Submission to the Legislative Council Select Committee on the Production of Documents

In the 1850's John Stuart Mill the English philosopher, writing about the implications of power in the nascent democracies of England and America stated that "…there is in the world at a large an increasing inclination to stretch unduly the powers of *society over the individual*…It is hardly every kept under restraint by anything but want of power; and as the power is not declining, but growing, unless a strong barrier of moral conviction can be raised against the mischief, we must expect, in the present circumstances of the world , to see it increase."

Mill would not be heartened by the way the Executive branch of government works in modern parliamentary democracies, particularly as the model has evolved in Australia with its very strict party discipline in the lower house. The ability for scrutiny of the Executive by the Parliament in the lower house is all but non-existent and this coupled with the sclerotic and dysfunctional Right-To-Information system here in Tasmania puts a high burden on the Legislative Council. To claim, paraphrasing Sir Anthony Mason commenting on *Egan v Chadwick*, that Ministerial responsibility is to prevail over the role of a House in securing accountability of Government**, inverts the true order of constitutional priorities.**

As a former long standing Secretary of the Department of Premier and Cabinet in Tasmania I am acutely aware of the responsibilities of running effective and efficient public administration. To this end I come to this problem with the natural caution of an administrator that wishes the Executive branch to be effective in the performance of its functions, that supports the ability of the public service to provide frank and fearless advice in relation to policy matters, yet at the same time maintain appropriate accountability to the electors of Tasmania through their Parliamentary representatives.

Section 1. of the *Parliamentary Privilege Act (1858)* conveys a very wide power for the production of documents. It should be noted that there is ample historic practice constraining the improper use of this power, such as for the production of private documents e.g. personal papers. As a former Secretary in charge of the Cabinet process, I am heartened that it is well understood by members of the Legislative Council that there is category of *information* concerned with the policy making process should be protected from disclosure. When immunity is claimed for Cabinet documents as a class, it is generally on the basis that disclosure would discourage candour on the part of public officials in preparing advice for Cabinet and the result would be less optimal decision making.

Cabinet confidentiality is therefore a good of "effectiveness". Parliamentary scrutiny of executive government is a good of "accountability". But where does this leave us? The House asserting its right and the Government refusing to comply – end result – a frustrating standoff.

As has been stated often in these kind of debates, a common thread emerging from the many disputes over the production of documents is that the question of the claimed right of Executive privilege versus the requirement to comply with a Legislative Council request is a political question, not a procedural or legal one and therefore must be resolved politically.

I find this rather unsatisfying. In essence, a government will release information that it would rather keep confidential only on the back of a political judgment as to whether the disclosure of the information would be more damaging that not disclosing it. In an environment of weak external scrutiny and a tendency for government to widely define the class of documentation subject to claims of immunity this has the effect that proper scrutiny is significantly eroded.

Of note in recent debates around production of documents in Tasmania, it is not even the Cabinet documents themselves that have had the claim of privilege but consultant reports utilised by public servants in the production of Cabinet advice. This is a very long bow to draw as it is highly likely that the reports referred to are largely factual in nature and make very little or no reference to matters of government policy or advice to Cabinet.

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.

I will not traverse the many grounds on which a claim for PII *may* be claimed as these will be well known to members of the Committee and may well be the subject of other submissions. I would however like to make a specific observation about claims regarding commercially sensitive information. This appears to be used widely as a rationale for non-production of documents though perhaps more so in RTI processes than to Parliament. Most of these claims are totally spurious. The claim for the privilege of a document cannot be supported by such a category of information. Only the commercially sensitive information itself could be subject to such a claim and then only by reference to the damage to commercial interests. Such a claim must be substantiated by reference to the specific potential harm to commercial interests rather than some vague catch-all of commercial confidentiality. In any event, it is a very straight forward process to redact the specific commercial-in-confidence information and produce the document. Or in the case of a request by the House or Committees - that information be treated confidentially and not reproduced in any publicly available reports.

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 make this submission with the humility to recognise that there will be others, better placed, to make specific suggestions to this Committee on a process for resolving disputes that arise regarding the production of papers, documents and records. 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 considered by an independent legal arbiter. Importantly, it is ultimately for the House to determine the validity of the claim.

I thank the Members of the Select Committee for the opportunity to make a submission on this important topic and that such actions as may result from your deliberations will be part of Mill's "strong barrier of moral conviction" raised against the potential mischief of Executive Government.

Rhys Edwards
1 August 2019