



PREMIER OF TASMANIA

29 JUL 2019

Hon Ruth Forrest MLC
Chair
Legislative Council Select Committee – Production of Documents
Email: pod@parliament.tas.gov.au

Dear Ms Forrest

Thank you for your correspondence inviting a written submission to the Legislative Council Select Committee on the Production of Documents.

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 documents, and moreover, hold the Executive to account. For the reasons outlined below, the Government does not support measures to alter these long established and satisfactory principles, conventions and processes. Furthermore, the Government will not support changes that may undermine parliamentary privilege, the role and functions of the Executive, and the important principle of the comity of the two Houses of Parliament.

Parliamentary Committee functions and powers

The Tasmanian Legislative Council, as a house of review, has throughout its history made extensive use of Committees of inquiry to hold the Government to account and allow for community engagement in the parliamentary process. The Tasmanian Government acknowledges the Legislative Council's functions and the inherent value of an objective and balanced assessment of Government performance.

Notwithstanding this, it must be recognised that there are already significant privileges in place which support the Legislative Council in undertaking its role as the House of Review. Notably, the *Parliamentary Privileges 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. These powers must be exercised within the framework of our Westminster System of Government and our bicameral Parliament. In this context, the Legislative Council's primary role is providing a check and balance to the lower house by scrutinising legislation and other policy decisions of the Government-dominated House of Assembly. This is an important and specific role, and any change to existing privileges has the potential to distort the intended separation of roles between the executive function, residing in the House of Assembly, and the review responsibilities of the Legislative Council.

As you are aware, the legislative provisions under the Act are supported by the procedures and guidance provided within the Standing Orders. The Standing Orders support the purposes of the Act by providing for the attendance of witnesses and the production of documents, either from within Parliament (Standing Order 243) or from outside Parliament (Standing Order 241). The Standing Orders also make it clear that persons who refuse to attend or produce evidence may be held in contempt (Standing Order 245).

Public Interest Immunity

In any consideration of the powers or methods by which a Committee may resolve disputes concerning the provision of documents, it is appropriate to also review historical limitations on such demands.

There is significant common law authority recognising circumstances where it is contrary to the public interest to produce documents to Parliament. Notably, courts have historically recognised that documents that record the deliberations of Cabinet or any Cabinet Sub-Committee are protected by public interest immunity. Relevantly, I note that in the High Court proceedings, *Commonwealth v Northern Land Council*¹ it was stated that:

'...it has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which is made.'

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.

It was because this responsibility of Ministers was part of the system of responsible government that the majority of the court in the matter of *Egan v Chadwick*² considered that it was not reasonably necessary for the New South Wales Legislative Council to call for documents that would conflict with the doctrine of ministerial responsibility – that is, the court held that the powers of the Legislative Council did not extend to a call for the production of Cabinet documents.

However, the common law also evidences a reluctance on the part of courts to involve themselves in the balancing of public interest considerations, in so far as they arise in Parliamentary proceedings. In accordance with the separation of powers, this is typically not a constitutional function appropriate to be undertaken by judicial officers. When the court leaves the occasion and manner of the exercise of such privilege to the Parliament, it does so on the assumption that the institutions will act in a responsible manner. In this regard, it is assumed that the legislature will take seriously its responsibility to prohibit further disclosure of documents obtained where disclosure would be detrimental to the public interest. The Standing Orders are also supportive of this assumption (Standing Order 202). While not an exhaustive list, other public interest grounds which may be advanced for the protection of a document include:

- (a) prejudice to legal proceedings;
- (b) prejudice to law enforcement;
- (c) damage to commercial interests;
- (d) unreasonable invasion of privacy;
- (e) prejudice to national security or defence;

¹ (1993) 176 CLR 604.

² (1999) 46 NSWLR (563).

- (f) prejudice to international relations; and
- (g) prejudice to relations between the Commonwealth and the states.

In contemplating public interest immunity in relation to Parliamentary Committees, it is pertinent to reflect on the witness and document protections which were deliberately embedded into the *Public Accounts Committee Act 1970* (the PAC Act) at the time of its creation. As you are aware, the Public Accounts Committee is a powerful parliamentary committee of inquiry that regularly seeks witnesses and calls for documents. When the PAC Act was established, the Second Reading Speech and clause notes suggest that there was a considered decision to safeguard witness rights and, by implication, respect the confidentiality of certain classes of documents. For these reasons it would seem that section 7(2) of the PAC Act provides that any witness that appears before the Public Accounts Committee should have the same protection and privileges as any witness in an action tried in the Supreme Court. On its face, this provision allows witnesses to rely on appropriate justifications to refuse production, including public interest immunity and legal professional privilege. It is also appropriate to add that section 7(2) of the PAC Act is in similar terms to section 19(1) of the *Public Accounts and Audit Committee Act 1951* (Cth). The relevance of these precedents of preserving witness rights is significant, particularly when considering that witnesses entering a parliamentary inquiry may have no protection against self-incrimination and potentially the abrogation of certain other immunities which are considered to be fair and in the public interest.

Other considerations

The work of Parliamentary Committees is one of several powerful 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, Right to Information requests and laws that maintain legislative review mechanisms.

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 that this lack of certainty is somewhat exacerbated by the very broad Term of Reference for the Committee. Given that the resources available to the work of Committees is finite, these potential additional costs may further undermine the public interest in pursuing what are arguably unnecessary and uncertain procedural changes.

While the Tasmanian Government is not supportive of any change to the existing framework concerning the production of documents, it is nevertheless committed to increasing accountability across all departments, as evidenced by our ongoing reforms to improve transparency and expand routine disclosures of information. In this respect, I note just some of the measures implemented by my Government to increase accountability and transparency of decision-making:

- (a) numerous extensions to the information released under the routine disclosure of information policy, including the release of 67 new routine datasets online since June 2018;
- (b) launching a new Government Information Gateway webpage available on the Department of Premier and Cabinet website to make government information proactively disclosed, easier to find;
- (c) continuing to publicly report on gifts, benefits and hospitality received and given by officers across all agencies at least quarterly on agency websites;
- (d) supporting policies to publish Right to Information decisions;
- (e) delegating Ministerial responsibilities under the *Right to Information Act 2009* to departmental officers;

- (f) tabling the *Right to Information Amendment (Applications for Review) Bill 2019* to ensure that the Ombudsman can review a decision of a Minister or a Minister's delegate in relation to information in the possession of a Minister;
- (g) undertaking a review of the *Electoral Act 2004*, including electoral donations;
- (h) ongoing publication of major public consultation submissions;
- (i) implementing an updated Ministerial Code of Conduct; and
- (j) improving the integrity of Parliamentary decision-making by expanding the disclosure of spouse interests and financial information through amendments to the *Parliamentary (Disclosure of Interests) Act 1996*.

Thank you again for the opportunity to provide a submission to the Select Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Will Hodgman', with a stylized flourish at the end.

Will Hodgman MP
Premier