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Submission re: The Production of Documents

We are writing as a group of public law scholars with an ongoing interest in parliamentary procedure. Professor Gabrielle Appleby is the Director of the Judiciary Project in the Gilbert + Tobin Centre of Public Law at UNSW Law, is the 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 is a Senior Lecturer in Law and Director of Clinical Legal Practice at the University of Tasmania School of Law, and also teaches into the annual ANZACATT Parliament Law, Practice and Procedure course. Professor George Williams AO is the Dean of the UNSW Law Faculty, and has extensive experience as a barrister in the High Court in many cases over the past two decades, including on freedom of speech, freedom from racial discrimination and the rule of law.

This submission breaks down the question raised in the Committee's terms of reference into two parts. In particular, we consider:

1. What **types of disputes** might arise as to the production of 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;
2. Who might be **the most appropriate person or institution** to resolve such disputes and the **process** by which that might occur.

To assist the Committee we provide a brief analysis of each option and provide a recommendation as to which option we believe to be the most desirable, weighing up a number of principles including the separation of powers, the importance of respecting parliamentary privilege and cognisance, and expectations of the rule of law and the accountability of public power.

Types of disputes: Disputes between the government and the Legislative Council (including its committees and joint committees) give rise to two different claims. The first is a ***legal*** claim, that the Legislative Council (including its committees and joint committees) do not have the *legal or constitutional power* to require the production of the documents. The second is a ***public interest*** claim, that even if the Legislative Council (including its committees and joint committees) has the legal or constitutional

power to require the production of the documents, it should not exercise that power *in the public interest*.

The ***legal*** power of the Legislative Council and its Committees to require the production of documents has been addressed in the *Parliamentary Privilege Acts.*[1] 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.[2]

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 practised.

The following submission is based on an assumption that the power to compel the production of documents by an officer of the Crown falls within the powers of the Legislative Council (including its committees and joint committees).

Once it is established that the Legislative Council (including its committees and joint committees) have power to compel production of documents from the government, a number of different disputes might still arise about the scope and exercise of that power. These include:

- Disputes about whether the Legislative Council (including its committees and joint committees) has the power to compel the production of documents by a government member of the House of Assembly. This is a longstanding *legal question* as to whether the Council has the power to call members from the other House.

- Disputes about whether the Legislative Council (including its committees and joint committees) should exercise its power to compel testimony and the production of documents by Ministerial advisers. As Yee Fui Ng has outlined in her book, *Ministerial Advisers in Australia* (2016), there is little doubt that

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1 *Parliamentary Privilege Acts 1858, 1885, 1898* and *1957* (Tas).

2 Without going into the detail of this concern for the purposes of this submission, we note that the provisions of the *Parliamentary Privileges Act 1858* (Tas) do not explicitly extend to bind the Crown. There is a statutory presumption in the *Acts Interpretation Act 1931* (Tas) s 41(1) that references to a person in legislation do not include the Crown. This then gives rise to a challenging question of statutory interpretation as to whether the reference in the *1858 Act* (notably enacted prior to the 1931 *Acts Interpretation Act*, and in response to a decision of the Privy Council respecting the Legislative Council's powers with respect to the Comptroller of Convicts) are intended to bind the Crown.

the legal powers to compel this exist, but that there may be *public interest reasons* that the Council should not insist on the production of documents by Ministerial advisers.

- Disputes about whether the Legislative Council (including its committees and joint committees) can or should order the production of documents over which the government claims are covered by legal professional privilege, the privilege against self-incrimination, or public interest immunity (previously known as Crown privilege). With one exception, this is a *public interest* based claim that even though the Council has power to demand the production of documents that would otherwise be protected by these privileges, in some cases the public interest in maintaining the privilege outweighs the public interest in production. The exception to this is the limited category of Cabinet documents, which the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563 has held are not able to be sought, at least by the Legislative Council in that State.

The most appropriate person or institution to resolve disputes:

Parliament itself: Traditionally, disputes between the government and the Legislative Council (including its committees and joint committees) have been governed by the Council's power to deal with matters within its jurisdiction. As a matter of practice, these matters would be referred to the Legislative Council's Privileges Committee for investigation and recommendation. The Privileges Committee will investigate the matter, and will follow the procedures set out for Committee hearings by the Parliament. While this includes a number of safeguards for witnesses appearing before Committees, including information about privilege claims and seeking an in camera hearing, individuals do not have a right to legal representation, and stricter procedural rules that apply in courts do not apply.

Ultimately, if the Council was satisfied that the government's refusal to produce documents that it or its Committees have called for is not made out it might find the relevant government member in contempt, which under s 3 of the *Parliamentary Privilege Act 1858* extends to the ordering of imprisonment (although there remains some uncertainty as to the current application of this provision to the Crown, see our assumption, set out above).

Houses are often reluctant to use their powers in these more extreme forms, and often have used other methods to punish the government for failing to produce documents. For instance, the Senate has extended question time, removed procedural advantages for ministers, delayed government legislation and restricted government minister's ability to handle government business in the House.

Concerns have been raised that this traditional method of resolving privilege, particularly when the contempt power is used, is no longer appropriate as it is important to ensure that the dispute is dealt with by an independent decision-maker, and that the imposition of a penalty by the Council has followed a fair process. A particular concern is that the process might be affected by partisan politics. However, others, such as Anne Twomey, have argued that, for instance, the federal Senate's

reluctance to test the outer limits of its contempt powers, and its policy of a more moderate and reasonable approach, is an most appropriate way to ensure the House is not brought into disrepute (see Anne Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council' (2008) 23 *Australasian Parliamentary Review* 257).

Reference to an Independent Legal Arbiter: In New South Wales, following the very public confrontations between the government and the Legislative Council in the 1990s, the Council has issued Standing Order 52, which appoints an "independent legal arbiter" to determine some disputes that arise. The process is that, where the government seeks to make a claim of privilege, a claim is prepared describing the document and the reasons for the claim and the documents are delivered by to the Clerk. These documents are made available to the members of the Legislative Council but not published. If any member disputes the claim, the Clerk is authorised to release the document to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim. In this way, the Council retains final control of the process. The person is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

The New South Wales procedure extends only to disputes about privilege claims, and not other disputes that we have listed above. A similar procedure exists in Victoria under the Legislative Council Standing Order 11.03(2), but, unlike the New South Wales procedure, has not been used.

One of the current challenges that has been identified with respect to the independent legal arbiter system in New South Wales is whether the individual appointed to that position is tasked to resolve *only* questions of law that arise with respect to the power to require the production of documents (that is, whether the privilege actually exists), or also to make a recommendation to the House as to whether, even if the documents do fall within a privileged category, there are sufficient public interest reasons as to why it should not be exercised. Previous arbiters have taken the view that the role was to evaluate competing public interest claims and recommend to the Parliament where the public interest lay in any particular dispute. More recently, the arbiter has taken the view that the role is to determine the legal validity of the privilege claim and leave the public interest claim to the Parliament. Twomey has criticised the former position:

> It is arguable that the evaluative role of the independent legal arbiter should be confined to deciding the first point – whether the documents fall within a privileged category. There are good grounds for arguing that the independent legal arbiter should not undertake the second balancing task as, like a judge, the arbiter does not have the relevant experience to make such an assessment. This is consistent with the fact that the arbiter is a 'legal' arbiter with legal qualifications who is engaged to undertake a 'legal' evaluation of the validity of the claim for privilege.

If the arbiter were to undertake a role in balancing public interest claims, Twomey recommends that a directed and structured approach is taken by the arbiter, who should consider:

1. Whether the production of the documents is reasonably necessary for the fulfilment of the Legislative Council's constitutional functions; and

2. Whether the public harm caused by disclosure outweighs the need for such material to be made public in the fulfilment of the constitutional functions of the Legislative Council.

A further question that arises is who the independent arbiter might be. In New South Wales, the person is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

It might be considered desirable to appoint to this role an existing statutory officeholder in Tasmania, for instance, the Ombudsman or the Tasmanian Integrity Commissioner. While, particularly in relation to the Ombudsman, we accept that the officer may have relevant expertise for appointment to this position, the appointment of an entirely independent, neutral arbiter would appear more desirable. The Ombudsman and the Integrity Commissioner have a pre-existing relationship with the executive and the parliament, which may at any particular point in time complicate their ability to perform the role of arbiter with the necessary perceptions of impartiality. Further, their decisions stand as executive decisions, and are subject to judicial review in the courts, which might give rise to questions as to their advice as independent arbiter. Finally, the appointment of either of these officers to the role of independent legal arbiter would require further statutory amendment.

On the other hand, appointing an eminent barrister, or a retired judge, whether from Tasmania or elsewhere (this might include, for instance, the appointment of a former Solicitor-General to this position, as has occurred in New South Wales, who would have a wealth of expertise in the relevant law), removes all of these considerations of perceptions of bias and the status of advice.

Reference to the Court: A third option is the possibility of legislative amendment to refer these disputes to the Court to determine. Currently, without legislative amendment, the courts will only determine disputes over privilege if the matter has otherwise been brought before the Court (for instance, in *Egan v Chadwick*, an action for trespass had been brought against the Usher of the Black Rod). This type of general referral has been made with respect to other matters. For instance, at the federal level, the question of disqualification of members under s 44 of the Constitution, once a matter reserved for the Houses themselves to determine, has now been the subject of legislative amendment so that the Houses may refer the matter to the Court (s 376 of the *Electoral Act 1918*). A similar process might be adopted in relation to the determination of disputed claims of privilege. It was once attempted at the federal level by the Australian Democrats in the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994* (Cth).

There are a number of concerns about bringing the Court into determine disputes around the production of documents, which include the serious incursions it makes into parliamentary affairs, and the discretion it would give to the Court to determine whether the public interest requires the production of particular documents. The Courts themselves have generally expressed a reluctance to become involved in these matters, preferring them to be worked through at a political level.

Our recommendation: Given the above consideration of different types of disputes, and the possible different processes for resolving them, it is our recommendation to the Committee that it adopt a process of appointing an independent arbiter for the resolution of disputes between the government and Legislative Council (including its committees and joint committees).

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.

To assist the Committee, we have proposed three draft Standing Orders for consideration by the Council.

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Disputes over powers of the Legislative Council

Where a dispute arises as to the power of the Legislative Council, its Committees or joint committees whose appointment was initiated by the Council, to order the calling of a witness or the production of a document, the following procedure applies:

(1) The government must prepare a return showing the reasons for the dispute as to the power of the Legislative Council, its Committee or a joint committee whose appointment was initiated by the Council, to order the production of the document;

(2) On receipt of such a return, the Clerk is authorised to refer the return to an independent legal arbiter.

(3) The independent legal arbiter must evaluate the reasons provided and report within seven calendar days to the House as to:
   (a) whether, in the arbiter's opinion, Legislative Council, its Committee or a joint committee whose appointment was initiated by the Council, has the power to require the production of documents;
   (b) 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.

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Disputes over privilege claims

(1) Where a dispute arises as to the production of a document before the Legislative Council, its Committees or joint committees on the basis of a claim of privilege (including public interest immunity), the following applies:

(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.

(2) 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.

(3) The independent legal arbiter must evaluate the claims and report within seven calendar days to the Council as to:
(a) whether, in the arbiter's opinion, the documents fall within the claimed category of privilege, either:
(i) in their entirety; or
(ii) in part;
(b) 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.

(4) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Independent Legal Arbiter

(1) The independent legal arbiter is to be appointed by the President and must be:
(a) a Queen's Counsel;
(b) a Senior Counsel; or
(c) a retired Supreme Court Judge.

(2) 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.

(3) No member of the Council shall seek to interfere or influence with the inquiry or report of the Independent Legal Arbiter.

(4) All acts done in the course of, or for purposes of or incidental to, the inquiry and reporting to the President of the Council are at the request of the Council and part of the business of the Council.

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We give our permission for this submission to be published by the Committee, and would be very pleased to speak to the Committee further about any dimension of it.

Yours sincerely

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