings that are in progress and not yet finalised.**[32] See also paragraphs 134-135.

130. Parliamentary Committees. The position is less clear.[33] You may request not to answer a question on the grounds that it might incriminate you. There is no requirement for a Committee to grant such a request, although there are persuasive arguments to support the view that a Committee should carefully consider such a request, taking into account factors such as the principles of natural justice, merits of the request, significance of the information sought and any alternative means of accessing that information.

131. If you are asked a question that you think may incriminate you, you should request that:

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[31] *Inquiries Act 2014*, section 65(2)(a).

[32] *Inquiries Act 2014*, section 33.

[33] Neither the *Parliamentary Committees Act 2003* nor the Standing Orders expressly allow a witness appearing before a Parliamentary Committee to refuse to answer a question on the ground that the answer might incriminate the witness (although the Standing Orders do protect evidence produced by a witness to a Committee from being used in other proceedings – see paras 130-132).

- you not be compelled to answer the question on the basis that the answer may potentially incriminate you – you may do this by respectfully asking the inquiry to consider your request on that basis that it would be against the principles of natural justice to compel you to answer; and/or
- your evidence be given in private; and/or
- you be given an opportunity to seek independent legal advice. You can request this at the outset, or if a request not to answer a question on the grounds of self-incrimination is denied.

132. See further paragraphs 46-48 and 64-68, in respect of a request to produce a document that might incriminate you.

Can I be sued or prosecuted for evidence that I have provided?

133. Anything said or done by a witness in the course of a Committee's proceedings cannot be used against a person in legal proceedings or a prosecution.[34]

134. Evidence given to a Royal Commission or Board of Inquiry is not admissible in other proceedings against a witness, unless:
    - the proceedings relate to an offence against the *Inquiries Act 2014*; or
    - the proceedings relate to an offence against section 254 (destruction of evidence) or section 314 (perjury) of the *Crimes Act 1958* in relation to the Royal Commission or Board of Inquiry; or
    - the evidence was or could have been obtained independently of its production to the Royal Commission or Board of Inquiry by the person seeking to use it in the other proceedings.[35]

135. However, you will only be protected from legal action if your evidence is given to a Parliamentary Committee, Royal Commission or Board of Inquiry. As such, you should not repeat your evidence outside the hearing.

When "off the record" evidence may be given

136. No evidence that you provide is "off the record". Any evidence you give will form part of the inquiry's records and may expose you or the Government to adverse consequences.[36]

137. In the unlikely event that you are asked to give evidence "off the record", you should request that the evidence be given on the record. If necessary, you should seek a postponement and consult with the relevant Minister/s.

Legal representation during your appearance

138. A person is not entitled to legal representation at a public hearing of a Joint Investigatory Committee unless both Houses of Parliament resolve otherwise.[37]

139. In relation to Select Committees and Standing Committees, the Standing Orders do not prohibit legal representation. In this case, a witness should seek express permission from the committee to have representation during proceedings.

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[34] *Constitution Act 1975*, sections 19(1), 19A(7); *Parliamentary Committees Act 2003*, sections 4(1), 50; *Legislative Assembly of Victoria Standing Orders* (August 2017), Standing Order 196; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 17.09.

[35] *Inquiries Act 2014*, sections 40(2) and 80(2).

[36] *Parliamentary Committees Act 2003*, section 28(9); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 219; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22(1).

[37] *Parliamentary Committees Act 2003*, section 27(3).

140. You should not usually need legal representation when appearing before a committee. You should consult DPC if you believe that you require legal representation when appearing before a committee.

141. If you receive a request to appear before a Royal Commission or Board of Inquiry, it may allow you to be legally represented.[38] You should seek advice from your relevant legal branch about whether it is appropriate for you to be legally represented when appearing before a Royal Commission or Board of Inquiry.

Can I be reimbursed for expenses I incur in giving evidence?

142. It will depend on the type of inquiry.

143. Parliamentary Committees. No regulations regarding witness expenses have been made under the *Parliamentary Committees Act 2003*.[39] The Standing Orders do not make provision for reimbursement of expenses in relation to Standing Committees or Select Committees. If a witness wishes to claim for expenses for appearing before a committee, the matter should be discussed with senior officials. If warranted, a formal written request should be made to the committee for reimbursement of the expenses.

144. Royal Commissions or Boards of Inquiry. Regulations regarding witness expenses have been made under the *Inquiries Act 2014*.[40] These regulations allow witnesses attending an inquiry at the request of a Royal Commission or Board of Inquiry to claim expenses relating to loss of income, childcare, meals, accommodation and travel in accordance with prescribed scales.

Appearances before the Bar of a House of Parliament

145. In both Houses of Parliament in Victoria, the main entrance to each House can be "barred" by the lowering of a heavy rail. This "Bar" of the House is a point outside which no Member may speak to the House or over which no "stranger" (people who are not Members of Parliament) may cross and enter the Chamber unless invited by the House. Historically, the Bar is the place to which persons are brought so that the Speaker may address them on behalf of the House, or at which persons are orally examined.

146. Both the Legislative Assembly and the Legislative Council can summon witnesses to be examined at the Bar of the House.[41]

147. It would be only in exceptional circumstances that an official would be summoned to the Bar of a House of the Parliament and each case would need individual consideration. In addition to following these Guidelines, such a case would require specific guidance, depending on the particular circumstances.

4.3 After the hearing

Reviewing your evidence and making further submissions

148. You will be provided with a proof copy of your evidence. You should carefully review this for accuracy. You should bring any inaccuracies to the attention of the committee, Royal Commission or Board of Inquiry and request that it be corrected.

149. You will not be permitted to alter the substance of your evidence.

150. In some cases, it may be necessary to make a further appearance or submission. If relevant evidence has not been provided, you should consult with senior officials, your

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[38] *Inquiries Act 2014*, sections 15(1)(b) and 62(1)(b).

[39] *Parliamentary Committees Act 2003*, section 28(7).

[40] *Inquiries Regulations 2015*.

[41] *Legislative Assembly Standing Orders* (August 2016), Standing Order 190; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 17.04.

department/agency head, and/or the Minister about a further appearance or submission.

Can a committee request further information after my appearance?

151. Following your appearance, a committee, Royal Commission or Board of Inquiry may request further information or written answers to questions that were posed during a hearing. If a request is made, you should follow the processes in the *Guidelines for Submissions and Reponses to Inquiries*.

Appendix A: Executive Privilege

Executive Privilege

What is executive privilege?

Executive privilege is a privilege held by the Executive Government. It is similar to public interest immunity, but applies to Parliamentary Committee inquiries (as opposed to litigation before courts or executive inquiries such as Royal Commissions or Boards of Inquiry).

The Government may claim executive privilege in response to a committee request for information if it considers the public interest in withholding the information outweighs the public interest in providing it to the committee.

When can a claim of executive privilege be made?

In assessing whether the public interest in withholding the information outweighs the public interest in providing it, the Government (during the 58th Parliament) has informed Parliament it will consider whether providing the information would:

- reveal, directly or indirectly, the deliberative processes of Cabinet;
- reveal high-level deliberative processes of the Executive Government, or otherwise genuinely jeopardise the necessary relationship of trust and confidence between a Minister and public officials;
- reveal information obtained by the Executive Government on the basis that it would be kept confidential, including because the documents are subject to statutory confidentiality provisions that apply to Parliament;
- reveal confidential legal advice to the Executive Government;
- otherwise jeopardise the public interest on an established basis, in particular where disclosure would:
    - prejudice national security or public safety;
    - prejudice law enforcement investigations;
    - materially damage the State's financial or commercial interests (such as ongoing tender processes, or changes in taxation policy);
    - prejudice intergovernmental and diplomatic relations; or
    - prejudice legal proceedings; or
- reveal the contents of a document that is not "public and official", such as a Ministerial diary.

Do I have to produce documents or provide evidence that is subject to a claim of executive privilege?

In relation to requests for document that are subject to a claim of executive privilege, refer to paragraphs 49-60.

In relation to providing other evidence that might be subject to a claim of executive privilege, refer to paragraphs 123-126.

Appendix B: Public Interest Immunity

Public Interest Immunity

What is public interest immunity?

Public interest immunity is a legal doctrine which allows the State to withhold information from production in legal proceedings, or to executive inquiries, if production of the information would be contrary to the public interest.[42]

When can a claim of public interest immunity be made?

Public interest immunity may be claimed over information that would be prejudicial to the public interest if released, because disclosure would:

- reveal the deliberations of Cabinet (this includes documents prepared for the purpose of consideration by Cabinet or a Cabinet Committee or that otherwise reveal the decisions or deliberations of Cabinet);
- reveal high-level deliberations of the Government (this category includes advice to Ministers or senior departmental officers);
- reveal information obtained on the basis that it would be kept confidential;
- reveal confidential legal advice;
- prejudice the State's commercial or financial interests;
- prejudice national security or public safety;
- prejudice law enforcement investigations;
- prejudice legal proceedings;
- prejudice intergovernmental relations; and/or
- reveal personal information (this category includes personal information of third parties or non-executive Government officers).

Do I have to produce documents or provide evidence that is subject to a claim of public interest immunity?

In relation to requests for document that are subject to a claim of public interest immunity, refer to paragraphs 66-75.

In relation to providing other evidence that might be subject to a claim of public interest immunity, refer to paragraphs 69-78.

[42] See *Sankey v Whitlam* (1978) 142 CLR 1, 38-39.

Appendix C: Further Guidance and Information

Additional Guidance for Witnesses

The Parliament of Victoria has published the following guidelines that may assist witnesses who appear before Parliamentary Committees:

- "Giving evidence to a Parliamentary Committee at a public hearing"
- *Guidelines for the Rights and Responsibilities of Witnesses.*

These are available at <http://www.parliament.vic.gov.au/committees/get-involved>.

Further Information

Additional information can also be located at:

- Campbell, Enid, *Parliamentary Privilege* (Federation Press, 2003)
- *Code of Conduct for Victorian Public Sector Employees 2015*
- Hallett, Leonard Arther, *Royal Commissions and Boards of Inquiry* (Law Book Company, 1982)
- *Inquiries Act 2014*
- *Inquiries Regulations 2015*
- Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria
- Legislative Assembly of Victoria, 'Fact Sheet G2 – Parliamentary Committees'
- *Legislative Assembly of Victoria Standing Orders* (August 2016)
- Legislative Council of Victoria, 'Information Sheet 6 – Committees'
- *Legislative Council of Victoria Standing Orders* (2017)
- Parliament of Victoria, "Giving evidence to a Parliamentary Committee at a public hearing", available at <http://www.parliament.vic.gov.au/committees/get-involved>
- Parliament of Victoria, "Guidelines for the Rights and Responsibilities of Witnesses", available at <http://www.parliament.vic.gov.au/committees/get-involved>
- *Parliamentary Committees Act 2003* (Vic)
- Prasser, Scott, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006)
- Taylor, Greg, *The Constitution of Victoria* (Federation Press, 2006)
- Waugh, John, 'Contempt of Parliament in Victoria' (2005) 26 *Adelaide Law Review* 29

213A. (a) A Member may lodge a notice of motion seeking the Assembly to order a document or documents to be tabled in the Assembly. If agreed to, the Clerk is to communicate to the Chief Minister's Directorate all orders for a document or documents made by the Assembly.

(b) When returned, the document or documents (where no claim of privilege is made by the Chief Minister) will be laid on the Table by the Clerk.

(c) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document or documents, a description of the document or documents and the author of the document or documents.

(d) If at the time the document or documents are required to be tabled the Assembly is not sitting, the document or documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the Assembly and authorised for publication with the Clerk circulating the document or documents to all Members as soon as practicable.

(e) Where a document or documents is considered by the Chief Minister to be privileged, a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege.

(f) Where the Assembly requires a document or documents to be returned, either the document or documents requested or a claim of privilege must be given to the Clerk within 14 calendar days of the date of the order by the Assembly.

(g) Any Member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents within seven calendar days of the receipt of the claim of privilege. On receipt of such communication, the Clerk will advise the Chief Minister's Directorate, who will provide to the Clerk, within seven calendar days of receipt of the dispute of validity claim, copies of the disputed document or documents. The Clerk is authorised to provide the disputed document or documents to an independent legal arbiter as

soon as practicable, for evaluation and report within 10 calendar days as to the validity of the claim.

(h) The Clerk is also authorised to provide to the independent legal arbiter and to all Members, submissions from any Member in relation to the claim of privilege.

(i) The independent legal arbiter is to be appointed by the Speaker and must be a retired Supreme Court, Federal Court or High Court Judge.

(j) A report from the independent legal arbiter is to be lodged with the Clerk and:

  (i) made available only to Members of the Assembly; and

  (ii) not published or copied without an order of the Assembly.

(k) If the independent legal arbiter upholds the claim of privilege, the Clerk shall return the document or documents to the Chief Minister's Directorate.

(l) If the independent legal arbiter does not uphold the claim of privilege, the Clerk will table the document or documents that has been the subject of the claim of privilege. In the event that the Assembly is not sitting, the Clerk is authorised to provide the document or documents to any Member upon request, however, the document or documents do not attract absolute privilege until tabled by the Clerk at the next sitting of the Assembly.

(m) Other persons requesting to examine the document or documents may do so with the Clerk maintaining a register showing the name of any person examining the document or documents tabled under this order. *(Amended 21 September 2017)*

Continuing resolution 8B

Public interest immunity

8B

This resolution provides guidance to Ministers and public officials as to the process for raising public interest immunity claims during committee proceedings

Resolution agreed by the Assembly

30 June 2011

In order to provide Ministers and public officials with guidance as to the proper process for raising public interest immunity claims in the course of a proceeding of a committee, this Assembly adopts the following procedure:

(1) If:

(a) an Assembly committee requests information from a directorate, agency or Territory-owned corporation; and

(b) an officer of the directorate, agency or Territory-owned corporation to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer will be given reasonable opportunity to refer the request to a superior officer or to a Minister, in accordance with standing order 264A (o).

(2) If a Minister, on a reference by an officer under paragraph (1), concludes that it would not be in the public interest to disclose the information or document to the committee, the Minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(3) A Minister, in a statement under paragraph (2), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as confidential evidence.

(4) If, after considering a statement by a Minister provided under paragraph (2), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Assembly.

(5) A decision by a committee not to report a matter to the Assembly under paragraph (4) does not prevent a Member from raising the matter in the Assembly in accordance with other procedures of the Assembly.

(6) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraphs (2) or (3).

(7) If a Minister concludes that a statement under paragraph (2) should more appropriately be made by the head of an agency or Territory-owned corporation, by reason of the independence of that agency or Territory-owned corporation from ministerial direction or control, the Minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraphs (2) and (3).

(8) This resolution has effect from the date of its passage in the Assembly and continues in force unless and until amended or repealed by this or a subsequent Assembly.

1. If the information is commercial-in-confidence to a commercial counterparty, it must be specifically identified.
2. The information must be 'commercially sensitive'. This means that the information should not generally be known or ascertainable.
3. Disclosure would cause unreasonable detriment to the owner of the information or another party.
4. The information was provided under an understanding that it would remain confidential.

Criterion one is critical when assessing information provided to government by a third party. If criterion one is not met, the other criteria are not assessed. This approach supports a culture of openness and accountability for the expenditure of public money, efficient and effective management of government departments, and the most appropriate and beneficial use of public funds.

We also are mindful of the requirements of section 81 of the FM Act, which limits the capacity of a Minister to cite commercial-in-confidence as a ground to not provide information to Parliament. Section 81 states:

> *'The Minister and the accountable authority of an agency are to ensure that –*
>
> *a. no action is taken or omitted to be taken; and*
>
> *b. no contractual or other arrangement is entered into, by or on behalf of the Minister or agency that would prevent or inhibit the provision by the Minister to Parliament of information concerning any conduct or operation of the agency'.*

Government contracts typically reflect this requirement in a standard clause that allows the disclosure of confidential information if it is 'required by any law, judicial or parliamentary body or governmental agency'.

Exemption from the section 81 requirement would require non-disclosure to be in the 'public interest'. That is, disclosure would likely cause underlying harm to the public interest and the extent of the probable harm is sufficient to outweigh reasons for disclosure. For instance, disclosure could:

- damage current government negotiations
- have a negative effect on future government procurement.

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Legislative Council Select Committee
PRODUCTION OF DOCUMENTS

8 November 2019

LCSC/POD 11

Hon Will Hodgman MP
Premier of Tasmania
11th Floor
15 Murray Street
HOBART

Email: will.hodgman@parliament.tas.gov.au

Dear Premier

Further to your correspondence of 5 September and 17 October 2019, I write to provide the following written questions that you undertook to provide a response to:

1. How would you describe 'Responsible Government' and how does this manifest in the Tasmanian Parliament?
2. Do you believe the Parliament is supreme?
3. Do you believe the Ministry (Government) is responsible to the Parliament?
4. Do you believe the non-elected Executive (bureaucracy) are responsible to the Parliament through the Minister/Ministry?
5. Do you believe the proceedings of Parliament are absolutely privileged?
6. How would you describe the role and functions of the Parliament as a whole?
7. What responsibilities do you believe exist and how should these responsibilities manifest within the Tasmanian Parliament?
8. Could you provide a pictorial illustration of the system of 'Responsible Government' in Tasmania, clearly identifying the role and functions of each part of Government and Parliament, including lines of responsibility/reporting?
9. How do you see the application of the *Parliamentary Privilege Act 1858* (Tas) and the *Parliamentary Privilege Act 1958* (Tas), in terms of the power of either House to call for the production of papers/documents?

10. What powers do you believe the Legislative Council has to call for the production of documents/papers;
    a. What limitations do you believe exist; and
    b. What is the basis for these limitations?
11. What relevance do the *Egan vs Willis* [(1998) 195 CLR 424] and *Egan vs Chadwick* [(1999) 46 NSWLR 563] decisions have to the Tasmanian Parliament in the area of powers to call for the production of papers/documents?
12. In addition to comments made on pages 2 and 3 of your submission, on what basis do you believe each of the following claims, detailed separately, could be made following a request for the production of documents/papers:
    a. 'Executive privilege';
    b. 'Public interest immunity';
    c. 'Cabinet confidentiality';
    d. 'Commercial-in-confidence'; or
    e. Other claims of privilege?
13. On each of the points below what information/evidence should be provided by the responsible Minister for the refusal to provide a document/paper as requested;
    a. Executive privilege';
    b. 'Public interest immunity';
    c. 'Cabinet confidentiality';
    d. 'Commercial-in-confidence'; or
    e. Other claims of privilege?
14. In your submission you noted the High Court proceedings, '*Commonwealth vs Northern Land Council*' referring to the need to keep Cabinet deliberations confidential. What documents, in your experience as a Minister and Premier, record the 'deliberations of Cabinet'?
15. What documents, in your view, constitute Cabinet documents that should attract privilege and be exempt from a request for production; and
    a. Please provide justification for such a claim over each 'class' of document.
16. In your submission you claimed 'that any changes to the existing conventions and process may not only create additional complexity and inefficiencies but also lead to unforeseen consequences, and critically, further administrative costs…';
    a. Please provide more detailed explanation and examples of what you see as;
        i. Additional complexity that could be created;
        ii. Additional inefficiencies that could be created; and
        iii. Possible unforeseen consequences.
17. There has been some suggestion that a change in the process whereby an independent arbiter can review the documents where privilege is claimed by result in bureaucrats being reluctant to offer 'frank and fearless' advice.
    a. What is your view on this point;
    b. If you agree, on what basis do you believe this would be the case; and
    c. Do you believe the work of the bureaucrat is completed once information, reports and advice are submitted to Cabinet through the relevant Minister?
18. In your view, how could or would a new Standing Order (SO) put in place to enable an independent arbiter to assess a claim of privilege impact on the role and function of the Executive and/or Cabinet?

19. If a new SO was put in place, do you have a view as to the most desirable model comparing the Victorian, New South Wales and ACT models; and
    a. Please provide a critique of each model in terms of its application to Tasmania.
20. Do you believe that an RTI assessment undertaken by an RTI officer should be applied to a request for a document from the Legislative Council or a Committee of the Legislative Council or Joint House Committee?
    a. Please provide rationale for your answer.
21. Do you believe a process that involves an independent arbiter to assess documents over which a claim of privilege has been made would have any impact on Ministerial Advisors or other State Service employees in providing advice to their Minister; and
    a. If so, what impact could this have; and
    b. What is the basis for your comments?
22. What level of expertise do you believe an independent arbiter should have in order to fulfil this role, should it be introduced?

The Committee may have further questions in the near future that require your response.

The Committee would be pleased to receive this information by email to the Secretary, Ms Julie Thompson by close of business Monday 25 November 2019.

The Committee looks forward to receiving this additional information.

Yours sincerely

HON RUTH FORREST MLC
CHAIR
w. 03 6212 2320 f. 03 6212 2345 e. pod@parliament.tas.gov.au

TASMANIA

PREMIER OF TASMANIA

13 DEC 2019

Hon Ruth Forrest MLC
Chair
Legislative Council Select Committee – Production of Documents
Email: pod@parliament.tas.gov.au

Dear Ms Forrest

I am writing in relation to your letter of 8 November 2019, in which you have outlined a number of additional questions related to the continuing inquiries of the Legislative Council Select Committee – Production of Documents. My responses to these questions are as follows:

Response to Questions 1 – 13

Questions 1 to 13 largely seek my views on the well-established, well understood principles of the Westminster system of responsible government and otherwise raise technical legal matters related to the application of Parliamentary privilege in Tasmania. The Committee has spent considerable time discussing Parliamentary privilege and its application in Tasmania with numerous technical experts that provided a variety of perspectives and opinions. The Committee has also investigated in detail the application of Parliamentary privilege in other jurisdictions across Australia. My Government has nothing further to add to these lines of inquiry, except to reiterate that it continues to be held to account through current, Parliamentary processes. Beyond this, we have demonstrated our commitment to increasing accountability across all departments through ongoing reforms to improve transparency and expand the routine disclosure of information.

All other lines of inquiry into the principles of responsible government and Parliamentary privilege in the context of the Tasmanian Parliament are matters for the Committee to consider in its own capacity and my Government will review the outcomes of the Committee's work with interest.

Response to Questions 14 and 15

At the Committee Hearing on 1 November 2019, Ms Jenny Gale, Secretary, Department of Premier and Cabinet (DPAC) provided a detailed response in relation to the definition of Cabinet documents as outlined in the Cabinet Handbook. I refer to that definition here[1]:

[1] Refer to paragraph 1.4.11 of the Cabinet Handbook (April 2018).

GPO Box 123, Hobart TAS 7001 | Telephone: 61 3 6165 7650 | Email: will.hodgman@dpac.tas.gov.au

For the purpose of Cabinet confidentiality, without seeking to be exhaustive 'Cabinet documents' may include: Cabinet Minutes, a document recording a Cabinet decision, Cabinet Agendas; other records of Cabinet discussions; records of discussions or deliberations between Ministers, Secretaries of Departments and other senior officials and/or ministerial staff which would tend to reveal the deliberations of Cabinet if disclosed, or any other record relating to the deliberation or decision of the Cabinet. This includes any information submitted to or proposed to be submitted to Cabinet for its deliberation.

For the Committee's deliberations, attached are definitions of Cabinet documents from other jurisdictions (refer to Attachment 1). As you will note, it is commonplace to have a broad definition of Cabinet documents. The matters which come before Cabinet for its deliberation are varied and it is essential in our system of responsible government that confidentiality is preserved in relation to such matters.

Response to Questions 16 and 18

In my original submission to this Committee, I advocated that changes to existing conventions and process may not only create additional complexity and inefficiencies, but also lead to unforeseen consequences, and critically, further administrative costs that cannot be estimated at this time.

While the Committee is yet to provide any clarity in relation to what 'process' might ultimately be recommended, some of the evidence which has already been acquired through the Committee's public hearing processes supports my Government's position in relation to these matters.

In this respect, I refer the Committee to the Secretary, DPAC's witness statement and the letter which she tabled at the hearing on 1 November 2019: correspondence from the Acting Secretary, New South Wales (NSW) Department of Premier and Cabinet to the Clerk of the NSW Legislative Council (refer to Attachment 2). In that letter, the Acting Secretary notes the '*particular difficulties and expense faced by agencies in responding to resolutions that do not specify any subject matter and/or require the review of thousands of records in a short period of time*'. The letter goes on to address the practical challenges in readily identifying when a claim of privilege should be made, when faced with significant time constraints in producing documents to Parliament. Additionally, the Acting Secretary notes that the cost of outsourcing just two interrelated requests for the production of documents to a law firm was in the vicinity of $380,000. This does not include the costs to departments, which has so far not been quantified.

I have also been advised that since the NSW March 2019 State Election there have been more than 38 orders for the production of documents by the NSW Legislative Council which the Government has needed to respond to, resulting in the provision of 430 boxes of documents. From indicative discussions by my Department with the New South Wales Department of Premier and Cabinet, it is my understanding that the Independent Auditor process can create a considerable strain on the Department's resources and the reallocation of departmental staff to these processes from other priorities is often required.

I also direct the Committee to the witness statement from the current NSW Independent Arbiter the Hon Keith Mason AC QC, who suggested to the Committee that the cost to the Department in administering this process 'must be huge'. Given Tasmania's economies of scale, it is reasonable to assume that the costs for administering a similar scheme here would be exponentially more.

Mr Mason confirmed his views on the administrative burden of responding to such requests for documents. It was noted that there is significant work undertaken by departments to compile, review, index and date every document prior to making any claim of privilege. It was also suggested by Mr Mason that the digitisation of the process would not necessarily change the inherent inefficiencies[2]. I would also presume that it would generate significant work for the Solicitor-General's Office in considering any department's claim of privilege.

It is also foreseeable that current document management systems used by Tasmanian departments require a significant investment in additional technologies to facilitate a proper process to document what has been provided to the Committee (e.g. barcoding each document if applicable, categorising, indexing and scanning).

Response to Questions 17, 18 and 21

The matters raised in relation to Questions 17, 18 and 21 generally concern whether any new process would impact on the provision of frank and fearless advice to Cabinet.

I refer the Committee again to the witness statement of the Secretary, DPAC in relation to these inquiries.

The State Service Code of Conduct[3] and the State Service Principles provide a core framework for public service conduct which all employees must comply with. Critically, the State Service Principles include a requirement that the *State Service is responsive to the Government in providing honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs.*[4] The State Service Principles also stipulate that the State Service is apolitical, performing its functions in an impartial, ethical and professional manner, where each employee maintains appropriate confidentiality.[5]

The provision of frank and fearless advice by the Tasmanian State Service is undertaken in the context of the current statutory framework and the respected conventions of Cabinet confidentiality inherent in our system of responsible government.

Cabinet confidentiality is a concept which is highly respected within the public service, and Courts have also long respected the confidentiality of Cabinet deliberations. For this reason, the long-standing respect for the confidentiality of these processes should be part of the broader consideration of the Committee in its review of any impact on the Tasmanian State Service.

In any discussion concerning the erosion of frank and fearless advice to the Government as a result of a potential disclosure to Parliament, it is important to consider that the Tasmanian State Service, and the public more generally, must have confidence that the Parliament and any of its Committees will act responsibly in exercising any claims of privilege.

Response to Questions 19 and 22

I reiterate my Government's position that it is not supportive of any additional model or process in relation to the production of documents for the reasons outlined in its original submission. In all other respects, these are issues for the Committee to determine in its own capacity.

---

[2] Refer to page 39 of the Committee's Public Hearing transcript of 24 September 2019.
[3] See section 9 of the *State Service Act 2000*.
[4] See section 7(1)(e) of the *State Service Act 2000*.
[5] See sections 7(1)(a) and 9(7) of the *State Service Act 2000*.

Response to Question 20

It is my Government's view that whether considering the provision of information under the *Right to Information Act 2009*, or in response to a request from one of the Houses of Parliament or a Parliamentary Committee, there exists certain exemptions to the disclosure of information which are equally applicable in either forum. This includes excluding the provision of information which would reveal the deliberations of Cabinet.

Yours sincerely

Will Hodgman MP
Premier

Attachments
1 Jurisdictional analysis: Definitions of Cabinet documents and Cabinet confidentiality
2 Letter from the NSW Department of Premier and Cabinet

Attachment 1

JURISDICTIONAL ANALYSIS:

DEFINITIONS OF CABINET DOCUMENTS AND CABINET CONFIDENTIALITY

VICTORIAN GOVERNMENT - CABINET HANDBOOK EXTRACT

Website: https://www.vic.gov.au/sites/default/files/2019-01/the-cabinet-handbook.pdf

Section 7 - Cabinet document management and security

7.1. Access to Cabinet information

Only those with a 'need to know' may have access to Cabinet information. The unauthorised and/or premature disclosure of matters contained in Cabinet information can be damaging to the government and to the public interest.

Any request for the disclosure of a document or other material that refers to a discussion conducted at a Cabinet meeting, records a decision made at a Cabinet meeting, or was considered at a Cabinet meeting is to be discussed with Cabinet Office before the relevant document or material is disclosed.

7.2. Cabinet-in-Confidence (CIC) classification

Based on exemptions under the Freedom of Information Act 1982, a document is CIC if it is:

- *an official Record of any deliberation or decision of Cabinet*
- *a document that has been prepared by a Minister or on their behalf or by an agency for the purpose of submission for consideration by Cabinet*
- *a document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet*
- *a document that is a draft of, or contains extracts from a document referred to above*
- *a document which refers to any deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.*

Typical examples of Cabinet documents include:

- *Cabinet/Committee agendas/briefs/minutes*
- *submissions prepared for consideration by Cabinet or a Cabinet Committee, even if the submission was, in the end, withdrawn prior to consideration*
- *submission attachments that were not already in the public domain at the time of the proposed Cabinet/Committee consideration*
- *agency-internal consultation and collaboration documents, memos, briefs and comments, including coordination comments*
- *correspondence containing or disclosing Cabinet/Committee information*
- *documents relating to the development or progress of legislation through Cabinet to Parliament, e.g. Drafting Instructions for the Chief Parliamentary Counsel, Cabinet Drafts of Bills or draft Second Reading Speeches*
- *any emails and file notes or general correspondence containing reference to CIC material e.g. matters arising from Freedom of Information (FOI) requests or Auditor-General investigations involving Cabinet/Committee documents or decisions*
- *any other document (including working drafts) that is considered a Cabinet document, e.g. notes, briefs or correspondence about any of the above which identify the subject, registration number, Cabinet or Committee, outcome or deliberation*

- *any information that is prepared as part of a policy development, consultative processes and/or during Cabinet submission drafting.*

Documents that are classified as CIC should be marked with 'Cabinet-in-Confidence' whether they are hard copy or digital. Documents already in the public domain may be attached to Cabinet submissions to provide Cabinet with detailed background on a particular issue. Whilst these documents are already in the public domain, their inclusion for Cabinet consideration should remain confidential.

Attachment 1

AUSTRALIAN GOVERNMENT - CABINET HANDBOOK EXTRACT

Website: https://www.pmc.gov.au/resource-centre/government/cabinet-handbook

Section 6 - Security and the Handling of Cabinet Documents

131. The security of Cabinet documents is critical to maintaining the integrity of the Cabinet process as it upholds the convention of Cabinet confidentiality. It is essential that the confidentiality of Cabinet documents, including draft Cabinet documents, is maintained to enable full and frank discussions prior to the Cabinet making its decision.

132. Cabinet documents are any material that:

(a) is prepared for the purpose of informing the Cabinet, for example:

i. Cabinet Submissions, Memoranda, Short-form Cabinet Papers and the attachments, supporting documents and co-ordination comments that are associated with these items;
ii. Powerpoint or other presentations made in the Cabinet Room;
iii. Any other papers prepared for the consideration by or for the information of ministers in a Cabinet or committee meeting, such as letters or reports, regardless of whether these documents are circulated in advance of the meeting or provided in the Cabinet Room; and
iv. Briefs for the Cabinet and Cabinet Committees.

(b) reveal the decision and/or deliberations of the Cabinet (including agendas, Cabinet minutes, notes taken by Cabinet note takers or Cabinet and Cabinet committee meeting dates)

(c) are prepared by departments to brief their ministers on matters proposed for Cabinet consideration

(d) have been created for the purpose of informing a proposal to be considered by the Cabinet (such as drafting comments or departmental cost analysis); and

(e) include, but not limited to, Pre-Exposure Drafts, Exposure Drafts, and Coordination and Final versions of Cabinet submissions.

133. The preparation, handling and storage of Cabinet documents are subject to detailed security requirements determined by the Cabinet Division, which seek to promote the 'need to know' principle and prevent unauthorised disclosure. The requirements apply equally to ministerial offices and their staff as to public servants. All Cabinet documents and associated records are to be protectively marked 'PROTECTED Cabinet' and carry a security classification of at least PROTECTED or higher.

134. Cabinet documents (including final Submissions, Memoranda, Papers or Cabinet Minutes) must not be copied, and this rule includes transcribing or copying of text of Cabinet documents (particularly Cabinet minutes) into departmental IT systems.

Attachment 1

NEW SOUTH WALES GOVERNMENT - CABINET HANDBOOK EXTRACT

Website: https://arp.nsw.gov.au/assets/ars/c5747633d7/Cabinet_Conventions.pdf

(**Note:** the below is an extract from page 7 of 'Cabinet Conventions: NSW Practice' (Addendum to Cabinet Practice Manual):

'Cabinet documents' are generally taken to include: Cabinet Minutes, submissions concerning Cabinet Minutes, correspondence concerning Cabinet Minutes, analyses of Cabinet Minutes and briefings to Ministers on Cabinet Minutes, Cabinet Agendas and Cabinet decisions. The equivalent documents concerning Cabinet Committees are also considered Cabinet documents. Draft versions of all such documents are also considered Cabinet documents.

Attachment 1

QUEENSLAND GOVERNMENT – CABINET HANDBOOK EXTRACT

Website: https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/cabinet-handbook.aspx

Section 1.7 Definition of Cabinet documents

Cabinet documents are diverse in their form and may broadly be defined as documents, which if disclosed, would reveal any consideration or deliberation of Cabinet, or otherwise prejudice the confidentiality of Cabinet considerations, deliberations or operations. Cabinet documents may include, but are not limited to, the following:

- *submissions, submitted or proposed to be submitted to Cabinet;*
- *Cabinet agenda, notice of meetings and business lists for meetings;*
- *minutes and decisions of Cabinet;*
- *briefing papers prepared for use by Ministers or Chief Executive Officers in relation to matters submitted or proposed to be submitted to Cabinet;*
- *documentation and minutes of Cabinet Committee meetings;*
- *reports generated by the Cabinet Secretariat or agencies which show Cabinet submissions or proposed Cabinet submissions;*
- *corrigenda to Cabinet submissions;*
- *reports and attachments to submissions that have been brought into existence for the purpose of submission to Cabinet;*
- *legislative proposals, Bills, explanatory notes and Explanatory speeches;*
- *correspondence between Ministers and/or the Premier that is submitted to Cabinet or that proposes matters to be raised in Cabinet;*
- *consultation comments on first lodgement and final Cabinet documents;*
- *reports or studies within or for the Queensland Government that are intended to form the basis of a Cabinet document or an attachment to a Cabinet document;*
- *all other minutes, correspondence between Ministers and other material that relate to Cabinet matters, eg. letters seeking waiver of all or part of the Cabinet process or minutes seeking comments on submissions;*
- *drafts, copies or extracts of any of the above; and*
- *all formats of the above, including hard copy, electronic, or microfilm formats.*

NSW GOVERNMENT

Premier & Cabinet

Our ref: DPC14/01705

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

10 JUL 2014

Dear Mr Blunt

Further Order for Papers – Documents from the office of the former Minister for Finance and Services and Minister for the Illawarra

I refer to the further resolution of the Legislative Council under Standing Order 52 made on Thursday, 15 May 2014 relating to documents from the office of the former Minister for Finance and Services and Minister for the Illawarra.

I am now delivering to you documents referred to in that resolution. The documents have been obtained from the Department of Premier and Cabinet. **Annexure A** is an index of all non-privileged documents that are being provided in response to the resolution. In accordance with Item 5(a) of Standing Order 52, those documents for which a claim for privilege is being made have been separately indexed (**Annexure B**) and the case for privilege has been noted.

I am advised that over 40,000 documents were required to be reviewed in order to determine whether they were relevant to the resolution and/or attracted claims of privilege. The volume of work involved in responding to this resolution, and to the earlier resolution of 19 March 2014, required the Department to engage external assistance. In this case, the Crown Solicitor's Office was retained by the Department.

As well as assisting the Department to review documents for relevance and Cabinet information, the Crown Solicitor's Office has prepared a submission in support of the Department's claims that privilege should attach to a number of the documents now being produced. This submission is enclosed at **Annexure C** to this letter.

Although I can certify that to the best of my knowledge all documents covered by the terms of the resolution are being produced, in a case such as this, my certification must be subject to qualifications similar to those outlined in the Department's privilege submission. Whilst this resolution was cast in narrower terms than the resolution of 19 March, and provided a longer than usual period for the return of documents, the obstacles to full compliance referred to in the Department's privilege submission and in the Acting Secretary's letter of 16 April 2014 remain relevant to this return. The Acting Secretary's letter noted in particular the difficulties and expense faced by agencies in responding to resolutions that do not specify any subject matter and/or require the review of thousands of records in a short period of time.

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Tel: (02) 9228 5555 ▪ F: (02) 9228 5249 ▪ www.dpc.nsw.gov.au

I also draw your attention to the Department's request to be given a further opportunity to make submissions should any claim for privilege be disputed. I note further that the time and other constraints applying in this case may mean that a claim for privilege has not been made by the Department where it may have been properly available and in the public interest to do so. The Department's privilege submission refers to these matters in Part 2 and in Part 4.

I also note that submissions in support of a claim of privilege may sometimes reveal information that is privileged. To the extent that they do, such submissions should be considered to be subject to the same confidentiality as the documents over which the privilege claim is made.

I am advised that the external costs to date of the Department in responding to both the first and second resolutions are in the order of $380,000. These costs are in addition to the "in-house" costs of the Department, and those of other agencies consulted during the review process, which have not been quantified.

Should you require any clarification or further assistance, please contact Ms Rachel McCallum, Deputy General Counsel, on telephone (02) 9228 5546.

Yours sincerely

Paul Miller
Acting Secretary

Two boxes of privileged documents &
six boxes of non-privileged
documents received at 4.55pm
Thursday 10 July 2014

Parliament of Tasmania, Hobart, TAS, 7000
www.parliament.tas.gov.au

Legislative Council Select Committee
PRODUCTION OF DOCUMENTS

23 January 2020

LCSC/POD 11

The Hon Peter Gutwein MP
Premier of Tasmania
11th Floor
15 Murray Street
HOBART

Email: peter.gutwein@parliament.tas.gov.au

Dear Premier

On behalf of the Committee I wish to congratulate you on becoming Tasmania's 46th Premier. The Committee looks forward to working with you during this Inquiry.

As you would be aware, the Committee received a submission from your predecessor, the Hon Will Hodgman MP, who requested further questions be sent by letter to him. The Committee received a response on 18 December. The Committee do have some further questions subsequent to this response and further evidence taken by the Committee during public hearings.

Additional information received by the Committee includes evidence received from New Zealand in relation to their policy regarding the disclosure of cabinet documents (please see attached correspondence). The Committee would appreciate your comment on this policy and whether you believe a similar policy could work in Tasmania.

To allow for a more effective way forward, the Committee respectfully requests your attendance at a public hearing.

Accordingly, the Committee invites you and any other departmental officers to attend a public hearing on one of the following dates:

Date:	**Tuesday 18 February**
Time:	**am (to be advised)**
Date:	**Monday, 10 March 2020**
Time:	**anytime (to be advised)**
Date:	**Monday, 16 March 2020**
Time:	**pm (to be advised)**
Venue:	**Committee Room 2, Parliament House, Hobart**

It would be appreciated if you could please confirm your availability to attend a public hearing by close of business 7 February 2020 to the Committee Secretary, Ms Julie Thompson via email pod@parliament.tas.gov.au or 6212 2320.

Yours sincerely

HON RUTH FORREST MLC
CHAIR
w. 03 6212 2320 f. 03 6212 2345 e. pod@parliament.tas.gov.au

Encl.

From: Stephen Moore [mailto:Stephen.Moore@ssc.govt.nz]
Sent: Thursday, 19 December 2019 10:39 AM
To: Julie Thompson <julie.thompson@parliament.tas.gov.au>
Subject: FW: FW: ATTN: Mr Webster - Legislative Council Select Committee on Production of Documents

Dear Ms Thompson

I am writing in response to your request to the New Zealand Cabinet Office seeking information on the Proactive Release of Cabinet Material policy. This request was forwarded to the State Services Commission (SSC) for response on 8 December as the lead agency for the implementation of the policy. Apologies for the delay in providing this information to you.

I have responded to each of your questions below. This information is largely drawn from the Cabinet Office Circular CO (18) 4 - Proactive Release of Cabinet Material: Updated Requirements. You can also read the Cabinet decision papers and supporting advice on the development of the policy on the Proactive Release page on the SSC website, under the section titled *Strengthening Proactive Release Requirements*, released on 18 September 2018. That page also contains examples of Cabinet papers released by SSC prior to and since the policy was introduced.

You may also be interested to note the implementation of the policy was a Commitment under New Zealand's *Open Government Partnership National Action Plan 2018-2020* (refer to Commitment 7).

Note this is a Government policy, and was approved by the New Zealand Cabinet in September 2018 , to take effect from 1 January 2019 (CAB-18- MIN-0418 refers, under the proactive release link above).

If you have any questions on the information below, or the published material, please feel free to contact me via stephen.moore@ssc.govt.nz or (64) 21 194 9149.

1. **Whether Cabinet information is released following Cabinet decisions**

The policy states that "all Cabinet and Cabinet committee papers and minutes must be proactively released and published online within 30 business days of final decisions being taken by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release beyond 30 business days". The exception is papers that have gone to the Cabinet Appointments and Honours (APH) committee, which are excluded due to the fact they commonly contain private information.

The papers are released by agencies on their websites, on behalf of their Minister(s). Ministers are responsible for proactive release, as Cabinet material can only be released under their authority and within their own portfolios. Where a Minister decides not to proactively release Cabinet material, to partially release, or to extend the release timeframe, the paper is required to clearly note the decision, set out the reasons, and, in the case of an extended timeframe, indicate when the material will be proactively released. This information is included in the Proactive Release section of the Cabinet paper.

2a. The timeframe between Cabinet decision and when information is released

Papers and minutes must be proactively released and published online within 30 business days of final decisions being taken by Cabinet, unless there is good reason not to publish all or part of the material, or to delay the release. Ministers can choose to release Cabinet material earlier than the 30 business days. The counting of the 30 business days in which Cabinet material must be proactively released starts from the day of the Cabinet meeting at which

final decisions are taken. Potential reasons for withholding the papers or redacting some information are outlined in paragraphs 26 and 34 of the Cabinet Office circular.

A "working day" calculator has been made available on the SSC website to assist agencies and Ministers' offices to determine the expected publication date.

2b. What information is released

Final versions of all Cabinet papers, and any attachments or appendices to those papers and associated minutes, must be released proactively and published online (excepting APH material), unless there is good reason not to publish all or part of the material. This includes minutes resulting from the consideration of oral items at Cabinet.

Where information is redacted, the reasons should be clearly stated. Each release must be accompanied by a coversheet and, as a protection against misuse of information, copyright statements should be included with the content of each paper published.

Ministers may also choose to proactively release related key advice papers provided to the Minister by departments or agencies. A key advice paper is a document addressed to the Minister who took the item to Cabinet, which seeks agreement from the Minister to recommendations on the matter (see the advice released regarding this policy under the link above as an example).

All material proposed for release must undergo a considered, reliable, robust, and thorough review process. Due diligence matters should be considered by the person or agency authoring or reviewing the material before Ministers give approval to proactively release and publish Cabinet material and key advice papers online. These include considerations of: whether the document contains any information that would have been withheld if the information had been requested under New Zealand's Official Information Act 1982; privacy; national security; and potential liability, civil or criminal, that might result from release of the material. See the Cabinet Office Circular for more information on this due diligence process.

2c. How the information is released

Departments and agencies must publish proactively released Cabinet material (and any related key advice) on a website maintained by or on behalf of the department or agency, or provide a link to the information if it is being published on another department's or agency's website.

All material published should be in a text searchable version. If the content is in formats other than HTML, commonly used formats should be selected and made as accessible as possible. The publishing agency may need to provide an accessible alternative of some of the information.

Where any of the information included in the material has already been released, the publisher can choose to link to the previously released material balancing this against ease of accessibility and usability.

2d. The process/power under which the release occurs

The policy was approved by Cabinet on September 2018 (CAB-18- MIN-0418 refers, under the proactive release link above). As noted above individual papers are released under the authority of the Minister or Ministers responsible for the portfolios under which the paper has been submitted to Cabinet or a Cabinet Committee.

2e. Actions taken (predominantly by opposition parties) on the release of the documents.

SSC provide an email address and telephone helpline to provide further advice on the implementation of the policy on the proactive release of Cabinet material and key advice papers and publishing online. Information on proactive release, including this policy, is also available on the SSC website.

The policy was announced on 18 September 2018, and came into effect from 1 January 2019. A report back to Cabinet on the policy, scheduled for December 2019, has been deferred until early 2020.

Since October 2019, Ministers' adherence to the policy, including the number of papers released, the number released within 30 working days, and the reasons for not releasing, have been the subject of a number of written Parliamentary questions.

I trust this answers your questions. As noted above, please feel free to contact me if you have any further questions. We finish up for the year tomorrow, and will be back in the office from 6 January 2020.

Kind regards

Stephen Moore
Principal Advisor | Integrity, Ethics and Standards
mobile: 021 194 9149 email: stephen.moore@ssc.govt.nz
I finish at 2.30pm Tuesday and Thursday

Te Kawa Mataaho | State Services Commission
www.ssc.govt.nz | www.govt.nz

TASMANIA

PREMIER OF TASMANIA

17 FEB 2020

Hon Ruth Forrest MLC
Chair
Legislative Council Select Committee – Production of Documents
Email: pod@parliament.tas.gov.au

Dear ~~Ms Forrest~~ Ruth,

I am writing in relation to your letter of 23 January 2020 inviting me to attend a public hearing to comment on the New Zealand Policy and whether I believe a similar policy would work in Tasmania.

Thank you for providing the opportunity to attend a hearing, however consistent with the advice of the former Premier, I also am of the view that it is neither required, nor within convention, for Ministers to attend a hearing in relation to this matter.

I am also advised that the matter on which you are making inquiries is likely outside the scope of the Terms of Reference of the Inquiry, which the Legislative Council resolved on 21 May 2019 and which is limited to 'options of an agreed process to resolve disputes that arise…'.

Notwithstanding this current line of inquiry, the Government has previously provided a written submission to the review clearly articulating its position on the matter. My predecessor also provided a response to further questions asked by the Committee and the Secretary of the Department of Premier and Cabinet attended a hearing of the Select Committee on 11 November 2019.

I do not think that any of my Ministers or I have anything additional to add to this Inquiry.

Thank you for your letter and for congratulating me on my appointment as Premier.

Yours sincerely

Peter Gutwein MP
Premier

GPO Box 123, Hobart TAS 7001 | Telephone: 61 3 6165 7650 | Email: peter.gutwein@dpac.tas.gov.au

APPENDIX 12 — LIST OF REFERENCES

List of references

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APPENDIX 13 — SUBMISSIONS AND WITNESSES

List of submissions

1	La Trobe University Law School
2	ACT Legislative Assembly
3	The Hon Sue Hickey MP
4	Mr Leigh Sealy SC
5	Australian Parliament – Senate
6	Tasmanian Legislative Council
7	The Hon Rob Valentine MLC
8	Victorian Legislative Council
9	Huon Valley Residents & Ratepayers Association (Inc)
10	Tasmanian Labor Party
11	Tasmanian Government
12	New South Wales Legislative Council
13	Professor Gabrielle Appleby, Dr Brendan Gogarty and Professor George Williams AO
14	Tasmanian Audit Office
15	Mr Rhys Edwards
16	Professor Richard Herr OAM
17	Queensland Parliament

List of witnesses

Friday 6 September 2019, Hobart
Mr Leigh Sealy SC
Professor Richard Herr OAM, Academic Director, Parliamentary Law, Practice and Procedure Course, Faculty of Law, University of Tasmania
Dr Brendan Gogarty, Senior Lecturer in Law and Director of Clinical Legal Practice, University of Tasmania, School of Law
Mr Rod Whitehead, Auditor-General, Tasmanian Audit Office
Tuesday 24 September 2019, Sydney
The Hon John Hannaford AM, former Leader of the Opposition, Legislative Council, Parliament of New South Wales
Mr David Blunt, Clerk of the Parliaments, Legislative Council, Parliament NSW
The Hon Keith Mason AC QC, current Independent Legal Arbiter, Legislative Council, Parliament of New South Wales
Mr John Evans, former Clerk of the Parliaments, Legislative Council, Parliament of New South Wales
Professor Gabrielle Appleby, Director of Judiciary Project in the Gilbert + Tobin Centre of Public Law at University of New South Wales; Constitutional Consultant to the Clerk of the House of Representatives; and teaches into the annual ANZACATT Parliament Law, Practice and Procedure Course. Dr Brendan Gogarty, Senior Lecturer in Law and Director of Clinical Legal Practice, University of Tasmania, School of Law (via tele-conference)

The Hon Michael Egan AO, former Leader of the Government and Treasurer, Legislative Council, Parliament of New South Wales
Wednesday 25 September 2019, Melbourne
Dr Anita McKay, Lecturer, La Trobe Law School, College of Arts, Social Sciences and Commerce, La Trobe University
The Hon Gordon Rich-Phillips MP, current Member; former Deputy Leader of the Opposition and; former Minister, Legislative Council, Parliament of Victoria
Mr Wayne Tunnecliffe, former Clerk of the Legislative Council, Parliament of Victoria
Monday 30 September 2019, Hobart
Mr Rhys Edwards
Friday 1 November 2019, Hobart
Mr Tom Duncan, Clerk of the Legislative Assembly for the ACT (via tele-conference) Mr David Skinner, Director of the Office of the Clerk, Legislative Assembly for the ACT (via tele-conference)
Ms Jenny Gale, Secretary, Department of Premier and Cabinet
Mr Nigel Pratt, Clerk of the Legislative Council of Western Australia (via video-conference) Mr Andrew Hawkes, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Legislative Council of Western Australia (via video-conference) Ms Anne Turner, Advisory Officer, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Legislative Council of Western Australia (via video-conference)
Friday 29 November 2019, Hobart
Mr Andrew Hawkes, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Legislative Council of Western Australia (via tele-conference) Ms Anne Turner, Advisory Officer, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations, Legislative Council of Western Australia (via tele-conference)
Tuesday 10 March 2020, Hobart
Mr Sam Engele, Executive Group Manager, Policy and Cabinet, Chief Minister, Treasury and Economic Development Directorate ACT (via tele-conference)
Honorary Associate Professor Rick Snell
Mr Neil Laurie, Clerk of the Parliament, Queensland Parliamentary Service (via tele-conference)
Wednesday 16 March 2020, Hobart
Mr Bret Walker SC (via tele-conference)
Emeritus Distinguished Professor Jeff Malpas
Mr David Pearce, Clerk of the Legislative Council Tasmania
Professor Anne Twomey, Professor of Constitutional Law, Director, Constitution Law Reform, Faculty of Law, The University of Sydney (via tele-conference)

APPENDIX 14 — MINUTES OF PROCEEDINGS

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on TUESDAY, 28 MAY 2019 at 9.30am– CR 2

MEMBERS PRESENT:

Ivan Dean MLC
Ruth Forrest MLC
Jane Howlett MLC
Meg Webb MLC
Josh Willie MLC

STAFF PRESENT: *Julie Thompson* (Secretary)

ORDER OF THE COUNCIL DATED 22 MAY 2019

The Order of the Council appointing the Committee dated 22 May 2019 be received. The *Secretary* advised of the Clerk's correspondence dated 24 May 2019 advising Mr Gaffney was discharged from serving on the this Committee by Resolution of the Council on Thursday, 23 May 2019.

ELECTION OF CHAIR

The Chair *pro-tem* indicated that she would act as returning officer in the election of a Chair. Nominations were called for the role of Chair. Mr *Dean* nominated Ms *Forrest*, which was seconded by Ms *Howlett.*

There being no other nominations, the returning officer declared Ms *Forrest* to be duly elected Chair.

The Chair *pro-tem* thereupon yielded the Chair to Ms *Forrest.*

ELECTION OF DEPUTY CHAIR

The Chair called for nominations for the position of Deputy Chair. Mr *Dean* nominated Ms *Howlett*, which was seconded by Mr *Willie.* There being no other nominations, Ms *Howlett* was declared Deputy Chair.

FUTURE PROGRAM

A general discussion took place.

The *Chair* advised of her upcoming trip to the Houses of Parliament, London where she intends to seek further information in relation to the Committee's Terms of Reference.

Also, the Chair advised the Deputy Clerk's advice is available regarding any legal issues that arise throughout the Committee process and Stuart Wright is overseeing the Secretary's role.

The Committee ***RESOLVED*** the Advertisement calling for submissions be placed in the three regional newspapers **Saturday, 8 June 2019**.

The Committee ***RESOLVED*** the *Secretary* investigate costings to advertise in the major mainland papers.

The Committee ***RESOLVED*** the closing date for Submissions be **Friday, 26 July 2019** and the *Secretary* will circulate a draft invitation list.

The Committee ***RESOLVED*** to next meet on **Monday, 12 August 2019** at 1.00 pm – 3.00 pm to consider submissions received.

The Committee ***RESOLVED*** the Secretary draft a media advisory regarding the establishment of the Committee.

The *Chair* requested the Parliamentary Research Service provide a comprehensive review on the Parliament of New South Wales dispute resolution process and to review any processes or practices utilised by any other Australian jurisdiction including the Senate's practices in this area.

The Committee discussed the requirement for the Committee to travel to New South Wales to meet with the relevant representatives regarding their dispute resolution process. There may be additional stopovers in Canberra and Melbourne for meetings depending upon submissions received (two day trip, end of August).

The Committee ***RESOLVED*** the *Chair* to write to the President requesting approval for this requirement.

NEXT MEETING Monday 12 August 2019 at 1.00 pm – 3.00 pm.

ADJOURNMENT: The Committee adjourned at 10.05 am

CONFIRMED

Date: 12/08/2019

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on MONDAY, 12 AUGUST 2019 at 1.00 pm– CR 2

MEMBERS PRESENT:

Ivan Dean MLC (phone)
Ruth Forrest MLC
Jane Howlett MLC
Meg Webb MLC
Josh Willie MLC

STAFF PRESENT:

Julie Thompson (Secretary)
*Catherine Vickers (*Deputy Clerk) (left meeting at 1.48 pm)
*Allison Waddington (*Executive Assistant*)*

BRIEFING ON BACKGROUND PRS PAPER

At 1.00 pm Bryan Stait, Parliamentary Research Service briefed the Committee on Production of Documents Procedures in NSW, Victoria and the Senate.

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Tuesday, 28 May 2019.

CORRESPONDENCE

Incoming

1. Email dated 19 June 2019 from Bridget Noonan, Clerk, Parliament of Victoria declining invitation to provide submission.
2. Letter dated 19 June 2019 from Richard Bingham, CEO Integrity Commissioner declining invitation to provide submission.
3. Letter dated 24 June 2019 from Richard Connock, Ombudsman declining invitation to provide submission.

Outgoing

1. Letters sent 13 June 2019 to stakeholders inviting submission to the Select Committee (see attached stakeholder list).
2. Letters sent to stakeholders acknowledging receipt of submissions.

The Committee endorsed and received incoming and outgoing correspondence.

SUBMISSIONS RECEIVED AS OF FRIDAY 26 JULY 2019

The following Submissions were received :

001 Latrobe University Law School
002 ACT Legislative Assembly
003 Hon Sue Hickey MP, Liberal Member for Clark
004 Leigh Sealy SC
005 APH Senate
006 Legislative Council Clerk Tasmania
007 Hon Rob Valentine MLC, Independent Member for Hobart
008 Legislative Council Clerk Victoria
009 Huon Valley Resident's & Ratepayers Assoc (Inc)
010 Tasmanian Labor Party

LATE SUBMISSIONS

The following late Submissions were received

011 Tasmanian Government
012 Legislative Council Clerk New South Wales
013 Dr Appleby, Dr Gogarty and Prof Williams
014 Auditor-General
015 Rhys Edwards

The Committee AGREED to accept a late submission from the House of Commons.

PUBLICATION OF SUBMISSIONS TO WEBSITE

The Committee RESOLVED to publish submissions received to the website.

FUTURE PROGRAM

1. Consideration of Submissions received for invitation to present evidence

The Committee AGREED to invite the following stakeholders to public hearings:

001 Latrobe University Law School
004 Leigh Sealy SC
005 APH Senate
006 Legislative Council Clerk Tasmania
008 Legislative Council Clerk Victoria
010 Tasmanian Labor Party
011 Tasmanian Government
012 Legislative Council Clerk New South Wales
013 Prof Appleby, Dr Gogarty and Prof Williams
014 Auditor-General
015 Rhys Edwards

The Committee AGREED to hold public hearings in Hobart on Friday, 6 September 2019 and to invite:

004 Leigh Sealy SC
010 Tasmanian Labor Party
011 Tasmanian Government
015 Rhys Edwards

2. Possible travel – Sydney, Melbourne and Canberra

A discussion took place regarding travel to Sydney, Melbourne, and Canberra.

The Committee AGREED to travel to New South Wales, Victoria and Canberra on 23 -25 September 2019.

A discussion took place regarding stakeholders.

NEXT MEETING

9.15 am on Friday, 6 September 2019 in Hobart.

ADJOURNMENT:

The Committee adjourned at 2.22 pm

Meeting no: 2/2019

CONFIRMED

Date: 06/09/2019

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on FRIDAY, 6 SEPTEMBER 2019 at 9.18 am– CR 2

MEMBERS PRESENT:

Ivan Dean MLC
Ruth Forrest MLC
Jane Howlett MLC
Meg Webb MLC
Josh Willie MLC

STAFF PRESENT:

Julie Thompson (Secretary)
*Allison Waddington (*Executive Assistant*)*

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Monday, 12 August 2019.

CORRESPONDENCE

Incoming

1. Email dated 15 August 2019 from Pam Voss, Officer Manager, Tasmanian Labor Leader's Office advising Rebecca White MP and Ella Haddad MP are unable to attend public hearings and have nothing to add to their written submission. (LCSC/POD 10)
2. Letter received 5 September 2019 from Will Hodgman MP, Premier declining the invitation to attend public hearings. (LCSC/POD 11)

Outgoing

1. Letters sent 13 August 2019 to stakeholders inviting verbal evidence at Hobart public hearings.
2. Letter dated 29 August 2019 to Hon Craig Farrell, MLC, President, Legislative Council regarding travel request.

The Committee endorsed and received incoming and outgoing correspondence.

A discussion took place regarding the incoming correspondence from the Government.

The Committee AGREED to discuss further at the end of today's meeting.

LATE SUBMISSION

The following late Submission was received:

016 Richard Herr OAM

The Committee AGREED to accept the late submission from Richard Herr OAM.

The Committee RESOLVED to publish the submission received to the website.

PUBLIC HEARINGS

At 9.27 am LEIGH SEALY SC was called, made the statutory declaration and was examined. (LCSC/POD 4)

Ms *Howlett* left her seat at 10.33 am

The witness withdrew at 10.34 am

Ms *Webb* left her seat at 10.35 am
Ms *Howlett* took her seat at 10.36 am

At 10.36 am RICHARD HERR OAM was called, made the statutory declaration and was examined. (LCSC/POD 16)

Ms *Webb* took her seat at 10.37 am
Mr *Willie* left his seat at 10.37 am
Mr *Willie* took his seat at 10.38 am

The witness withdrew at 11.37 am

The Committee suspended at 11.38 am
The Committee resumed at 11.55 am

At 11.55 am DR BRENDAN GOGARTY, SENIOR LECTURER IN LAW AND DIRECTOR OF CLINICAL LEGAL PRACTICE, UTAS SCHOOL OF LAW was called, made the statutory declaration and was examined. (LCSC/POD 13)

Ms *Howlett* took her seat at 11.56 am

The witness withdrew at 12.39 pm

At 12.40 pm ROD WHITEHEAD, AUDITOR-GENERAL was called, made the statutory declaration and was examined. (LCSC/POD 14)

Mr *Dean* left his seat at 12.45 pm
Mr *Dean* took his seat at 12.47 pm

The witness withdrew at 1.07 pm

OTHER BUSINESS Discussion resumed regarding Government's incoming correspondence received 5 September 2019.

The Committee RESOLVED to write to the Premier and extend another invitation to the Premier, Attorney-General and Jenny Gale, Secretary, Department of Premier and Cabinet to appear at a public hearing on Monday 30 September 2019 at 3.00 pm.

NEXT MEETING 9.00 am on Tuesday, 24 September 2019 in Parliament House, Sydney

ADJOURNMENT: The Committee adjourned at 1.23 pm

CONFIRMED

Date: 10/09/2019

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on TUESDAY 10 SEPTEMBER 2019
At 5.52 pm – ANTE-CHAMBER, LEGISLATIVE COUNCIL

MEMBERS PRESENT	*Ivan Dean MLC* *Ruth Forrest MLC* (Chair) *Jane Howlett MLC* (Deputy Chair) *Meg Webb MLC*
STAFF PRESENT	*Julie Thompson* (Secretary)
CONFIRMATION OF PREVIOUS MINUTES	The Committee considered and endorsed the Minutes of the Meeting held on Monday 6 September 2019.
CORRESPONDENCE	**Outgoing** Letter sent 9 September 2019 to the Hon Will Hodgman MP, Premier requesting attendance at public hearings on 30 September 2019. The Committee endorsed the outgoing correspondence
CLERK'S ADVICE ON THE INTRODUCTION OF A NEW STANDING ORDER	The Committee considered the draft letter seeking advice from the Clerk regarding the introduction of a new standing order to the House. The Committee AGREED that the draft letter be adopted and sent.
NEXT MEETING	9.00 am on Tuesday 24 September 2019 in Parliament House, Sydney.
ADJOURNMENT	The Committee adjourned at 5.56 pm.

CONFIRMED

Date: 24/09/2019 **CHAIR**

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on
TUESDAY 24 SEPTEMBER and WEDNESDAY 25 SEPTEMBER 2019 at -
PARLIAMENT HOUSE, MELBOURNE AND SYDNEY

COMMENCEMENT

At 8.50 am in the Preston Stanley Room, Parliament House, Sydney.

MEMBERS PRESENT

Ivan Dean MLC
Ruth Forrest MLC (Chair)
Jane Howlett MLC (Deputy Chair)
Meg Webb MLC
Josh Willie MLC

STAFF PRESENT

Stuart Wright (Acting Secretary)
Julie Thompson (Executive Assistant and Hansard Monitor)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Monday 6 September 2019.

CORRESPONDENCE

Outgoing
Letter dated 10 September 2019 to David Pearce, Clerk of the Legislative Council, Parliament of Tasmania requesting advice regarding the introduction of new Standing Orders to the House.

Inwards
Letter received 19 September 2019 from David Pearce, Clerk of the Legislative Council, Parliament of Tasmania providing advice regarding the introduction of new Standing Orders to the House.

Tabling of Document
Dr Brendan Gogarty – Copy of PowerPoint presentation from public hearing on 6/9/19 (LCSC/POD 13). The Committee **RESOLVED** to publish the presentation to the inquiry website.

PUBLIC HEARINGS

At 8.55 am HON JOHN HANNAFORD AM, Former Leader of the Opposition, Legislative Council of New South Wales (1995-99) was called and was examined.

The witness withdrew at 10.04 am

Mr *Dean* left his seat at 10.04 am

At 10.05 am MR DAVID BLUNT, CLERK OF THE PARLIAMENTS, LEGISLATIVE COUNCIL, PARLIAMENT OF NEW SOUTH WALES was called and was examined.

Mr *Dean* took his seat at 10.06 am

Question on Notice
Whether it would make a difference to the current process in NSW if there was to be a clearly articulated purpose at the commencement of a request and an assessment of the outcomes of a request at the conclusion.

The witness withdrew at 11.02 am

The Committee suspended at 11.02 am
The Committee resumed at 11.15 am

At 11.15 am HON KEITH MASON AC QC, CURRENT INDEPENDENT LEGAL ARBITER, LEGISLATIVE COUNCIL, PARLIAMENT OF NEW SOUTH WALES was called and was examined.

Ms *Howlett* took her seat at 11.19 am

Tabled Document
Report Under Standing Order 52 on Dispute Claim of Privilege – Landcom Bullying Allegations 2019

The witness withdrew at 12.20 pm

At 12.20 pm MR JOHN EVANS, FORMER CLERK OF THE PARLIAMENTS, LEGISLATIVE COUNCIL, PARLIAMENT OF NEW SOUTH WALES was called and was examined.

Ms *Webb* left her seat at 12.59 pm
Ms *Webb* took her seat at 1.02 pm

The witness withdrew at 1.05 pm

The Committee suspended at 1.05 pm
The Committee resumed at 3.15 pm

At 3.15 pm DR GABRIELLE APPLEBY, PROFESSOR, UNIVERSITY OF NEW SOUTH WALES, ASSOCIATE DEAN AND DR BRENDAN GOGARTY, SENIOR LECTURER IN LAW, UNIVERSITY OF TASMANIA (VIA TELECONFERENCE) was called and was examined.

The witness withdrew at 4.22 pm

Mr *Dean* left his seat at 4.22 pm
Mr *Dean* took his seat at 4.24 pm

At 4.22 pm HON MICHAEL EGAN AO, FORMER LEADER OF THE GOVERNMENT AND TREASURER, LEGISLATIVE COUNCIL, PARLIAMENT OF NEW SOUTH WALES (1995-2005) was called and was examined.

The witness withdrew at 4.55 pm
The Committee suspended at 4.55 am

The Committee resumed at 9.53 am, G3 Meeting Room, Parliament of Victoria, 55 St Andrews Place, East Melbourne.

At 9.53 am DR ANITA MCKAY, LECTURER/COMMITTEE MEMBER, INTERNATIONAL STUDIES RESEARCH GROUP, LA TROBE UNIVERSITY was called and was examined.

Question on Notice
When the un-redacted documents were received by the Committee?

Mr *Willie* left his seat at 10.39 am
Mr *Willie* took his seat at 10.41 am

The witness withdrew at 10.47 am

The Committee suspended at 10.47 am
The Committee resumed at 11.10 am

At 11.10 am HON GORDON RICH-PHILLIPS MP, FORMER DEPUTY LEADER OF THE OPPOSITION, LEGISLATIVE COUNCIL, PARLIAMENT OF VICTORIA (2014-18) was called and was examined.

The witness withdrew at 12.15 pm

The Committee suspended at 12.15 pm
The Committee resumed at 12.19 pm

At 12.19 pm WAYNE TUNNECLIFFE, FORMER CLERK OF THE LEGISLATIVE COUNCIL, PARLIAMENT OF VICTORIA (1999-2014) was called and was examined.

Ms *Howlett* left her seat at 1.03 pm

Mr Richard Willis, Assistant-Clerk Procedure, Legislative Council of Victoria came to the table at 1.15 pm.

The witness withdrew at 1.20 pm

NEXT MEETING Monday 30 September 2019 in Committee Room 2, Parliament House, Hobart.

ADJOURNMENT The Committee adjourned at 1.20 pm.

CONFIRMED

Date: 30/09/2019 **CHAIR**

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on MONDAY 30 SEPTEMBER 2019
At 1.57 pm – CR2

MEMBERS PRESENT

Ivan Dean MLC (via phone)
Ruth Forrest MLC (Chair)
Jane Howlett MLC (Deputy Chair*) (via phone)*
Meg Webb MLC
Josh Willie MLC

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Tuesday 24 and Wednesday 25 September 2019.

CORRESPONDENCE

Incoming

1. Letter received 27 September 2019 from the Premier, the Hon Will Hodgman MP declining the invitation extended to the Attorney-General, Secretary of DPAC and himself to appear at the Committee's Public Hearing on Monday, 30 September 2019.

The Committee received the incoming correspondence.

(Ms *Howlett* joined the meeting at 1.59 pm)

PUBLIC HEARING

At 1.59 pm RHYS EDWARDS was called, made the statutory declaration and was examined. (LCSC/POD 15)

(Mr *Dean* joined the meeting at 2.02 pm)

The witness withdrew at 2.55 pm.

OTHER BUSINESS

Premier' s Correspondence
A general discussion took place.

The Committee **RESOLVED** to write to the Premier respectively requesting the Premier reconsider his decision to appear before the Committee and request his attendance at the following public hearing dates: Friday 18 October 2019 at 9.30 am or Friday 1 November 2019 at 9.00 am. The Secretary to discuss the wording of the response to the Premier with the Clerk and circulate a draft letter for the Committee's consideration.

Transcript David Blunt
The Chair read an extract from David Blunt's Transcript regarding the Clerk's Register and suggested the Committee seek additional further regarding the processes.

The Committee AGREED to write to Mr Blunt requesting additional information ie. the management of the register, the process, security measures, storage, back-up of papers and thoughts on an electronic option.

Invitation to provide additional information
The Committee **AGREED** to write to Anne Twomey and Brett Walker SC inviting written information regarding their respective areas of expertise in relation to executive government's accountability to the parliament.

Publication of Transcripts to Website
The Committee **RESOLVED** to publish New South Wales, Victorian and Rhys Edwards Transcripts to the website.

The Committee **AGREED** to write to all witnesses who appeared before the Committee in New South Wales and Victoria thanking them for meeting with the Committee.

NEXT MEETING Friday 18 October 2019 at 9.30 am or Friday 1 November 2019 at 9.00 am.

ADJOURNMENT The Committee adjourned at 3.26 pm.

CONFIRMED

Date: 11/10/2019 **CHAIR**

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on FRIDAY 11 OCTOBER 2019
At 4.00 pm – CR2

MEMBERS PRESENT

Ruth Forrest MLC (Chair) (via phone)
Meg Webb MLC
Josh Willie MLC (via phone)

APOLOGIES

Jane Howlett MLC
Ivan Dean MLC

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Friday 30 September 2019.

CORRESPONDENCE

Outgoing

1. Letter dated 4 October 2019 to the Premier, the Hon Will Hodgman MP respectfully requesting the Secretary of DPAC and himself to present verbal evidence. (LCSC/POD 11)
2. Letter dated 7 October 2017 to Professor Anne Twomey, University of Sydney inviting her to participate in the Committee's Inquiry.
3. Letter dated 7 October 2017 to Bret Walker SC inviting him to participate in the Committee's Inquiry.
4. Letter dated 7 October 2017 to Dr Anita McKay, Lecturer, La Trobe Law School. (LCSC/POD 1)
5. Letters dated 7 October 2019 to NSW and Victorian stakeholders thanking them for their contribution at public hearings.
6. Letter dated 9 October 2019 to David Blunt, Clerk of the Parliaments, Legislative Council New South Wales requesting additional information regarding the Clerk's Register. (LCSC/POD 12)
7. Letter dated 9 October 2019 to David Blunt, Clerk of the Parliaments, Legislative Council New South Wales providing question on notice from public hearing. (LCSC/POD 12)

Inwards

1. Email received 9 October 2019 from Dr Anita McKay, Lecture Trobe Law School providing answer to question on n (LCSC/POD 1)
2. Email received 9 October 2019 from Office of the Hon Will Hod MP, Premier acknowledging receipt of letter to Premier da October 2019. (LCSC/POD 11)

The Committee received and endorsed the outgoing and inwards correspondence.

TABLING OF DOCUMENTS

The Committee **RESOLVED** to table the following documents:

1. Legislative Council Western Australia – Report 62 – Standing Committee on Estimates and Financial Operations – *Provision of Information to the Parliament,* May 2016.

2. *Government Response to* Legislative Council Western Australia Report 62 Standing Committee on Estimates and Financial Operations – *Provision of Information to the Parliament.*

3. *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57, 22 November 2019, B59/2018.

FUTURE PROGRAM

A discussion took place regarding the following possible jurisdictions to receive evidence from or seek written information:

1. **ACT** *(LCSC/POD 2)*
   SO 213A Order for the production of documents held by the executive
2. **Western Australia**
   Tabled a Report in 2016 into the provision of information to the parliament
3. **ACT, QLD and NZ**
   Process of 'full disclosure' of Cabinet documents 30 days after cabinet decisions
4. **South Australia**
   Process of 'partial disclosure' of Cabinet documents

The Committee **AGREED** to write to all jurisdictions to request further information.

OTHER BUSINESS

Secretary to contact Premier's Office to follow-up his appearance before the Committee.

Possible public hearing – Legislative Council Tasmania

A discussion took place regarding possible public hearing.

The Committee **AGREED** to schedule a public hearing of the Legislative Council Tasmania at a later date.

NEXT MEETING

Friday 18 October 2019 at 9.30 am or Friday 1 November 2019 at 9.00 am.

ADJOURNMENT

The Committee adjourned at 4.14 pm.

CONFIRMED

Date: 18/10/2019

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on FRIDAY 18 OCTOBER 2019
At 9.00 am – CR2

MEMBERS PRESENT

Ivan Dean MLC
Ruth Forrest MLC (Chair)
Jane Howlett MLC (Deputy Chair) (via phone)
Meg Webb MLC
Josh Willie MLC

APOLOGIES

Nil

STAFF PRESENT

Julie Thompson (Secretary)
Stuart Wright (Clerk-Assistant and Usher of the Black Rod)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Friday 11 October.

CORRESPONDENCE

Inwards

The following correspondence was received:

1. Letter received 17 October 2019 from the Premier, the Hon Will Hodgman MP providing a response to the Committee's invitation of 4 October 2019 (LCSC/POD 11)

TABLING OF DOCUMENTS

The Committee **RESOLVED** to table the following documents:

1. Parliament of Western Australia, 39th Parliament - Report 6, Joint Standing Committee on Audit, *Review of the Minister's Report on the Financial Management Act 2006*, August 2016
2. Parliament of Western Australia, 39th Parliament - Report 7, Joint Standing Committee on Audit, *Review of the Operation and Effectiveness of the Auditor General Act 2006*, August 2016
3. Government's Response Attachment A (undated) to the Parliament of Western Australia, 39th Parliament - Report 7, Joint Standing Committee on Audit, *Review of the Operation and Effectiveness of the Auditor General Act 2006*, August 2016
4. Parliament of Western Australia, 40th Parliament - Report 1, Joint Audit Committee, *Second Review of the Financial Management Act 2006*, May 2019
5. Government's Response Attachment A (undated) to the Parliament of Western Australia, 40th Parliament - Report 1, Joint Audit Committee, *Second Review of the Financial Management Act 2006*, May 2019

OTHER BUSINESS

Future Public Hearings

The Committee discussed dates and times for the following witnesses:
ACT Parliament, Mr Tom Duncan, Clerk - 1 November at 9am
WA Parliament, Legislative Council Clerk/Officers – 1 November at 2pm (AEDT) 11am (AWST)

Premier's Correspondence, dated 17 October 2019

Stuart Wright briefed the Committee and a general discussion took place.

The Committee **RESOLVED** the Chair write to the Premier requiring Jenny Gale to appear at a public hearing on Friday 1 November and further, questions will be then forwarded to the Premier for his response.

The *Chair* reminded Committee Members that there is to be no discussion of committee proceedings outside this Committee.

NEXT MEETING Friday 1 November 2019 at 9.00 am.

ADJOURNMENT The Committee adjourned at 9.38 am

CONFIRMED

Date: 01/11/2019

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on FRIDAY 1 NOVEMBER 2019
At 8.56 am – CR1

MEMBERS PRESENT

Ivan Dean MLC
Ruth Forrest MLC (Chair)
Jane Howlett MLC (Deputy Chair)
Meg Webb MLC
Josh Willie MLC

APOLOGIES

Nil

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Friday 18 October 2019.

CORRESPONDENCE

Inwards

1) Email dated 22 October 2019 from Jenny Gale, Secretary, Department of Premier and Cabinet accepting invitation to appear at public hearings on 1 November 2019
2) Email dated 25 October 2019 from Tom Duncan, Clerk of the Legislative Assembly for the ACT providing information from Sara Burns, Chief Minister Directorate regarding Cabinet Decision Summaries and Executive Document Release

Outgoing

1) Letter dated 18 October 2019 to Mr Neil Laurie, Clerk of the Legislative Assembly, Queensland Parliament extending invitation to provide written or verbal evidence.
2) Letter dated 18 October 2019 to Mr David Wilson, Clerk of the House of Representatives, New Zealand Parliament extending invitation to provide written or verbal evidence.
3) Letter dated 18 October 2019 to Mr Chris Schwarz, Clerk of the Legislative Council, South Australian Parliament extending invitation to provide written or verbal evidence.
4) Letter dated 18 October 2019 to Mr Richard Crump, Clerk of the House of Assembly, South Australian Parliament extending invitation to provide written or verbal evidence.
5) Letter dated 18 October 2019 to Premier extending invitation to Secretary Department of Premier and Cabinet to attend public hearings on 1 November 2019
6) Letter dated 18 October 2019 to Nigel Pratt, Clerk of the Legislative Council, Legislative Council of Western Australia regarding an invitation to present verbal evidence.
7) Letter dated 18 October 2019 to Tom Duncan, Clerk of the Legislative Assembly, For the Australian Capital Territory regarding an invitation to present verbal evidence.

The Committee received and endorsed the inwards and outgoing correspondence.

PUBLIC HEARINGS

At 9.01 am TOM DUNCAN, CLERK, AND DAVID SKINNER, DIRECTOR OF THE OFFICE OF THE CLERK, LEGISLATIVE ASSEMBLY FOR THE ACT were called, and were examined. (LCSC/POD 2)

Question on Notice

- Copies of Reports by Independent Legal Arbiters

The witnesses withdrew at 9.51 am

At 9.53 am JENNY GALE, SECRETARY, DEPARTMENT OF PREMIER AND CABINET was called, made the statutory declaration and was examined. (LCSC/POD 12)

(Ms Howlett left her seat at 10.30 am)
(Ms Howlett took her seat at 10.33 am)

Tabled Documents

- Cabinet Handbook (April 2018)
- Copy of letter dated 10 July 2014 from Premier & Cabinet, NSW Government to Legislative Council New South Wales

The witness withdrew at 11.00 am

Further to information provided by Sara Burns, Chief Minister Directorate ACT the Committee AGREED to extend an invitation for her to provide verbal evidence.

The Secretary to follow-up on correspondence sent to Queensland, South Australia and New Zealand Parliaments regarding cabinet disclosure as to advice on who would be better placed to provide information.

A discussion took place regarding questions to the Premier.

The Committee AGREED that Members forward questions to the Secretary by close of business Friday, 8 November 2019.

The Committee AGREED that the Chair write to the Premier requesting a response to questions provided by Members.

(Ms Howlett left the meeting at 11.07 am)

The Committee suspended at 11.07 am
The Committee resumed at 2.03 pm

MEMBERS PRESENT

Ivan Dean MLC
Ruth Forrest MLC (Chair)
Meg Webb MLC
Josh Willie MLC

APOLOGIES

*Jane Howlett MLC (*Deputy Chair*)*

PUBLIC HEARING

At 2.03 pm NIGEL PRATT, CLERK, ANNE TURNER, ADVISORY OFFICER AND ANDREW HAWKES, ADVISORY OFFICER, LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA were called, and were examined via video-conference.

Due to technical difficulties the public hearing was cancelled at 2.30 pm.

A discussion took place regarding rescheduling cancelled public hearing.

The Committee AGREED that the Secretary arrange for a public hearing via tele-conference for either 4 pm or 1 pm on Monday, 18 November 2019 or 12 pm on Friday 29 November 2019.

The Committee RESOLVED to publish Hansard transcripts to the website.

ADJOURNMENT

The Committee adjourned at 2.48 pm

CONFIRMED

Date: **29/11/2019**

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on FRIDAY 29 NOVEMBER 2019
At 11.57 am – CR2

MEMBERS PRESENT

Ivan Dean MLC
Ruth Forrest MLC (Chair)
Meg Webb MLC
Josh Willie MLC

APOLOGIES

Nil

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Friday, 1 November 2019.

CORRESPONDENCE

Outgoing

1. Letter dated 8 November 2019 to the Premier, the Hon Will Hodgman MP providing written questions. (LCSC/POD 11)
2. Letter dated 8 November 2019 to Tom Duncan, Clerk of the Legislative Assembly for the ACT providing question on notice. (LCSC/POD 2)

Inwards

1. Email dated 6 November 2019 from Neil Laurie, The Clerk of the Parliament, Queensland Parliamentary Service providing advice of his availability to present verbal evidence and resubmitting attached submission dated 25 July 2019. *(Please note: transmission error occurred at QLD's end)*
2. Email dated 8 November 2019 from Tom Duncan, Clerk of the Legislative Assembly for the ACT providing question on notice – copies of independent arbiter reports tabled in the Assembly. (LCSC/POD 2)
3. Letter dated 22 November 2019 from Departmental Liaison Officer, Office of the Premier, the Hon Will Hodgman MP advising *'The Premier is currently on a trade mission and returning for the resumption of Parliament. We anticipate a reply will be provided in due course upon his return.'* (LCSC/POD 11)

The Committee received and endorsed the inwards and outgoing correspondence.

PUBLIC HEARINGS

At 12.01 pm ANNE TURNER, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations and ANDREW HAWKES, Advisory Officer to the Legislative Council Standing Committee on Estimates and Financial Operations Legislative Council of Western Australia were called, and were examined via tele-conference.
(No Submission received)

(Ms Howlett left the meeting at 12.35 pm)
(Mr Dean left his seat at 12.35 pm)

(Mr Dean took his seat at 12.36 pm)

The witnesses withdrew at 1.00 pm

OTHER BUSINESS

The Committee RESOLVED to publish the hansard from today's public hearing to the webpage.

A discussion took place regarding correspondence received from the Premier.

The Committee RESOLVED to respond to the Premier setting a timeframe to receive response to questions as provided by the Committee by Friday 13 December 2019.

The Committee RESOLVED to receive and publish the Queensland submission to the webpage.

The Committee discussed possible further hearings next year from the Clerk of the Queensland Parliament and ACT Chief Minister Directorate regarding cabinet disclosure.

NEXT MEETING

To be advised

ADJOURNMENT

The Committee adjourned at 1.10 pm

CONFIRMED

Date: 14/01/2020

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on TUESDAY 14 JANUARY 2020
At 3.30 pm – CR2 & VIA TELECONFERENCE

MEMBERS PRESENT

Ruth Forrest MLC (Chair)
Meg Webb MLC (via teleconference)
Josh Willie MLC

APOLOGIES

Ivan Dean MLC
Jane Howlett MLC

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Friday, 29 November 2019.

CORRESPONDENCE

Outgoing

1. Letter dated 2 December 2019 to the Premier, the Hon Will Hodgman MP extending the timeframe for the response to questions to close of business Friday, 13 December 2019. (LCSC/POD 11)

Inwards

1. Letter dated 13 December 2019 from the Premier, the Hon Will Hodgman MP providing response to questions. (LCSC/POD 11)
2. Email dated 19 December 2019 from Stephen Moore, Principal Advisor, Integrity, Ethics and Standards, State Services Commission providing information regarding cabinet disclosure.

BUSINESS

Consideration of Inwards Correspondence

A discussion took place regarding incoming correspondence received from the Premier.

The Committee noted the Premier's resignation and RESOLVED to write to the new Premier with questions and information from New Zealand regarding cabinet disclosure for comment.

Future Program

A discussion took place regarding future program.

The Committee AGREED to invite the following persons to provide verbal evidence at public hearings on Tuesday, 10 March 2020 or Monday 16 March 2020:

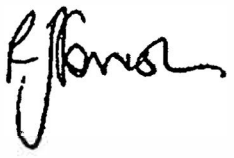
1. Clerk of the Legislative Council Tasmania;
2. Clerk of the Queensland Parliament;
3. ACT Chief Minister Directorate and;
4. Stephen Moore, Principal Advisor, Integrity, Ethics and Standards, State Services Commission, New Zealand.

The *Secretary* to clarify whether the *in-confidence* status marked on email from New Zealand is applicable to Committee.

NEXT MEETING To be advised

ADJOURNMENT The Committee adjourned at 3.53 pm

CONFIRMED



Date: 23/1/2020 **CHAIR**

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on THURSDAY, 23 JANUARY 2020
At 3.05 pm – CR2 & VIA TELECONFERENCE

MEMBERS PRESENT	*Ivan Dean MLC (via teleconference)* *Ruth Forrest MLC (Chair) (via teleconference)* *Meg Webb MLC (via teleconference)* *Josh Willie MLC (via teleconference)*
APOLOGIES	*Jane Howlett MLC*
STAFF PRESENT	*Julie Thompson* (Secretary) *Allison Waddington* (Executive Assistant)
CONFIRMATION OF PREVIOUS MINUTES	The Committee considered and endorsed the Minutes of the Meeting held on Tuesday, 14 January 2020.
BUSINESS	The Committee AGREED to further reconsider the following resolution made at the last meeting:

> *The Committee noted the Premier's resignation and RESOLVED to write to the new Premier with questions and information from New Zealand regarding cabinet disclosure for comment.*

The Committee RESOLVED to amend the resolution to read — The Committee RESOLVED to write to the new Premier inviting him to attend a public hearing and to include New Zealand cabinet disclosure information for comment.

Consideration of Draft Correspondence to Premier

A discussion took place regarding the two options of the draft correspondence.

The Committee AGREED to the draft letter titled 'Premier Hearing' with amendment – removal of 13 February and deletion of last paragraph.

Future Program – possible witnesses

A discussion took place regarding possible witnesses.

The Committee AGREED to invite the following persons to provide verbal evidence at public hearings on possible hearing dates of Tuesday 18 February 2020, Tuesday, 10 March 2020 and Monday 16 March 2020:

1. Emeritus Professor Jeff Malpas
2. Associate Professor Rick Snell

NEXT MEETING	To be advised
ADJOURNMENT	The Committee adjourned at 3.18 pm

CONFIRMED

Date: 10/03/2020 **CHAIR**

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on TUESDAY, 10 MARCH 2020
At 9.00 am – CR2

MEMBERS PRESENT

Ivan Dean MLC
Ruth Forrest MLC (Chair)
Meg Webb MLC
Josh Willie MLC

APOLOGIES

Jane Howlett MLC

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Thursday, 23 January 2020.

CORRESPONDENCE

Outgoing

1. Letter dated 23 January 2020 to the new Premier, the Hon Peter Gutwein MP extending an invitation to appear at a public hearing. (LCSC/POD 11)

Incoming

2. Letter dated 17 February 2020 from the Premier, the Hon Peter Gutwein MP declining invitation to appear. (LCSC/POD 11)
3. Email dated 2 March 2020 from Stephen Moore, Principal Advisor, Integrity, Ethics and Standards, State Services Commission, New Zealand declining invitation to attend public hearing and suggesting the Committee approaches a member of the Government to provide evidence on cabinet disclosure.

The outgoing and incoming correspondence was endorsed and received.

PUBLIC HEARINGS

At 9.00 am MR SAM ENGELE, EXECUTIVE GROUP MANAGER, POLICY AND CABINET, CHIEF MINISTER, TREASURY AND ECONOMIC DEVELOPMENT DIRECTORATE ACT, was called and was examined (via teleconference).

Question on Notice
How many documents were requested of cabinet in 2019?
Further, how many of those documents requested were refused, and what action was taken? (ID)

The witness withdrew at 9.49 am.

At 9.50 am HONOURARY ASSOCIATE PROFESSOR RICK SNELL was called, made the statutory declaration and was examined.

The witness withdrew at 10.49 am.

The Committee suspended at 10.49 am.
The Committee resumed at 11.00 am.

At 11.00 am MR NEIL LAURIE, CLERK OF THE PARLIAMENT, QUEENSLAND PARLIAMENTARY SERVICE, was called and was examined (via teleconference). (LCSC/POD/17)

The witness withdrew at 11.39 am.

OTHER BUSINESS

A discussion took place regarding incoming correspondence.

The Committee AGREED to not take any further action with the Premier.

The Committee NOTED the correspondence from NZ declining invitation.

NEXT MEETING

At 1.00 pm on Monday, 16 March 2020 in Committee Room 2.

ADJOURNMENT

The Committee adjourned at 11.48 am.

CONFIRMED

Date: 16/03/2020

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of meeting held on WEDNESDAY, 16 MARCH 2020
At 12.58 pm – CR2

MEMBERS PRESENT

Ruth Forrest MLC (Chair)
Meg Webb MLC
Josh Willie MLC

APOLOGIES

Jane Howlett MLC

STAFF PRESENT

Julie Thompson (Secretary)
Allison Waddington (Executive Assistant)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meeting held on Tuesday, 10 March 2020.

CORRESPONDENCE

Outgoing

- Letter dated 11 March 2020 to Sam Engele, Executive Group Manager, Chief Minister, Treasury and Economic Development Directorate, ACT regarding questions on notice (LCSC/POD 25)

The outgoing correspondence was endorsed.

TABLED DOCUMENTS

The following documents were tabled:

1. Department of the Prime Minister and Cabinet, *CO (18) 4 – Proactive Release of Cabinet Material: Updated Requirements, Department* of the Prime Minister and Cabinet website. https://dpmc.govt.nz/publications/co-18-4-proactive-release-cabinet-material-updated-requirements

2. The Mandarin (2015), *Chris Eccles: What is frank and fearless advice, and how to give it,* The Mandarin website. https://www.themandarin.com.au/57359-chris-eccles-frank-fearless-advice-give/

3. New South Wales Public Service Commission, *Giving Frank and Fearless Advice – Public Service Commission,* New South Wales Public Service Commission website. https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-3/giving-frank-and-fearless-advice

(Mr *Dean* took his seat at 1.01 pm)

PUBLIC HEARINGS

At 1.01 pm MR BRET WALKER SC, was called and was examined (via teleconference).

The witness withdrew at 1.54 pm.

The Committee suspended at 1.54 pm
The Committee resumed at 2.00 pm

At 2.00 pm DISTINGUISHED PROFESSOR JEFF MALPAS, UTAS, was called, made the statutory declaration and was examined.

The witness withdrew at 2.43 pm.

The Committee suspended at 2.43 pm
The Committee resumed at 3.00 pm

At 3.00 pm MR DAVID PEARCE, CLERK OF THE LEGISLATIVE COUNCIL TASMANIA, was called, made the statutory declaration and was examined. (LCSC/POD 6)

The witness withdrew at 3.25 pm.

OTHER BUSINESS

A discussion took place regarding the future program of the Inquiry.

The Committee AGREED to proceed to report deliberations.

The Committee AGREED to meet on the following dates to consider the draft report:

15 and 16 April 2020
20 April 2020
24 April 2020

The Committee suspended at 3.38 pm
The Committee resumed at 4.08 pm

PUBLIC HEARINGS

At 4.08 pm PROFESSOR ANNE TWOMEY, PROFESSOR OF CONSTITUTIONAL LAW, DIRECTOR, CONSTITUTION LAW REFORM, FACULTY OF LAW, THE UNIVERSITY OF SYDNEY, was called and as examined.

The witness withdrew at 5.03 pm.

NEXT MEETING

At 9.00 am on Wednesday 15 April 2020 in Committee Room 2 and via tele-conference.

ADJOURNMENT

The Committee adjourned at 5.04 pm.

CONFIRMED

Date: 15/02/2021

CHAIR

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of Meetings held on
15 FEBRUARY 2021, 16 FEBRUARY 2021, 17 FEBRUARY 2021 & 19 FEBRUARY 2021

MONDAY, 15 FEBRUARY 2021

At 1.08 pm – CR2, Parliament House, Hobart and via Webex

MEMBERS PRESENT	*Ruth Forrest MLC* (*Chair) CR2* *Meg Webb MLC CR2* *Josh Willie MLC CR2*
STAFF PRESENT	*Julie Thompson* (Secretary)
CONFIRMATION OF PREVIOUS MINUTES	The Committee considered and endorsed the Minutes of the Meeting held on Monday, 16 March 2020.
	Mr *Dean* took his place at 1.10 pm (via Webex)
DRAFT REPORT DELIBERATIONS	The Committee considered Draft Report (version 001). The Committee suspended at 1.15 pm (due to video-conferencing technical issues (audio related)) The Committee resumed at 1.25 pm The Committee further considered Draft Report (version 001). The Committee suspended at 2.47 pm The Committee resumed at 2.56 pm The Committee further considered Draft Report (version 001).
	Mr *Dean* left the meeting at 4.30 pm
SUSPENSION	The Committee suspended at 5.00 pm

TUESDAY 16 FEBRUARY 2021

The Committee resumed at 9.00 am – CR2, Parliament House, Hobart

MEMBERS PRESENT	*Ivan Dean MLC* *Ruth Forrest MLC* (*Chair)* *Meg Webb MLC* *Josh Willie MLC*
STAFF PRESENT	*Julie Thompson* (Secretary)
DRAFT REPORT DELIBERATIONS	The Committee considered Draft Report (version 001).

The Committee suspended at 10.55 am
The Committee resumed at 11.13 am

The Committee further considered Draft Report (version 001).

Mr *Willie* took his place at 11.22 am

ELECTION OF DEPUTY CHAIR

The *Chair* called for nominations for Deputy Chair. Mr *Willie* nominated Mr *Dean*. Mr *Dean* being the only nominee, the *Chair* declared Mr *Dean* to be duly elected Deputy Chair.

SUSPENSION

The Committee suspended at 1.00 pm.

WEDNESDAY 17 FEBRUARY 2021

The Committee resumed at 9.17 am – CR2, Parliament House, Hobart

MEMBERS PRESENT

Ruth Forrest MLC (*Chair)*
Ivan Dean MLC (Deputy Chair)
Meg Webb MLC
Josh Willie MLC

STAFF PRESENT

Julie Thompson (Secretary)

DRAFT REPORT DELIBERATIONS

The Committee considered the Draft Report (version 001(a)(2)).

The Committee suspended at 10.44 am
The Committee resumed at 11.00 am

The Committee further considered Draft Report (version 001(a)(2)) -chapter – RATIONALE FOR INQUIRY (page by page).

The Committee ***RESOLVED*** that the Chapter stand part of the Report.

The Committee further considered Draft Report (version 001(a)(2)) -chapter – LEGISLATIVE COUNCIL TASMANIA (page by page).

The Committee ***RESOLVED*** that the Chapter stand part of the Report.

The Committee further considered Draft Report (version 001(a)(2)) -chapter – GROUNDS FOR IMMUNITY RELATED TO PRODUCTION OF DOCUMENTS (page by page).

The Committee ***RESOLVED*** that the Chapter stand part of the Report.

The Committee further considered Draft Report (version 001(a)(2)) -chapter – EXISTING PROCEDURES TO ORDER THE PRODUCTION OF DOCUMENTS (page by page).

The Committee ***RESOLVED*** that the Chapter stand part of the Report.

The Committee further considered Draft Report (version 001(a)(2)).

FUTURE MEETING DATE The Committee **AGREED** to meet on Thursday, 4 March 2021 at 2.30 pm – 5.00pm.

SUSPENDED The Committee suspended at 1.07 pm.

FRIDAY 19 FEBRUARY 2021

The Committee resumed at 9.02 am – CR2, Parliament House, Hobart and via Webex

MEMBERS PRESENT *Ruth Forrest MLC* (*Chair)*
Ivan Dean MLC (Deputy Chair) (CR2) (via Webex)
Meg Webb MLC (CR2)
Josh Willie MLC (CR2)

STAFF PRESENT *Julie Thompson* (Secretary)

DRAFT REPORT DELIBERATIONS The Committee considered Draft Report (version 001(a)(3)), chapter – NEXT STEPS – MATTERS FOR CONSIDERATION (page by page).

The Committee ***RESOLVED*** that the Chapter stand part of the Report.

The Committee suspended at 11.00 am.
The Committee resumed at 11.16 am.

The Committee further considered Draft Report Version 001(a)(3).

The Committee **AGREED** to recommit chapter – EXISTING PROCESSES TO ORDER THE PRODUCTION OF DOCUMENTS for consideration by the Committee to amend that all instances of 'procedures' be amended to read 'processes'.

The Committee ***RESOLVED*** that the recommitted Chapter stand part of the Report.

Mr *Dean* took his place at 11.26 am

The Committee further considered Draft Report Version 001(a)(3).

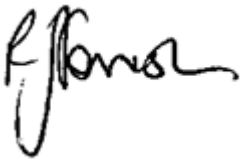
The Committee **AGREED** that reports and texts referenced in the Report be listed for consideration for tabling at the next meeting

Mr *Dean* left the meeting at 12.25 pm

NEXT MEETING Thursday, 4 March 2021 at 2.30 pm – 5.00pm in CR2 or via Webex.

ADJOURNED The Committee adjourned at 1.07 pm.

CONFIRMED



Date: 4 March 2021 **CHAIR**

LEGISLATIVE COUNCIL SELECT COMMITTEE

PRODUCTION OF DOCUMENTS

MINUTES of Meetings held on
THURSDAY, 4 MARCH 2021
At 2.30 pm – CR2, Parliament House, Hobart and via Webex

MEMBERS PRESENT

Ruth Forrest MLC (*Chair) (Webex)*
Ivan Dean MLC (Deputy Chair) (CR2)
Meg Webb MLC (CR2)
Josh Willie MLC (Webex)

STAFF PRESENT

Julie Thompson (Secretary)

CONFIRMATION OF PREVIOUS MINUTES

The Committee considered and endorsed the Minutes of the Meetings held on Monday, 15 February; Tuesday, 16 February; Wednesday, 17 February; and Friday, 19 February 2021.

TABLING OF DOCUMENTS

The Committee ***RESOLVED*** to table the following documents:

1. Anthony. Walsh 'Orders for Documents: An Examination of the Powers of the Legislative Council of Victoria', *Australasian Parliamentary Review*, vol. 25, no. 1, 2010.
2. Australian Senate, *Standing Orders and Other Orders of the Senate, Standing Orders, Chapter 26 – Tabling of Documents, 164 Order for the production of Documents,* Parliament of Australia website, accessed April 2019.
3. Australian Senate, Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994,* (49th Report), September 1994.
4. Australian Senate, *Guides to Senate Procedure: No. 12 – Orders for Production of Documents,* 2019, last reviewed 2019, Parliament of Australia website, accessed April 2020.
5. Australian Senate, Legal and Constitutional Affairs References Committee Report, *A claim of public interest immunity raised over documents,* March 2014.
6. Australian Senate, Procedure Committee, *Third party arbitration of public interest immunity claims,* Second Report of 2015, June 2015.
7. Australian Senate, Procedure Committee, *Tracking public interest immunity claims,* First Report of 2017, December 2017.
8. Blunt, Mr David, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament New South Wales, *Parliamentary Sovereignty and Parliamentary Privilege, The Fundamentals of Law: Politics, Parliament and Immunity,* Legalwise Seminars, UNSW, 2015, p.17.
9. Carney, Gerard, *The Constitutional Systems of the Australian States and Territories, Chapter 8 – Executive Power,* Cambridge University Press, 2006.
10. Christos Mantziaris, Laws and Bills Digest Group, Parliament of Australia, *Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege,* Research Paper 12, 1999-2000.

11. Clune, David, *The Legislative Council and Responsible Government: Egan v Willis* and *Egan v Chadwick – Part Three of the Legislative Council's History Project,* 2017.

12. Government of Western Australia, Department of Treasury, *Review of the Financial Management Act (2006) Report*, Perth, Western Australia, March 2014, recommendation 25.

13. Evans, Mr Harry Clerk of the Senate of the Australian Parliament: Selected Writings, Papers on Parliament No. 52, *Reasonably Necessary Powers: Parliamentary Inquiries and Egan v Willis and Cahill,* December 2009.

14. Evans, Mr Harry, *The Senate - Grounds for Public Interest Immunity Claims,* hc/pap/14613, 19 May 2005.

15. Evans, Mr Harry, *The Senate's Power to Obtain Evidence,* Papers on Parliament No. 50, March 2010.

16. Griffith, Gareth, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses, Briefing Paper 15, (1999),* New South Wales Parliamentary Library Research Service, August 1999.

17. House of Representatives Practice, *17 – Documents – Public Interest Immunity,* 6th Edition, Parliament of Australia Website, accessed October 2020.

18. Joint Standing Committee on Public Accounts, *Inquiry into the financial position and performance of Government owned energy entities in Tasmania,* Parliament of Tasmania, 2017.

19. Joint Standing Committee on Public Accounts, *Special Report No. 5 – Failure to comply with Summons,* Parliament of Tasmania, 2017.

20. Legislative Council Sessional Government Administration Committee 'A' – *Interim Report – Inquiry into the cost reduction Strategies of the Department of Health and Human Services,* Parliament of Tasmania, 2012.

21. Legislative Council Sessional Government Administration Committee 'A', *Report on Acute Health Services in Tasmania*, Parliament of Tasmania, 2019.

22. Legislative Council Sessional Government Administration Committee 'A', *Special Report on Failure to Provide Documents,* Parliament of Tasmania, 2019.

23. Legislative Council, Parliament of Tasmania, *Annual Report 2019-2020.*

24. Lumb, R. D. *The Constitution of Australian States,* 5th Ed., University of Queensland Press, 1991, pp. 32-45.

25. Moore, Jenelle, *The Challenge of Change: A possible new approach for the independent legal arbiter in assessing orders for papers,* 2015, Workshop 5A: Parliamentary Privilege in Contemporary Society, Parliament of New South Wales, accessed May 2019.

26. New South Wales Legislative Assembly Practice, Procedure and Privilege, Part 2, *Chapter 2 – Such Powers and Privileges as are Implied by Reason of Necessity,* Parliament of New South Wales, accessed April 2019.

27. *New South Wales Legislative Council Practice,* Chapter 17 – Documents, 2008.

28. Odgers Australian Senate Practice, *Chapter 16 – Senate Committees,* 14th Edition, 2016.

29. Odgers Australian Senate Practice, *Chapter 18 – Documents tabled in the Senate,* 14th Edition, 2016.

30. Odgers' Australian Senate Practice, *Chapter 19 – Relations with executive government,* 14th Edition, 2016.

31. Odgers' Australian Senate Practice Supplement to the 14th Edition, *Chapter 18 – Documents tabled in the Senate – Order for Production of documents,* Updates to 30 June 2019.

32. Office of the Auditor General, Western Australia, *Annual Report 2018-2019.*

33. Ombudsman Tasmania, *Right to Information Act 2009 Tasmania, Ombudsman's Manual,* First published July 2010.

34. Parliament NSW, *Evading scrutiny: Orders for papers and access to cabinet information by the NSW Legislative Council, 2017.*

35. Tasmanian Parliamentary Library, Parliamentary Backgrounders, *Tasmanian Parliament,* July 2005, Parliament of Tasmania Website, accessed 16 February 2021.

DRAFT REPORT DELIBERATIONS

The Committee considered Draft Report (version 002) -the COVER PAGE.

The Committee ***RESOLVED*** that the COVER PAGE stand part of the Report.

The Committee considered Draft Report (version 002) -TABLE OF CONTENTS (page by page).

The Committee ***RESOLVED*** that the TABLE OF CONTENTS stand part of the Report.

The Committee considered Draft Report (version 002) - EXECUTIVE SUMMARY (page by page).

The Committee ***RESOLVED*** that the EXECUTIVE SUMMARY stand part of the Report with amendment.

The Committee further considered Draft Report (version 002) – FINDINGS (page by page).

The Committee ***RESOLVED*** that the FINDINGS stand part of the Report with amendment.

The Committee considered Draft Report (version 002) - RECOMMENDATIONS.

The Committee ***RESOLVED*** that the RECOMMENDATIONS stand part of the Report with amendment.

The Committee considered Draft Report (version 002) - INTRODUCTION.

The Committee ***RESOLVED*** that the INTRODUCTION stand part of the Report.

The Committee further considered Draft Report (version 002) - APPENDICES 1-14.

The Committee ***RESOLVED*** that the APPENDICES 1-14 stand part of the Report with the inclusion of the Minutes of Meetings held on 15,16,17 & 19 February 2021 and today's minutes once confirmed by the Chair.

The Committee ***RESOLVED*** that the Draft Report (002) be the Report of the Committee.

The Committee ***RESOLVED*** that the Report be provided to the Clerks for review. Any minor grammatical modifications will be accepted by the Committee.

The Committee ***RESOLVED*** to present the Report for tabling on Tuesday, 23 March 2021.

The Committee ***RESOLVED*** that a draft Media Release be circulated to Members regarding the presentation of the Report.

ADJOURNMENT The Committee adjourned at 3.07 pm *sine die.*

CONFIRMED

Date: 04/03/2021 **CHAIR**