PUBLIC

THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON THE PRODUCTION OF DOCUMENTS MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON MONDAY 16 MARCH 2020.

Mr BRET WALKER SC WAS CALLED AND EXAMINED VIA TELECONFERENCE.

CHAIR (Ms Forrest) - Welcome. Thank you for joining us. We really appreciate your being available and your expertise. The evidence you will provide to us will be recorded and transcribed by Hansard. Because you are in another jurisdiction, parliamentary privilege doesn't apply. Your evidence will form part of our report and be published as public evidence, unless you get to a part where you would prefer us take the evidence in private, and you can make that request. This is also being broadcast. Do you have any questions before we start?

Mr WALKER - No, I am happy and familiar with those procedures, and I can confidently say there will be nothing I want kept secret.

CHAIR - Thank you very much. Mr Walker, we really appreciate your expertise in this area. We know that you provided advice to other parliamentary committees and processes on this issue of production of documents. What we were particularly keen to hear from you is your view of the constitutional powers, particularly with regard to the power to seek production of documents. I am not sure how familiar you are with Tasmania's situation; I'm sure you have some understanding of it. If you could make some comments about those aspects initially, the committee might have other questions to follow up with.

Mr WALKER - Yes, I do have familiarity with Tasmania's position because I have tried to keep up to date with all the jurisdictions on these matters.

In particular, I note that the former premier's letter contains some statements. I'm not quite sure to what extent they represent current practice. I was surprised by one matter in it where, on page 3 of the premier's letter, there was a suggestion that the familiar statutory provisions like providing protections to witnesses before committees as they would enjoy in court proceedings was such as to enliven, as it were, a right to claim and to receive protection of privileged material. That is, I think, just plainly wrong. I don't say it's at the heart of what the premier was writing about, but it's something that did stick out because I was not aware that Tasmania was following that practice and I'm not suggesting you do. It's absurd to suppose that legal professional privilege does not, in principle, prevent a requirement for material to be produced on an order for papers in Tasmania, but that the natural person or the individual who is asked to provide it can claim a privilege. That is absurd. I think it has just been a mistaking of the general provisions of those protective statutory provisions and the highly specific matter special to Houses like the Legislative Council whereby, of course, they can compel, if they so choose, the production of legally professional privileged material.

Whether to publish it, of course, is a totally different issue that so far, in every jurisdiction I know of, has been securely and successfully entrusted to the Chambers to exercise their decision from time to time.

CHAIR - Unfortunately, we haven't been able to get the Premier to attend the hearings and speak to that submission so it has been a little awkward to explore some of those matters. I appreciate your views on that.

Mr WALKER - I doubt whether it would be a consensus view that things are fine as they are which is my summary of the premier's letter by way of submission to the committee. It depends on your definition of 'fine'. 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.

My strong suggestion is that first of all it be understood what the powers are and, second, whether there is any utility or merit in adopting procedures to regularise and to permit argument about any particular exercise of the power. For my part, the power is clear. With one minor exception that I don't think much matters, the material before you that I have read to date suggests that nobody doubts the power of the House and with the House's authority, one of its committees to seek papers which would in other context attract a claim of privilege. Furthermore, a claim that would need to be upheld.

First of all, I have now doubt that there is a power for the House to inform itself as it sees fit. That is clear. No-one disagrees with that. The second is, it obviously prevails over claims for legal professional privilege. That is clear, just as it prevails over claims for privilege against self-incrimination. It also prevails, clearly and without doubt in my opinion, against claims for public interest immunity, that which used to be called Crown privilege.

To make it clear, the decision in the New South Wales Court of Appeal in Egan v Chadwick first of all does not depend on anything peculiar to New South Wales' constitutional history. It proceeds on bases that are true of all the Houses of all the parliaments in this country. Second, three to nil, the judges did decide that the Houses' power to compel production extended to documents that elsewhere would be covered by privilege based on public interest immunity. I want to make that crystal clear. There is no public interest immunity claim that can defeat the obtaining of papers by the New South Wales Legislative Council or any of its committees. The only exception is Cabinet secrecy. I don't know that your terms of reference comprehend examining the question of Cabinet secrecy but it is just as plain in the case of Cabinet secrecy that the power does not extend. That is on the basis of the law as it presently stands.

I gave a speech in 2017, the annual Harry Evans Lecture for the Australian Senate, I won't repeat any part of it -

CHAIR - We have a copy of that.

Mr WALKER - The whole of its thesis is that is the law, but the law is wrong. When you say things like that you have to be very clear - I am certainly not saying that is the state of the law at the moment. I am saying that I think the state of the law is wrong in principle, as a matter of political science and constitutional practice.

At present in New South Wales, where there are claims of legal professional privilege or indeed of commercial-in-confidence, or claims of public interest immunity, and also claims of Cabinet secrecy, if there is a dispute about a claim, it will be decided ultimately by the Chamber. However,

as you all know better than anyone, that is normally by a delegated authority, and it is normally by a process of what I am going to call 'compromise'.

By 'compromise', I don't mean people detracting from what they regard as the correct position; I simply mean often there can be a cutting back of a requirement for production, or there can be limited redaction, which would make publication acceptable, or there can be orders for secrecy which can deal with the matter. All of those are appropriately negotiated between Executive and Chambers, and that happens constantly.

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.

CHAIR - Thank you for that, Mr Walker. It has been helpful to have those matters clearly outlined, as you clearly describe how the process should work, and the constitutional powers, I guess.

Our terms of reference are focused on a resolution or a process to break deadlocks. We've heard of some in recent times where, in spite of all the proper processes being taken, documents haven't been provided, and sometimes reasons have been given, and sometimes they haven't.

The issue of cabinet-in-confidence, or Cabinet secrecy as you call it, that is one of the matters that has been raised. It seems there is a lack of clarity around what actually constitutes a document that should be considered to be Cabinet-in-confidence, or of secrecy provisions around that. Do you have a view on that?

Mr WALKER - I do. Your observation is absolutely spot-on. There is doubt about it, and this been felt, I think, for decades, if not centuries. Notoriously, abuses can grow up. Mr Fitzgerald in Queensland identified some of them in another place and another time where, as it were, artificial endorsement of potentially embarrassing documents as having gone to Cabinet could be suspected as having been a device adopted to achieve undeserved secrecy - so you have to be careful about allowing procedure to trump the substance of the matter.

That is why an arbiter can be very useful in order to be allowed to examine claims for Cabinet secrecy, just as judges examine them when they are raised in court. They do this not be revealing secrets, but by ruling on the proximity of, and the actual use of, and what the contents would divulge of the documents in question.

I can't be more specific than that, because there are no bloodlines. 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 eavesdrop on Cabinet. That would appear to be self-defeating. Unless it is amounting to 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.

Mr WILLIE - You talked a little about New South Wales and that its process emerged from a dispute. Other jurisdictions have implemented processes without a dispute taking place, so I guess my question is a speculative one.

Do you have any recommendations to the committee as to what should be in that process to make sure its robust in the event that there is a conflict? Will it take a conflict between the Upper House and executive government to give that process authority? Or do you think it can work without that?

Mr WALKER - That compresses a lot of the relevant history and is, with respect, spot on. First, you don't need a conflict in order to devise a procedure designed to avoid, to the greatest extent possible, undesirable aspects of conflict - not all conflict is undesirable, of course. Second, you already have a sufficient understanding of the position around the country and the position in your own parliamentary history quite recently to know that there is great value in addressing this and doing something about it before there is a red-hot and urgent conflict. I don't think that there's any need to await a concrete conflict in order to do something. I think that would quite unfortunate.

You have the advantage of other places having moved and you have the advantages of being able to compare and contrast. I think Tasmania has the opportunity to devise a system which picks the best of the features from around the country. If I may say so, the most important one is a negative feature; that is an independent arbiter, as it's sometimes called - 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.

Chief Justice Spiegelman in Egan and Chadwick put this very well, and I would commend his institutional modesty of the judges, compared to the members of parliament, in that regard.

The first feature is, don't let an outsider tell you what to do. Ask him or her to consider matters and to put, as it were, what can be said for and against. The pros and cons approach, requiring such a person not to take a particular position but requiring him or her to discuss what can be said for and against, is most likely to give you the greatest benefit of their intelligence and impartiality. That is the first thing.

The second thing is there has to be preserved a very strong distinction between the different matters of public interest that are involved with the different privileges. At the top of the tree there is Cabinet secrecy which has a constitutional significance we do not need to elaborate now, but it calls for special attention. Particularly as, on the state of law at the moment, if there is genuinely Cabinet secret material then you really should not get it.

Below that, there is very last field of public interest immunity, which is very various, and you are entitled to get that if you think you should. No arbiter, rapporteur, or adviser should ever tell you, you shouldn't. That would be an impertinence, in my view.

Legal professional privilege should never really matter except if there is a doubt about whether something does enjoy that privilege. Then it is only in order to inform whatever approach the Chamber may then take to non-disclosure or limited disclosure, or redaction, et cetera. It could never be an objection to production, in my view.

The same thing is true of material that might be regarded as relevant, to pending or future legal proceedings. The so-called sub judice approach. The Chamber is used to how to deal with those matters. I would only respectfully suggest, I think around the country, chambers are a little too tender and are a little too ready to rule things out because there is said to be sub judice.

Then, of course, there is that vast array of subject matters that you are all used to in evidence to, and documents for, committees, namely where either very personal affairs or important commercial matters are requested of you, to be kept confidential, if only for a certain time. They are not matters that you really need much assistance on from rapporteurs, and the like, but it is very

important that things are put in the right box, and it is understood that there is only one that could be an objection to production and that is Cabinet.

Everything else is really a matter of 'Do we really want it, bearing mind whatever risks we' - that is, we the Chamber - 'may think attaches to production?' I think there was one case of an inadvertent disclosure that I'm aware of, but by and large the record is much, much better than the record of the executive in guarding against leaks. You would want to be fairly proud and determined to maintain that record that the Chambers can and should decide for themselves the degree of secrecy or the degree of disclosure that anything that might be called sensitive should attract.

I would rather deformalise the procedures compared say with our order 52 in Sydney. I would probably make it a more compressed authority for such a personage to give advice concerning Cabinet secrecy and then to report what could be said for or against claims of any other kind that can't prevent production but can only control disclosure.

CHAIR - Just on that, New South Wales has a fairly well used process which, as you are aware, enables all members of the Legislative Council to view the documents and then, if they wish, challenge documents that are claimed to be privileged, which means they get to see them. Victoria has a model that hasn't been used, where only the member who requested it gets to view it. Then the ACT has a model where the document in question, once it has a claim of privilege, is provided to the independent - I think they call them 'arbiter' there as well - person to make a determination.

What I am hearing you say is that it's your suggestion that this person would only give advice or an opinion on whether the claim of privilege should prevail. I just want to clarify what you are saying about that.

Mr WALKER - Yes, absolutely. It would be very, very bad for the privileges of the House to hand over that kind of decision-making, either generally or on the merits of any particular case, to an outsider.

CHAIR - If the rapporteur, or whatever the title of the person is, provides advice to the parliament that the privilege should prevail with the reasons for that, I assume, they would provide, it's up to the House then to determine the result of that - is that what you are saying?

Mr WALKER - Absolutely. You can, to adopt legal jargon, say, 'With respect, I disagree'. That can happen and, from time to time, no doubt will happen.

CHAIR - If you don't want to answer this question, that's fine because I guess it's going outside your area a little bit. You talked about how it's helpful to have a process, which is part of the tool kit. If Tasmania is to proceed along these paths, what sort of model do you think might work, bearing in mind we are a small jurisdiction and we have limited financial resources to pay for an independent rapporteur? The requests to date haven't been frequent but it doesn't mean they wouldn't be. On past history, one would expect there wouldn't be an absolute snowing of the process, but you don't know.

Mr WALKER - No. The first thing is, unless the executive accepts certain propositions then you are going to have the kind of conflict of which you are all aware in potential. The proposition that the executive desirably would accept is that public interest immunity does not deprive the House of the power if it so chooses to compel the production of a document. The same is true of

legal professional privilege and I'm bound to say I have not yet heard anybody say that legal professional privilege should prevent production except for that reference in the premier's letter, which I thought was off-piste, as it were.

If the executive accepts those propositions, which can be seen in Egan v Chadwick, then the only question is, what do you do about a case where the executive says, 'This is Cabinet secret'? Also, what do you do about cases where the executive says, 'Look, this probably gives us immunity, or legal professional privilege or commercial-in-confidence, so you as the Legislative Council are entitled to get it - but please, for the following reasons, either don't press for it, or if you do press for it, then keep it under lock and key, et cetera.'

In both those cases, it seems to me the most important thing to observe - which you will see in the terms of the New South Wales standing order - is that the rapporteur, call him or her what you like, advises rather than rules. That is the first thing.

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 almost at all costs - then a cousel 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.

As to the others, though, there should be no expectation of the House deferring to the advice or position of a so-called arbiter, which is one of the reasons why I feel so strongly that the New South Wales system would be improved, and any Tasmanian emulation of it would be superior, if you were to choose (or New South Wales were to modify) 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.

CHAIR - On that point, there are different models where New South Wales or the members in the Legislative Council get to view the document and potentially challenge it. In Victoria, only the member who requested it. In the Australian Capital Territory, the contested document goes straight to the person who is to provide that advice. Do you have a view on that?

Mr WALKER - I have a view. I don't think there is much to be said for members being able to see documents that are the subject of an unresolved claim for Cabinet secrecy. Let's put them off in one special box at the moment.

For all others, I think the New South Wales approach is the best that preserves the dignity of the Chamber and the standing of individual members, and that is, that anybody who wishes to can see it. I don't think there is any difference between that and the system that says you can see it upon

request. I think they are really the same, because it is not as if, say you made a request to the Clerk, that the Clerk could say no and knock you back.

Members are - and I say this with some trepidation, because I don't want to encourage you in any overweening sense of your own importance, which is considerable - but members are not in a position where they should be told by anyone on the parliamentary staff that they can't look at a document, which it may well be appropriate for them to look at. You are the bosses, and it is for those reasons that every member, in my view, should be able to look, for the purposes of considerating what to do about one of these contested orders for production. You should be allowed to look at the document, except in the case of a Cabinet document.

CHAIR - In the case of a Cabinet document, what would be the best process in determining whether it actually does meet whatever that standard is, to make it a Cabinet document?

Mr WALKER - That's where I think the New South Wales system really is good. That would be subject of advice by the impartial outsider with expertise. That advice would be considered by the House and, as I've said already, I would hope that in practically every case it will be for, all intents and purposes, a ruling, because it is unlikely that the House would ordinarily be in a position to either claim greater expertise or, of course, to display impartiality.

Don’t get me wrong, I don't think members of the House should have anything in the nature of impartiality; you are elected members. However, the impartiality of applying a legal test to the facts of that document is something which rather more fits the judicial or legal bent of mind, and I think the two cultures can help each other at that point.

Wherever there is a Cabinet question, in my view, rather than push it to what I could imagine as a ghastly piece of litigation in the courts, it is much better to adopt the New South Wales approach.

CHAIR - Just to repeat that back, in my understanding, and correct me if I'm wrong, please. If there is a document that is contested on the basis of Cabinet secrecy, that document shouldn't be viewed by members until they have had advice from an independent party with regard to the nature of that claim?

Mr WALKER - That's right. That is only for the Cabinet claims.

CHAIR - Yes. We have had circumstances where the claim hasn't necessarily been Cabinet documents in the first instance. It may be that it's initially a public interest immunity claim, then some of the story evolves, which is a bit frustrating, and then when one's challenge becomes a cabinet-in-confidence claim, that is prolonging the agony.

Mr WALKER - I can see why that might produce a twinge of cynicism, but to be fair, they are plainly overlapping categories. That is, Cabinet secrecy is seen by us lawyers as a subset of documents for which there is a claim of public interest immunity.

To be fair, it is probably in the nature of things that upon a contest emerging, something which was simply called public interest immunity - PII - suddenly becomes Cabinet. That need not be sinister at all.

CHAIR - Regarding the nature of the advice that a committee or the House can request, how you would see that presented in providing that advice back with reasons, and so on? How do you see that?

Mr WALKER - There is no doubt that the report has to be definitive, that is, specific about the documents that have been supplied for consideration, because it will be for the House to compare that with the way in which the House's order for production was expressed.

Second, it should record the nature of the executive claim - what category or kind of claim for so-called privilege is being exerted.

Third, it should summarise, refine and distil the arguments for and against the claim being a good one.

Next, it must distinguish between a Cabinet claim on the one hand, and all other claims on the other, in the sense that only a Cabinet claim would be a ground for the House not persisting with the call. The rapporteur should then, as to non-Cabinet cases, again distil the arguments for and against the non-disclosure or non-production or redaction that the executive has sought or that anybody else has raised. That should all be the subject of as concise a document as possible for the House. That is all it should be though.

CHAIR - Not to suggest, for example, that the additional redaction if it was to be released? Just commenting on the document.

Mr WALKER - No. I think it would be really wrong for such a person to be a self-mover in relation to redaction. To put it crudely, we all have views of where the public interest lies but you, the elected members of a Council, have a particular constitutional responsibility for the public interest. I do not think the views of somebody like myself or one of my friends, a retired judge, about what the public interest requires by way of redaction really are worth you having. You should be making up your own minds about that, which is why, it seems to me, it is for the executive to claim in relation to a document that you are entitled to see and you are entitled to use. It is for the executive to say, 'Please keep the figures on page 5 secret at least for the next 18 months for the following reasons'.

In my experience, the Chambers will always accede to that, but passing over that high political likelihood, a rapporteur should only consider the executive's claim to the figures on page 5. He or she should certainly not say, 'By the way, on page 6, I think it might be embarrassing for that engineering firm to be named and you should redact that'. That is all together getting hands too dirty and pretending to be one of you or, worse, pretending to be a voting majority of all of you. I think that is really wrong. Do not let the roles get confused. They are there to help you not to take decisions out of your hands.

CHAIR - To make it really clear, if we were to recommend such a process on these matters would that be an instrument of appointment? Or would it be in the Standing Orders?

Mr WALKER - In the Standing Orders in my view. Again, it obviously needs to be in if you like document of appointment. In a sense, that is because you would appoint a person to do the things required in the matter required by your standing order X.

CHAIR - I don't think this has happened in New South Wales in recent times, but if a document or documents were requested; they are contested; they are sent through their standing-order process for independent assessment; the claim of immunity is not upheld; and so back to the parliament we go. If the Legislative Council continues to pursue that document and the Government continues to say no, I believe the only other option is court. Is that right?

Mr WALKER - No, there are other options and they are parliamentary. Say there is a responsible minister in the House, or in the Council, as in Mr Egan's case; he can be suspended from the service of the House. I know this sounds trivial but it is what legal history is made out of, Mr Egan's first case, Egan v Willis, was a trespass to the person case. My client, Black Rod, was sued for laying his hand gently on Mr Egan's forearm, or at least we all pretended that had happened, so that the court could then rule on the question whether that was within the Council's power, which is what enabled the court to rule on the question as to whether the Council had the power to compel the production of documents.

My own view is that such cases should be kept to a minimum. It is not a happy time for parliamentary chambers to commit these issues to courts of law, which, to put it mildly, are not all as sensitive as say Chief Justice Spiegelman and Mr Justice Priestly were in Egan v Chadwick to the different and special nature of parliamentary powers. So, it would not lead straight to litigation but you'd have something that is almost as gruesome; that is, you'd have suspension of people responsible for non-production from the service of the House in order to compel not punish and, ultimately, depending upon other resolutions that may follow from the House, you've questions of contempt - all of which makes one grit one's teeth, but that is the nature, of course, of political conflict.

It's also the nature of conflict produced by what I'll call executive defiance of parliamentary norms. This would not be the only area where executive defiance of parliamentary norms produces conflict.

It picks up from my earlier remark that not all conflict is wrong or bad because I hope the Chambers will always be in conflict with executive defiance of parliamentary norms. That is solely a choice for the executive. I hope, as a voter and a person who lives in Australia, that no parliament will back off in the face of that kind of attitude by the executive.

Ultimately, this sanction is political, by which I mean electoral, though that's indirect. I don't say that lightly at all, I myself think that those sanctions are really important. I don't know that I would ever expect any election to be decided by such issues, but lots of water drops can break down a stone.

CHAIR - In the Tasmanian Legislative Council we often don't have ministers in the House at all. We have one at the moment. The Leader of the Government is responsible for all the business of government in the House, which means it's quite significant to suspend that person, who isn't the minister and doesn't necessarily have custody of the said document, which means that the whole of government business is hamstrung, at least until they can appoint someone else. Sometimes we've only had one member of the government in the House.

Mr WALKER - Is that all? That will give the Government something to think about, no doubt.

CHAIR - I guess they can always appoint one of the independents to fulfil that role, but it hasn't come to that. Mind you, when the Liberal Party were in power some years ago and they

didn't have a Liberal member in the Legislative Council, they did appoint a member to fulfil that role. He was of their leaning, I guess.

It's a big ask to consider for our House to suspend a member who is not really the one who is withholding the document.

Mr WALKER - I agree, but that is what the situation in a not-so-numerous House will present. It's a big ask everywhere, by the way, in any parliament, to suspend anyone from the sitting. It's highly exceptional and is appropriately treated very seriously. What I am suggesting, as I have suggested in many other contexts, is the Chamber should not go running off to court. You may be dragged into court but you should not go running there.

CHAIR - The Western Australians are there at the minute, or it's finished.

Mr DEAN - I will follow up on the point of what is cabinet-in-confidence material. I will relate the position on a matter that we had before the Public Accounts Committee where a Cabinet discussion apparently ensued and following from that, outside of that meeting, there was then correspondence between two ministers in relation to a matter of significance that helped to bring this inquiry to a head. How far, in your opinion, can that be taken?

Mr WALKER - The correspondence between the ministers after a Cabinet is, in my opinion, no different from the thousands or tens of thousands of documents of government administration that are produced following many Cabinet decisions. Many Cabinet decisions put in train are either legislation or other executive decisions that produce classic subject matter for a House to scrutinise. Nobody has ever said that because this matter was once in Cabinet, every document to do with the matter thereafter is protected. You can rest easy about that. Any arguments of that kind are nonsense on stilts and no-one would dream of appointing as a rapporteur, would ever make a mistake of that kind.

However, the Cabinet discussion itself, let's take the crown jewels, the Cabinet notebook, would remain secret. If a minister were so unwise, in my view, betraying his or her oath of office as to reveal Cabinet discussions in correspondence with a ministerial colleague then there would be a very extraordinary position produced. In my view, at that point the secret would no longer be a secret and so the rule that the secret must be kept could no longer operate. I am afraid to say, I can remember this arising in the pink batts royal commission where I was counsel for Mr Rudd, and Cabinet secrecy was dealt with in what I would kindly call an unorthodox fashion.

It became a very embarrassing question as to whether one would, as it were, compound the problem that had already arisen. In principle, what I have just said is the only way to proceed. It is pretty grim, isn't it, that if the rule says you have to keep a secret but the secret is not kept, the rule that says you have to keep a secret, alas, can no longer apply.

In the example you have given me, if a minister revealed Cabinet discussions in correspondence to a minister outside Cabinet then I suspect that the better view would be that it is no longer Cabinet secret. Ministers should not be doing that so you are talking about what happens when people have done what they shouldn't do.

Mr DEAN - I suppose you could take that further, couldn't you, if one minister writes to another minister on a Cabinet discussion, then that minister can then take it to somebody else and it goes on and on. I guess they shouldn't claim that was cabinet-in-confidence material.

Mr WALKER - They have to be careful because you have this yawning gap between calling it secret and what the world knows. It is no use pretending something secret if too many people know it. There is an oath of secrecy for all members of Cabinet and they have to keep it. Full stop. No ifs or buts and no political shenanigans. I hope that insecure dealing with Cabinet secrets just stops. That is one of the reasons why Cabinet leaks are such an abomination because they only come from a member of the government.

CHAIR - Just on that, if I might, if that letter was written leading up to a Cabinet meeting, it was part of the documentation that was provided to Cabinet in regard to decisions that were to be made regarding the matter, rather than afterwards, would that change it?

Mr WALKER - Yes, absolutely. Submissions or representations, recommendations, perhaps in the form of ministerial correspondence placed before Cabinet to get a decision on it is a classic example, in my view, of documents that would, without much difficulty, attract Cabinet secrecy. That is because it leads up to and its revelation would disclose the contents of Cabinet decision making. It is before the event. There is no secret before the event but before the event there is work done, whether by public servants or ministers, which can provide the content of an understanding of Cabinet decision-making and discussion. None of us hopes that Cabinet proceeds spontaneously without any documents before it.

CHAIR - We can reasonably assume that doesn't occur.

Mr WALKER - Yes, by definition there is a lot of material beforehand which can include ministerial correspondence that would be Cabinet secret.

CHAIR - We are nearly out of time, Mr Walker. Do you have anything you would like to say that we haven't covered off on yet?

Mr WALKER - No, except to say I wish you all the best. It is an important constitutional question you are doing. As I hope you know from my record, I am a huge enthusiast for Houses taking seriously their scrutiny functions and I wish you all the best in the latest contribution to that.

CHAIR - We really do appreciate your sharing your expertise and time with us. We know you are very busy.

THE WITNESS WITHDREW.

Professor JEFFREY EDWARD MALPAS, DISTINGUISHED PROFESSOR, UNIVERSITY OF TASMANIA, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Welcome, Jeff. I'm sure you're quite familiar with the committee process, but to remind you, this is being recorded by Hansard. It will form part of our public record and be published on our website. While you are here giving evidence, you are protected by parliamentary privilege, which doesn't extend outside this place. If there is anything of a confidential nature you want to give, you can make that request and the committee would consider that. Do you have any questions before we start?

Mr MALPAS - No.

CHAIR - We are also being broadcast.

Jeff, we appreciate your coming in. We understand that you've had quite a bit to do with the initial development of the State Service Act when it was first set up. We would particularly appreciate your comments and views about the comments made by the Secretary of DPAC in relation to concerns raised that someone - a public servant - providing advice to be presented to Cabinet, or for ministers generally, may be concerned to give frank and fearless advice if they felt that advice was going to become public. This is slightly away from our terms of reference, but one of the factors that was raised during our hearings, particularly by the Government themselves in their written submission and responses that we received in writing, and the evidence that the Secretary provided, was that the capacity to give frank and fearless advice is very important to Cabinet and to ministers, and that any risk of publication of any of that advice would perhaps stymie that. Whilst we're looking for a mechanism to break deadlocks when documents are sought, we also, if we're going to recommend a process, don't want to create a consequence that could negatively impact the provision of advice, for example.

If you don't mind, we might just start with your expertise and background that brings you here.

Mr MALPAS - I am now Emeritus Distinguished Professor; I was distinguished professor at the University of Tasmania for many years. I set up the Centre for Applied Philosophy and Ethics around 1999-2000, which was a consultancy that was part of the School of Philosophy. We engaged in consultancy work for the state government and for private corporations and so on over quite some years until eventually the centre got a new director who didn't really care for the centre in the way that we thought and eventually it ceased, but that was after I'd stopped being director.

One of the very first jobs we had was a consultancy for the then State Service commissioner, Greg Vines. In the first part of that job, it wasn't that I was involved in the development of the original document, but we were involved very much in the implementation of the State Service Act. That involved me working with Greg around his conception of what the act was intended to do and the sort of ethos that he wanted it to promote. We spent a lot of time working with various state government departments and with State Service employees across the entire State Service to talk through the implications of the act.

Part of what I can comment on is that background and certainly what the intentions were behind it. I should say I've also had a bit of a chat with Greg in the last few weeks about these issues and

the extent to which his recollection matches mine, and the extent to which my own sense of the intentions of the act are the same as his and we're pretty much in agreement on that.

I've also had a bit of a chat with Chris Smyth, who was the deputy to Greg during that time and who I also worked fairly extensively with.

There were two parts to the work that I did. Part of it was the implementation of the State Service Act, but another part of it, which I think is also relevant here, was working with senior members of the State Service around the conception of the State Service, around the way the State Service operates and around issues like the provision of advice, and also the issue of politicisation within the State Service. I think these are issues that are bound up with some of the issues that you're discussing.

That's the background. I'm not, obviously, a lawyer; I'm certainly not a constitutional lawyer so I'm not in a position to give expert advice on some of the matters that I know have been discussed by previous witnesses to this committee. But I think I can comment on matters relating to the State Service Act and its development.

I think I can also comment more broadly in relation to the ethical and political ethos that we might expect to be part of government operations. I have a bit of familiarity with some of these broader issues, because I am also an associate of a consultancy firm called Ethicos, which specialises in providing advice on a wide range of governmental and corporate organisational issues - particularly ethics, particularly around issues of confidentiality, transparency and similar issues.

CHAIR - Mr Malpas, with that framework, can you talk about the intent under the State Service Act, as it currently is, relating to that whole question of the provision of frank and fearless advice, and the claim that if public servants felt their advice may be made public at some stage, this would limit or might stymy their frankness and their candour? With what education and involvement you had at the time, whether you think there is a need perhaps for a refreshing of the intent of the act? It seems that what we are hearing in some quarters is that perhaps this is not well understood.

Mr MALPAS - Certainly, if you look at the act, it has been modified a little since its original implementation. The act essentially has two parts. One part sets out a set of principles or values that are supposed to underpin the operation of the state service, and those were the things Greg Vines and I were most focused on, because part of what the act was doing was aiming to making a shift within the ethos of the state service operation, away from a purely procedural mode of operation to a principles-based mode of operation. That was quite an important and major shift at the time. It was one we had difficulty getting across to some members of the state service, particularly in Treasury for some reason.

That is quite important, because what has happened in the intervening period is that the State Service Act has ceased to be a sort of proactive document, and has very often ended up being a document that has been used for disciplinary purposes in relation to employment considerations and so on. The first part of the act is the part of the act I would have hoped that the Integrity Commission would have taken up. To some extent it has, particularly under Richard Bingham, but that is a part of the act that I think we really could have done more with.

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.

The act does of course include some obligations on the part of state service employees relating to issues of confidentiality, but those parts of the act are really to prevent employees accessing or making use of information for improper purposes. I do not think it can in any way be read to restrict availability or access to documents in the ordinary course of events.

I read Jenny Gale's evidence. I would have liked her to have provided an argument as to why she believed improvement in access and transparency would lead to problems in the provision of frank and fearless advice, because I frankly cannot see what the argumentative connection could be.

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. A friend of mine is the head of Jacinda Ardern's department, and the anecdotal evidence is that they are seeing it is resulting in better advice and better decision-making, not worse. 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.

Mr DEAN - Mr Malpas, I'm not sure whether you are going to answer this question. When these public servants - state service - are put into these senior positions and are required to be writing and passing information on to ministers, what sort of training are they given? Are they told, for instance, that 'You will always be frank, that you will always be open and honest with your correspondence to ministers, and to the Premier and to the Cabinet'? Or are they told, 'Well, you need to be careful, because that document could be released publicly. It could become a public document and therefore you need to be very careful of what you put in it'?

Mr MALPAS - These are issues that my colleagues and I in Ethicos and other forums have discussed at some length. One of our concerns is that over the past 20 years or so, there has been an increased desire to control information - even in my own circumstances within the university. The first impulse on the part of most managers is that when it is a decision, and when it concerns the evidence for that decision, it is better to keep that confidential rather than to release it.

I don't think there is a well-thought out reasoning behind this, other than that one wants to control circumstances, and we control circumstances by controlling information.

In terms of the training, 20 years ago when we implemented the State Service Act, we required departmental heads and members of their departments to attend the sessions we ran. We ran large sessions and small sessions. Only part of those sessions was about informing them of the details of the act, and particularly those in that first part of the act - the state service principles, the values and so on. Also, part of what we were doing was getting people to talk about what that meant.

What does a 'merit principle' mean, which was one of the important things at the forefront of our minds then. You don't get people to understand and abide by principles by just telling them what the principles are. You have to get them to think about it. You have to get them to start acting on them. You have to get them to think about how they will act on them in particular circumstances.

We did a fair amount of that work then and we followed it up. I did one-on-one sessions with a whole range of departmental heads and senior state servants. We did do some training of that sort then.

I know Richard Bingham and the Integrity Commission have also tried to do similar sorts of training around issues of ethics and integrity of government, but I haven't seen Richard for a while, and I'm not sure where he got to with that.

I do think there was an intervening period where there wasn't very much going on in terms of what I would think of as 'ethical' training, that I think we probably really need to do in relation to the state services, because Greg Vines and I did a bit of work in this respect, as well in relation to state parliament.

One of the interesting things we discovered when we were dealing with the act was that most members of parliament had very little idea of what was in the act, or what it was supposed to be about. I think there's an enormous job to do there.

The key point to get across to state servants is, if the job of government, if the job of a state servant, is to both make and enable good decision-making to take place, good decision-making can only be decision-making that is based on a good evidential base. Evidence can be of different sorts, but it has to be on a good evidential base. Partial decision-making is almost always bad decision-making - decision-making that is influenced improperly by political considerations, or considerations that don't pertain to the facts.

Frank and fearless advice ought to be exactly the advice that is given on the basis of the evidence, on the basis of the facts, and leaves to one side, the political considerations. It might be that a state servant might address those considerations separately. But you can't make good decisions without good evidence and you can't make good decisions without the facts. It seems to me, that is a really simple point. That is even aside from questions of honesty, integrity and so on, that you might also bring to bear.

State servants who are not giving that sort of advice are not attending to their responsibilities as state servants. You might even argue that they are not making good on their responsibilities in terms of facilitating good governmental decisions. Again, I can't see that there is any real argument you could give as to why you would not want that evidence to be well-founded, to be evidentially

well based but it is going to be better based if it is open to scrutiny from others. You may have missed something. You want that to be known. The commitment to giving good advice ought to also involve a commitment, where possible, for the evidence, the advice you give, to be open to scrutiny because that will improve the quality of the advice.

Mr DEAN - Then it is fair to say that no state servant who is advising to ministerial level, should ever have any consideration to where that report could go at the end of the day. In other words, it could become public but that should not be in their thinking in any way whatsoever.

Mr MALPAS - Not if they are acting according to the way the State Service Act requires them to act. If they are acting in a way that is apolitical, and if they are performing their functions in an impartial, ethical and professional manner, I would argue that this requirement means that can't be a consideration. How do you fit that in under being ethical, impartial or professional? That you are worried about who might see this later.

One of the things we often do when we are talking to people about ethics is to say to them, 'Okay, if you want to judge the ethics and the honesty of your actions, how much you are acting with integrity, then try to broaden the group of people who know about what you are doing'. The more you can think about what you are doing in a way that others look at it, then the more you are likely to act in a better fashion.

I would say to a large extent that is true about advice as well. Try to think about that advice as being accessible to a broader range of people. You are likely to be much more careful in what you say, more balanced, more judicious, to make sure your arguments are better supported. If you know that the only person who is going to see it is somebody to whose interests you may have tailored the evidence, then you are not going to want anybody else to see it. Partiality is supported by secrecy, impartiality is supported by greater scrutiny.

CHAIR - Just to follow up on that. You made some reference earlier to the politicisation of the state service. I am not sure, historically - Ivan has been here slightly longer than I. I think it is only in more recent years, since I have been here, that we have seen this increasing reluctance to release documents and information even to parliamentary committees, let alone to the public.

In spite of a new right to information legislation that was allegedly to promote a push approach to information, rather than pull. Push information out there. Do you believe there has been a politicisation of the public service in recent years that could be part of the underlying problems here? If so, what do we do about that?

Mr MALPAS - The politicisation of the public service across Australia, is a phenomenon that has been researched and well documented. It probably begins with the Hawke/Keating administration federally and it has increased over the years. It is tied up with a whole range of different factors. Again, I think a fundamental impulse is a desire for greater control. It has been the case in the past, and it is not just true of governments, it is also true of corporations, managers and all sorts of situations, that a managerial ethos has developed in which the control over information has become quite important. That has reinforced a tendency towards politicisation that was already going on anyway.

We identified this as a problem 20 years ago. One of the concerns that we had was how to educate parliamentarians or politicians to understand that the responsibilities of state service employees is not necessarily a responsibility to serve the interests of any particular political party

or politician but there is a requirement for impartiality and independence there. One of the problems we had in those days was a number of cases where parliamentarians or politicians had contacted members of a department or a departmental head wanting information, advice or support for what was essentially a partisan political purpose rather than for a governmental purpose. We were concerned about how we established clarity about these sorts of divisions.

One of the other problems we identified that was associated with politicisation is that it seemed to us there was a lack of what we talked about then as a 'senior service ethos'. There was a tendency for departmental heads to see their primary relationship as with the minister rather than also having good relationships with other senior heads. We thought that was problematic because the development of good senior service ought to give you a good group of people who can swap notes on what is happening, who can talk about the way in which the state service is operating as a whole, but who also can support one another, provide advice, and back up one another in relation to things like the provision of advice and so on, and political pressure that might be brought to bear.

Although I haven't done work on this recently, my suspicion is that it has probably got worse. There is greater autonomation, individualisation, on the part of heads, so there is more of a direct line from the minister down through the department and even less horizontal connection, particularly between senior members of the state service. I think that is a problem.

I don't have material to hand that I can use to directly provide you with evidence as to this phenomenon of politicisation but it is something that has been identified as a federal issue. It is similarly an issue here; maybe to a lesser extent, but it is certainly still an issue. I think there are some things that could be done about it but they would require some minor things and some major things as well.

CHAIR - That may be getting outside the terms of reference about what needs to happen there. It is an interesting feed in to the argument that is being used for one of the barriers to providing this advice.

Mr MALPAS - Certainly, to be completely frank, Greg's response and my response to the evidence from Jenny Gale, with all respect, was they seemed to be more driven by a set of considerations that were political rather than strictly addressing the sorts of considerations that the State Service Act itself specifies. I might add that neither Greg 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.

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.

Mr DEAN - That was along the line of my question written here. Jenny Gale raises it as an issue that the authors of these documents going into Cabinet and so on, they would restrict the information that they would put in these documents if they believed or thought that that document could become a public document and be released publicly.

With what you have done, and I think you have been involved in training, as you have said and so on, has any evidence been brought forward to you at any stage from any senior public servant that corresponds directly with Cabinet ever said to you that it is an issue, that it is a problem?

Mr MALPAS - No. This was never an issue when we implemented the act and when we did that we put a lot of emphasis on the need for frank and fearless advice, for impartial advice, for advice to address the evidence responsibly and properly. Again, I would say that the obligations given under the act are that the advice should be given in exactly that way. A state servant who modified their advice because they were concerned about who might see it could, it seems to me, be construed as acting contrary to their responsibilities under the act.

My tendency is to feel that if advice has been closed off like that then there is less tendency to provide advice that is impartial in the way that is required. There will be a greater tendency, irrespective of the intentions of the person giving the advice, to want to shape that advice to the person who is receiving it. If advice is going to be impartial, again one way of making sure that it is impartial is to hold in your mind the idea that there will be a wider group of people who will read this rather than just the person you are giving the advice to.

This is an idea that, if you like, underpins the way academic work operates. The reason we publish our findings and the reason only published work is given weight in academia is because that is work that we are willing to put out there in the public domain so that it can be challenged. If we were just doing this for ourselves it would be worthless because it would not be open to challenge. We would also be much more inclined to provide advanced hypotheses, give views, that perhaps were much more partial to what we were interested in or our friends were interested in. If you just put emphasis on that word 'impartial' and you want to make sure that state servants give impartial advice then do not restrict the availability of the documentation because irrespective of intention and if the documentation is restricted, the tendency will be to err on the side of partiality.

Again, it seems to me that there is really no argument on the basis of the State Service Act nor on the basis of what we ought to hold to in terms of democratic and open government to argue for restriction in this way.

Mr WILLIE - You do not think that there may be the potential for processes to break down where public servants may not put things into writing? They may give advice verbally because that will not end up in the public domain. I have heard rumours of things not being written down because

of right to information acts. I do not know how much truth there is to that but you hear these rumours every now and again.

You do not think that there is a potential for a perverse outcome? We have heard evidence from other parties when we went to New South Wales that that may be a concern in a small jurisdiction.

Mr MALPAS - Of course, that is always a possibility. You can always have breakdowns in good conduct within any organisation. Breakdowns in good conduct are often facilitated by the encouragement of informal practices by the loss of a sense of what the real principles are that are important here.

If, as I've suggested, one of the problems we have has actually been a loss of principled operation within government, and I'm not going out on a limb in saying that. This has been happening at all levels and there are reasons for it. One of the reasons is the rise of a certain sort of mode of managerial conduct within government, within public services across Australia and across many other jurisdictions.

So, when that happens, of course, processes will break down but the fact that good processes can break down is not a reason for having good processes in the first place. It's a reason for putting in place mechanisms - training and so on - to ensure that people understand that that's an improper way of behaving.

Very often that way of behaving is also encouraged from the top and I'm a strong believer in the view that the tenor of an organisation - whether it's a government, whether it's a corporation, whether it's a university - is strongly determined by the behaviour and by the examples that are set by the people at the top of the organisation. I don't just mean prime minister or premiers, I also mean parliamentarians, I also mean departmental heads. All of these people have a responsibility.

Anybody who's in a managerial, supervisory or leadership role has that obligation, that responsibility and I don't think we've always been very good at that. We've very often allowed the conflation, for instance, of political interest with what I would say is governmental interest because it seems you can distinguish the two, or from national interest. I think we've actually lost a clear view of what some of these principles should be.

What I'm talking about are the principles that are at issue here. I agree, sometimes you will get what I would view, using this term very broadly, when you get corruption within organisations there's greater tendency for people to operate on the basis of informal advice - a word in your ear, don't put this down in writing, and all of that sort of thing. That's where real corruption within organisations begins. This is also where dysfunctional management and leadership begins.

One of the things you want to be able to do is to be clear on the principles and act according to the principles. You also want to put in place mechanisms to ensure that people understand why that might be a bad thing to be doing and why people should not ask for that because typically, when that advice has been given, it's because somebody's encouraged them to give it.

You really need a whole-of-organisation response that's not only focused on the stuff that's written down, the documentation, the stated principles but also looks at the informal operations, that also looks at the sort of processes that are in place but also, as it were, addresses issues of what we might think of as etiquette and good manners. Very often, etiquette and good manners we think

of them as old-fashioned but often they're mechanisms that we use in order to make sure that ethical boundaries aren't over-stepped. You're careful about what you ask of people. You attend to the limits of their role. You don't ask people to do things that are improper in terms of the role that they have.

Again, there's been a lot of work done on this. I did some work a few years ago with Paul DuGay from the Copenhagen Business School. He was very concerned about what he could observe, not only in Australian cases but in the UK for instance, around the breakdown of what he understood as the notion of office, where office was essentially a verbarian notion from the sociologist, Max Weber, around the structures that constitute what political roles, governmental roles - the limits of those roles, the obligations that are pertaining to them and, as it were, the importance of being able to distinguish between different sorts of obligations and different roles.

His argument has been that the rise again of a certain sort of managerial mode of conduct has tended to erode those distinctions, those conceptions and those fundamental values. Typically, when that happens, advice becomes informal, things are done off the record, under the table, whatever. They're done in other ways. That's because an ethos has developed that's an inappropriate ethos not because the principles or the structures are wrong. It's because the cultural determinants of behaviour, rather than the structural determinants, have changed.

CHAIR - It has been very helpful, Jeff, to hear challenges to some of the arguments that have been put as to why a document shouldn't be produced, which is what it has boiled down to in many respects, in that approach. It feeds into the terms of reference.

Mr MALPAS - If I could add, that there might be disinformation to want to produce documents worries me because it's indicative of the development of a problematic culture that we ought to be concerned about. If I was still running a centre for applied philosophy and ethics, I'd probably be here saying, 'You really need us to do some ethical work for you'.

There is an issue about setting up frameworks and sometimes doing the training work here is not a matter of, as it were, getting people to do courses and learning this. Sometimes it's just a matter of getting people to sit down and talk through the issues. Is it appropriate for a minister to make clear to the head of a department that this is the sort of advice that I want? What improper pressure does that put on the state servant? Those are things you need to talk about. They are things that need to be discussed openly and that's how you deal with a problematic culture or with tendencies towards a problematic culture. Again, that's a reason why you might want to look at things like the fostering of a stronger state senior service within the State Service to give people the opportunity to do that.

CHAIR - Jeff, on that point - and you may not wish to comment on this, it not being as much in your field of expertise - as you are aware, we have had a couple of incidents over the last few years where the government has refused to produce documents with different claims, some with very nebulous claims at best. The committee is looking at a process of resolution to try to break the deadlock we found ourselves recently a couple of times. Do you have a view on whether that is an appropriate step to consider and how that should look?

Mr MALPAS - I haven't thought through exactly how you might do this formally. As I say, I'm not a lawyer, I'm not a constitutional expert and I'm not familiar enough with the sorts of structures that you operate under. I do think that a really basic principle is that transparency ought to be the default option, not the other way around. The New Zealand Government case is a good

example of best practice and that doesn't just apply to the [inaudible]. They don't have an upper House there so it's not an issue of release of documents to an upper House. It's a release of document publicly. That keeps governments honest, just as having documents open to scrutiny from other people keeps the advice of public servants honest. It's a really basic sort of principle. In that respect, the issues you're enquiring into are not minor administrative issues on the side of government practice, they are central to it. I regard democratic governments as founded in the idea of open debate, of decisions being made that are openly justifiable, so I would be looking for any refusal to release documents as requiring very clear and strong justification. I'm not convinced by the standard resort to things like commercial-in-confidence because I think mostly that's a fudge. There are very few cases where commercial-in-confidence is a legitimate justification.

I'm not really in a position to comment on the mechanics of this but I think it's extremely important. I do think that release of documentation should be the default option and I would probably be arguing for something much wider even than just what is within the terms of reference you are considering. The New Zealand example is a very good one and the evidence there is not that it results in any restriction on the advice that's given but results in an improvement in the advice and in the decision-making. That's certainly backed up by the advice that I get from Jacinda Ardern's department.

Mr DEAN - You raised an interesting point previously about culture. It has been raised in this committee a couple of times and recently it was raised that culture seems to be an impacting interference here in the provision of documents open to the public and so on. That has filtered through the governments over a long time, not just with this Government but it's come from other governments as well that we've had in place. Do you wish to make any comment on that? That's probably more of a statement than a question. You raise culture and, as you said, it is an important issue.

Mr MALPAS - I tend to think that when you look at organisations and their operation, particularly in relation to issues of ethics, there are three levels at which that plays out. One is structural. The structure is usually given in terms of what's down on paper. It's the organisational structure, it's the statements of values, sometimes it's in strategic plans and so on.

The second we might say is behavioural, which is the ground-level conduct embedded in the way individuals act. You can get individuals who have just learnt bad ways of behaving, but what sits in the middle is this level of culture. The level of culture ought to be an expression and to reinforce what's there in the structure of the organisation. What's in the strategic plan ought to be well embedded and expressed in terms of the culture, and culture can have an impact on behaviour as well. People who might exhibit problematic behaviour will often be curtailed by a strong culture, partly because of peer pressure, partly because of social pressures. How do you get a good culture? In the end, culture is going to be determined by lots of things. Some of it will be history of an organisation, but a lot of it is determined by the people who set the example, who provide the leadership.

We're all familiar with organisations where the boss talks the talk but doesn't walk the walk. Those are organisations that have the structural determinants right. The old example we used to use was Enron, which on paper had all the structural determinants of a good corporation. It had lots of bad behaviours and the real problem was the culture.

You need leaders, you need people in that organisation who live the principles that are part of it. For a very strong State Service, you need senior people within the State Service who live those

values of impartiality, ethical and professional behaviour, apolitical behaviour. Ideally, if we think that these values are important in the State Service, some of those values have to carry through to parliament and to members of government as well. Again, they have to embody those values. They can't be okay at it and do it all right on some days but not on others. We have to hold them to much higher standards. You might say that's one of the burdens that's placed on you as parliamentarians, but it seems to me it's absolutely important, absolutely central.

Culture is determined by those sorts of factors. If you want to improve culture, you've got to address those issues. I'm not necessarily saying that people in leadership positions are failing because part of this is history as well. You can get good leaders who come into organisations that have developed a culture as a result of the history of past operation that is problematic. That usually requires proactive efforts to address it. Culture is the important middle term here that connects the formal structures to the individual behaviours, and we have to think that through and address it directly.

Mr DEAN - Excellent, thank you.

CHAIR - Thanks, Jeff. We really appreciate those insights. While it's not directly relating to the terms of reference, it definitely feeds into the mechanism and the understanding of why this is important and why we need to proceed and soon report.

Prof. MALPAS - Thank you for asking me along. Good to see you all again.

THE WITNESS WITHDREW.

Mr DAVID THOMAS PEARCE, CLERK OF THE LEGISLATIVE COUNCIL TASMANIA, WAS CALLED. MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Welcome, David. You know all the members very well and you're very familiar with the parliamentary process and the privileges you are afforded while you are here. It is being recorded. We are being broadcast and will be part of our record. We have your submission, which we appreciate and will be asking questions about that in just a moment.

We are inquiring into the production of documents and you are very aware of the challenges we have had in recent years in trying to access some documents from ministers, mainly through committee processes. You have been able to provide advice at different times in relation to its processes and the powers we have.

Initially, in terms of a broad comment, I wonder if you could talk to the committee about your views on the general power to call for papers. Where that power sits; how it works. Is there any doubt about that? And the custom and practice around those processes.

Mr PEARCE - 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, and I appreciate the difficulty in trying to navigate your way through issues when papers are not provided. It is a challenge. We have the Standing Orders, as I have mentioned, the act itself, although there is some conjecture about how far the absolute power of the Parliamentary Privilege Act. It has never really been tested in a court here.

They are the terms we work with. They're the statutory provisions we have and the standing order that goes with it. As Clerk, that is what we work to, to advise members accordingly.

CHAIR - Ivan chairs the Public Accounts Committee where we have had cause to issue a summons to produce a document which was refused. The then treasurer appeared as per the summons and claimed that the summons had been complied with, but didn't produce the document. The committee was then left with political options to try to suspend members, which is always difficult, particularly when the minister is not a member of our House, as was the case there.

You are aware that in other jurisdictions that there are other processes of sending contested documents to an independent body or person to make a judgement or advise on the nature of that claim. In particular, New South Wales, Victoria and the ACT have mechanisms for it. They are all similar but different.

How would it work in Tasmania for us to put in place a similar sort of mechanism? What would be the challenges or the benefits around that, in terms of having that additional option for trying to resolve a dispute?

Mr PEARCE - I don't really want to comment on the pros and cons of what applies in other jurisdictions other than to say that it would require a standing order change to our Standing Orders to implement something similar to New South Wales, Victoria or the Australian Capital Territory. I have an understanding of their systems.

Of course, it would take the members' agreement for something like that. I understand that certainty is always a good thing in terms of a process to step through. At the moment we navigate almost politically through some of these things - through resolutions in the House, reporting back, et cetera - which provides an element of certainty, but it does not give you a step-by-step through process, which is probably something that might be beneficial, but that is a matter for members to determine as well.

In terms of information that members and committees require, it is important they have sufficient information to hold the executive accountable. That is the core function of parliament, where the ministers are responsible to parliament, and parliament to the people. We make have made judgments in the upper House of how much information you can live with, so you do not get it all. We have never had it all. We have had letters that are redacted, we have had reports that have been redacted. It is matter of making judgments along the way, too. That is the way it has been thus far.

In terms of a standing order for the upper House, we could implement something if a recommendation comes forward. The Standing Orders committee would probably have a look at it and confirm that; bring that back to the House, for the members themselves to decide whether that is appropriate or not. Whether that gives the certainty, whether that gives the step-by-step through process that we are perhaps lacking to some extent today.

Having said that, in the past we have navigated our way through the processes that we have at our disposal, through negotiation.

CHAIR - But not entirely successfully.

Mr PEARCE - Not entirely successfully, but to the point where you have been able to report satisfactorily. Discharged the role and function of scrutiny. It is a judgment. It is a matter of degree, I suspect, as well.

CHAIR - Mr Pearce, if a recommendation for a change to standing orders was made, and was then taken to the Standing Orders Committee - let us follow that path for a moment - and then came back to the Legislative Council, and it was agreed. Assuming that there would need to be a process to refer a contested document or documents to an independent person - and usually in other jurisdictions that has been managed through the Clerk's office - what additional resourcing would that require of you and your office?

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 - Historically, you have been here longer than all of us, I think, as either Deputy Clerk or Clerk. In my experience, 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?

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.

CHAIR - If you wouldn't mind talking through again the powers that the Legislative Council has now, without a change to Standing Orders, to try to progress access to documents that are being contested.

Mr PEARCE - I guess it's really through communication and resolution of the House, I suspect. In terms of orders for production of documents, we have had very few over the last 20 odd years. You could almost count them on one hand. So, we have navigated by negotiation through

provision of the information in camera. We have worked around that and I find that has worked reasonably well. The only negative with it is often there are not reasons sufficiently given in terms of why the executive may want to withhold a certain document. Again, that is a matter for the House. The House can resolve to do all sorts of things.

CHAIR - Could you talk us through some of those options, just for the record?

Mr PEARCE - 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 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.

CHAIR - In some jurisdictions, members have been suspended for failing to produce documents. That is a little bit easier when you have an actual minister. I am not suggesting it is easy but it may be a little more straightforward when you have the minister who would have the documents in their custody, so to speak. It is a little more difficult in our House where the Leader, most likely, would be the one responsible and he or she may not have the custody of that document.

Can you speak to that? It has been raised by a number of other witnesses as an option to try to resolve a deadlock.

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.

CHAIR - Having that additional option, if you like, of having the capacity to send contested documents to an independent person to make a judgment about the validity of the claim would be an additional tool in your view?

Mr PEARCE - It would, certainly. 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.

CHAIR - Ultimately, that would be a decision for our House because they are our Standing Orders?

Mr PEARCE - Correct, yes.

Mr DEAN - I'm not sure if it's a silly question. In the case of a Joint House committee and that's one of the reasons why this committee is where it is now, the problem with the Public Accounts Committee, could the other place have taken an alternative position to the one that we took of seeking advice through the Legislative Council on producing a summons and so on? If it was brought back to the House and the House was to make a decision, could there be an alternative decision made in the other place? Could it also go into the other place?

Mr PEARCE - In terms of comity between the two Houses, they're separate entities. What the Assembly does is their business and it could do something completely opposite to what the upper House may want to do in terms of their treatment of a refusal or a treatment of a minister or the pursuit of a minister for information. That's a matter for the lower House.

Mr DEAN - It could occur.

CHAIR - David, in some of the evidence we've received, there seems to be - even without the head of DPAC - some confusion about what responsible government actually looks like and the role of the public servant within that and the approach taken to giving advice.

Do you want to comment on what you see as responsible government and how that should operate broadly?

Mr PEARCE - I can't speak for public servants. 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. That's how it works.

Responsible government is a flexible thing. It you 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.

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.

Mr DEAN - Do you believe that our Standing Orders, the way they currently are set out, are strong enough to require the production of documents that are not being given up? Do you think there need to be changes, from your point of view and your perspective?

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?

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.

CHAIR - If there was a determination that a document under the framework where you had independent advice that the document could be viewed or the government then decided the document could be viewed but only in the custody of the Clerk, say, which we've done in the past with a Public Accounts Committee - which wasn't administered by the Legislative Council then, it was administered by the House of Assembly so it was in the custody of the House of Assembly Clerk - would that create challenges for you in terms of where you would do that? Have we got the space? Would be a logistical challenge?

Mr PEARCE - I don't think so, Chair. In terms of a venue, viewing documents in my office would be appropriate. I think we tried that alternative with the Public Accounts last time around. We offered that up as a solution to the impasse and it wasn't taken up, but that's not to say a future government may not look at that and say that seems to be a better idea, it's going to be in complete confidence, and that could work without a great deal of fuss. It doesn't require a standing order change to do that. You will achieve a result.

CHAIR - Would you need a standing order or something to guide the collection of - it could even be a register as to who viewed the document and the time they were there, that sort of thing?

Mr PEARCE - You would probably want a resolution or in a standing order, as in the other states. I'm not quite sure why you'd need to have a register; it just seems to be another step that I don't believe is required. I'm not quite sure why you'd have to keep a record of who looks at the document.

Mr WILLIE - In case there's a leak, perhaps, so you can narrow it down to a number of members.

CHAIR - It's interesting, there is a register in New South Wales that's maintained by the Clerk's Office and, over the hundreds of documents that have been questioned and provided to the Clerk in New South Wales, there have been no leaks, which is interesting in itself. That's one of the concerns that our Government seemed to have raised here that they were concerned about leaks.

Mr PEARCE - I guess if there were leaks in that sort of process then the procedure and the arrangement wouldn't last very long. It's the integrity of the process that's protected by members doing the right thing, I suspect; otherwise, you would look to find a different way because it would be a problem. It goes to an acceptance of that process and members understand the process would probably fall over if something else occurred.

CHAIR - Is there anything else you wanted to add, David? It's fairly narrow what we are talking about here. It's just the practicalities of it and the Clerk's role and all of that. Is there anything else you wanted to add that we haven't covered?

Mr PEARCE - At this stage, Chair, no, I don't believe so.

CHAIR - Thank you for your time. I know you are busy at the moment dealing with other challenges. At least we leave more than a metre apart so we will be fine today.

THE WITNESS WITHDREW.

Professor ANNE TWOMEY, PROFESSOR OF CONSTITUTIONAL LAW, DIRECTOR, CONSTITUTION LAW REFORM, FACULTY OF LAW, THE UNIVERSITY OF SYDNEY, WAS CALLED AND EXAMINED VIA TELECONFERENCE.

CHAIR (Ms Forrest)- Welcome Professor Twomey. This hearing is being broadcast and recorded, and will be transcribed by Hansard and published on our website as part of the public record. You do not actually have parliamentary privilege, as you are not in our jurisdiction for giving evidence, but I hope you will be able to speak frankly and freely.

The committee has been looking at the production of documents by Government to predominantly parliamentary committees in our case, but to members as well. We would appreciate your insights and valuable experience in relation to the constitutional principles of responsible government, and the Crown and Executive responsibilities to parliament, and particularly the power of the parliament to ask for the production of documents. Some might say it has been contested slightly, but most would be in agreement with that.

Also, if you wish to speak further about a model to put in place to act as a circuit-breaker, we would be happy to hear your ideas on that, but understand your expertise is particularly around the constitutional nature of the powers and the privileges.

Prof TWOMEY - Okay, do you want me to give you a general view? Would that be helpful?

CHAIR - That would be helpful. If you could perhaps introduce yourself first and talk about your experience and background, just for the record.

Prof TWOMEY - I am Professor Anne Twomey from the University of Sydney, but I do have practical experience in this regard. I worked for the New South Wales Cabinet office during the Egan v Willis, and Egan v Chadwick cases, which dealt with the upper House in New South Wales requiring the production of documents. In fact, I was the person who did all the classification of the documents in terms of privilege in relation to those documents, and I was the person who asked Sir Laurence Street to come in as the independent arbiter to show that I was not cheating when it came to privilege. I accidentally started off that entire system. It was not intended to go on forever. It was really supposed to be a one-off event just to show that we were acting in good faith, we were not hiding documents inappropriately by saying that they were privileged. Yes, I was involved in all of that.

That gives me a two-fold perspective, because on the one hand I have seen this experience from the government side in terms of dealing with these things, but equally I have been on the other side as well as an academic, when I am wanting to get access to documents, or when I am dealing with a controversy - for example the recent 'sports rorts' inquiry at the Commonwealth level, and documents are being called upon by an upper House and they are not being produced, and the frustration that arises from that.

I am quite conflicted about it. Half of me really wants governments to be accountable to upper Houses, and therefore be required to produce relevant documents - but the other side of me that has had this experience in New South Wales, is also quite wary about that for a number of reasons.

Let me tell you the reasons why I am wary about it.

CHAIR - Just one moment, Anne. We think we are having trouble with the audio.

[Pause in proceedings as a better connection is dialled in.]

CHAIR - You were just talking about why you were wary.

Prof TWOMEY - Here is why I am wary about it. 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.

The second concern is just simply one of cost and resources. 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 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.

The third thing I'm wary about - and again I saw this as a public servant - 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 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.

They were my concerns about it. The question then, really, is: can you have a system where you do allow or require governments to produce documents that are important for the purposes of accountability - but the process is not abused or used excessively, and governments continue to behave in a way where they still have proper written advice and proper written records?

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.

CHAIR - Thanks, Anne. What I am hearing you say is that there is obviously a balance somewhere in all of this. We visited New South Wales and the Clerk's office -

Prof TWOMEY - The Clerks have very particular views about these things, and my view might be a little bit different.

CHAIR - Yes. We could see the extent of the number of documents stored just there at the time - not counting the ones in storage, as you mentioned. In Tasmania, we have had a couple of recent incidents, and one a number of years ago where documents were refused. On one occasion they were provided to be viewed in a room at the Clerk's office, and not to be photographed or taken out, or anything like that. The other document we could not get, other than it was redacted for the purposes of a right to information request by a member of the media, and the Opposition may have asked for it as well.

There are not a lot of documents being requested now. The upper House is a little different as it has a majority of Independent members, so there is probably a little bit less politics. That could change at any time, obviously.

Prof TWOMEY - That could make a big difference. Tasmania is very different in terms of its upper House to the rest of the country. You have two big differences to New South Wales. One is how your upper House is comprised, and so maybe you would get more concern about the public interest and less abuse of the process and that would be a good thing.

The other thing that is quite different from New South Wales is that in New South Wales there is no legislation that governs it. It is purely on the basis of what the courts interpret as reasonably necessary.

The big difference in Tasmania is that you do have a Parliamentary Privilege Act, and what we are really talking about here is an interpretation of that act and what the actual terms of it means. If you wanted to clarify it, you simply had to legislate, so you could legislate to change your Parliamentary Privilege Act to make it clearer what the extent of the power is, how you deal with privileged documents such as legal or professional privilege, or Cabinet documents, or whatever. There is nothing stopping you from doing that. The only thing that stops you is that normally governments are not keen on this, and if the Government controls the lower House, then it is not going to permit such legislation.

Given that you already have legislation, one obvious way of dealing with clarifying all of this, or putting in place any other kind of mechanisms, would be to make it clearer in the legislation how it applies.

CHAIR - In the absence of that - because generally in the lower House you do have a majority Government who may have a different view -

Prof TWOMEY - Governments always do, regardless of their stripe.

CHAIR - That is right. Both Houses have their own standing orders. In the other jurisdictions that have mechanism similar to New South Wales, have they done that through standing orders?

Prof TWOMEY - Yes.

CHAIR - There are different models. Victoria has a similar but different model to New South Wales, as does the Australian Capital Territory.

Is there a model that would work better in Tasmania, knowing what you do about our state and the workings of the upper House and the nature of it, in terms of depoliticising it as much as possible, and having it as a circuit-breaker when the members or the committee involved reasonably believe they need the information to assist them in their work?

Prof TWOMEY - That is a hard question. I would need to know a bit more about Tasmania to be able to make that kind of assessment. Under the standing orders in New South Wales, we have this notion of an independent arbiter. As I said, that was accidental in terms of how it came about. It wasn't really planned as such. It was simply the case that in the particular circumstances in the Egan v Chadwick case we had made claims in relation to ordinary categories of privilege, like legal professional privilege, et cetera. We wanted the opposition to understand we were making those in good faith, not trying to cheat or manipulate the system and so we thought it would be helpful to have someone independent to come in and have a look to show we were not trying to deceive them in terms of what we were claiming as privilege.

Having said that, in that regard the system they have in New South Wales works reasonably well. It could work better, but having some kind of person who is trusted by all sides, who can make an objective assessment as to whether claims to privilege are legitimate or not is probably a good thing to do. The one thing you do need to be a bit clearer on is things like the scope of Cabinet confidentiality and again legislation would help in this regard. One of the more problematic aspects

is what amounts to a Cabinet document. There are broader and narrower views on that as the case may be. It often pops up in things like freedom of information legislation. At least in the New South Wales legislation it says things like just because you staple it on the back of a Cabinet Minute does not make it a Cabinet document.

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 submissions 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.

CHAIR - If you tried to define in say the Parliamentary Privileges Act the power existing in that to define the scope. We heard from Bret Walker SC earlier today and he was suggesting it is really only the truly Cabinet documents that require secrecy, the ones that reveal the deliberations and legal professional privilege does not apply if public interest immunity does not apply.

Prof TWOMEY - To be clear, although they do not apply in terms of things the government can refuse to hand over, the legal professional privilege and the public interest immunity- at least in New South Wales - they are things the Legislative Council respects to the extent they say if you claim privilege in relation to those things we will not make them public unless there is a particular order made by the House. They are the sorts of ones you look at in-house and the sorts of assessments the independent arbiter makes.

That again is not so much a matter of law. As a matter of law, the New South Wales Court of Appeal said the Legislative Council can claim documents subject to legal professional privilege and public interest immunity, et cetera. The Legislative Council has itself accepted there are certain documents that should not be made public if they genuinely fall within those categories. Members can look at them, but they will not make them public unless they vote on it at a later stage to do so. I think also the Senate. You have probably seen this does also respect there are certain categories of documents which generally should not be made public. It has provisions about that too.

You are dealing with two sorts of things here. One is what is a matter of the law can a House require to be produced and then the second is what as a matter of responsibility should it require to be made public by tabling in the parliament or should there also be a process by which some of these documents can be handed over by the government, but not be treated as public because there is a public interest in maintaining their confidentiality.

CHAIR - A couple of points there. Do you think it's important if a standing order was developed to provide for an independent person to provide advice on the status of a document? If the government of the day provide reasons for their claim of immunity, whatever it is, that would provide enough guidance or you need more in terms of protecting or avoiding the release of documents that should remain not published, but still maybe accessible to parliamentarians?

Prof TWOMEY - Sorry, I got a bit lost in the course of that question.

CHAIR - Sorry, I got a bit confused myself. When you have documents that there is a claim made, not so much of cabinet-in-confidence, ones that might reveal the deliberations, but say public interest and you said in New South Wales there is a process that works so those documents can be viewed by the members, but not released publicly, how is that done? Is that through the standing order or is it through an agreement or -

Prof TWOMEY - Yes, it is through the standing orders. The standing orders provide in those circumstances the government when it hands over the documents can say in relation to these documents here we regard them as privileged, then those ones are accessible by members only and not tabled so they can be seen by the general public. If a member then disputes whether or not that particular documents or all of them are privileged or not, so if there is an argument about it, then they go to an independent arbiter, usually a retired Supreme Court judge to make the assessment. If the arbiter says they don't think it is privileged, then the document is normally by order of the House made public. If they say it is privileged, then normally they will keep it confidential.

As it is, once the House has the document the House retains control over it. The House can always vote regardless of whether it is privileged or not to make it publicly available if it so chooses. The House does choose to rely on those categories of legal professional privilege and public interest immunity, et cetera, because it recognises there is a public interest in some circumstances at least to keeping certain things confidential to the public.

CHAIR - Where there are documents that have been requested - perhaps cabinet documents that reveal the deliberations - I would assume they would not release, even for the consideration of the arbiter?

Prof TWOMEY - The way it works in New South Wales is because of the decision in Egan v Chadwick. The government never hands over the document it asserts to be cabinet-in-confidence, but it does hand over the documents it asserts have other forms of privilege in them. It is those documents that are otherwise privileged are the ones held so that members can see them, but they are not made public unless there is a dispute about them and it goes to the independent arbiter. The cabinet documents do not fall into that category because the court said there was a complete immunity in relation to cabinet documents so the government never hands those ones over.

CHAIR - An example such as an experience that happened in the Parliament here - there was a report prepared about funding and projections for health. It was requested by a committee of the Parliament to look at the expenditure in health. The claim was initially a bit vague as to what the claimed immunity was, but then eventually it came down to it being a cabinet document, because it had gone to Cabinet through some process. It was prepared for the minister, obviously, informing some of the costings for health services. Isn't there a risk for the process, as it is in New South Wales, that everything will be labelled cabinet-in-confidence revealing the deliberations and no one can look at it to prove otherwise?

Prof TWOMEY - 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.

CHAIR - We are different in size and in a range of other ways that our parliament works in Tasmania; in having a small upper House, single-member electorates, a staggered election cycle, a majority of independents and that sort of thing. The chances of making substantive change to, say, the Parliamentary Privileges Act would be difficult, particularly in view of the approach taken by the Government to this committee inquiry. If you were to consider a circuit-breaker approach - we have heard from New South Wales, we have visited there and looked at that, the ACT and Victoria, but Victoria's has not been tested as such. Within the ACT model - which is also a small jurisdiction with only one House - a requested document, once contested, is automatically referred to the arbiter for consideration. This is, I would have to check -

Prof TWOMEY - I was also going to say, does that cover Cabinet documents? In New South Wales, the difference with cabinet documents is simply because we don't have legislation, so this is all based on this notion of reasonable necessity and the court has said that reasonable necessity does not extend to the Cabinet documents because of the effect that has on the principle of responsible government. It would be different in Tasmania because you have legislation. In your case it would a matter of interpreting the scope of the statue that says that there is a power to send for documents. You have to try to say, how do you interpret what is a power to send for documents? What does that mean? It might well be that the court would interpret in the same way, as the court did in relation to reasonable necessity in New South Wales, but not necessarily, so you would need to be looking at intention. It might be that you are looking at principles of responsible government, et cetera, but it is much harder to know how that would be interpreted, especially without going to a court ,which I don't think is a particularly good way of dealing with it. Litigation and these things can be quite precarious.

CHAIR - I would have to check with the ACT submission and their evidence as to whether cabinet-in-confidence documents are exempt. It seems too easy to say that something is a Cabinet document and that is why it will not be given to us to provide to the arbiter.

Prof TWOMEY - One difference in New South Wales would be the way the arbiter process works. The state has to hand over the documents to the Legislative Council first. Therefore, once you have handed over the documents to the Legislative Council regardless of whether they are kept confidential from the public or just seen by members, it means that the government has surrended all control over all documents at that point and the House can, at any point, make them public.

If, however, you had a different system in relation to, for example, any of these claims of privilege, the independent arbiter would first assess whether the claims of privilege were legitimate before they went to the House and then the House could deal with them. The government may be more relaxed about that because it would know that if it was genuinely claiming privilege in relation to a Cabinet document, it would never actually go to the House and be in the House's control. That might be way of looking at it. I don't imagine that the government would be terribly thrilled with any of that, but if your government is behaving in an appropriate, legitimate way and was confident that an independent arbiter would say the same, it might be less concerned. The problem in New South Wales was always, well, once it gets to the point of dealing with the independent arbiter, et cetera, you've lost control over the documents anyway.

CHAIR - Yes. The ACT submission doesn't seem to be clear but I will go back to their evidence as well. I will read from the ACTs submission to you: the Chief Minister claimed privilege over a two-volume report. The ACT Health Infrastructure Asset and Condition Report and Minor Works Priorities on the basis that it -[TBC]

> Was prepared solely to Cabinet and a decision by Cabinet 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 would have inevitably disclosed the reasonings that Cabinet adopted in making its decisions.

It goes on to say -

> While acknowledging the documents would disclose the position adopted by a single minister in such a way as to lead to the identification of the competing stances taken by ministers in insuring Cabinet decision and could, to a degree, disclose the longer-term strategies of the present government regarding Health, the independent arbiter did not uphold the claim of privilege.

That was in one case.

Prof TWOMEY - Okay, that suggests that their independent arbiter is determining claims of privilege in relation to Cabinet documents. Maybe that's done at a point outside or before the documents are handed over to the Legislative Council, so it would be worth having a look at that and seeing how that works.

CHAIR - The documents, once contested, go to the clerk, who provides them directly to the arbiter. The members don't see them at that point.

Prof TWOMEY - Right, okay. That's different to what happens in New South Wales.

CHAIR - It is different. I don't thing Bret Walker will be happy with this clause in their Standing Orders because he was of a view, from my understanding, that the arbiter should provide advice and not a decision about what should happen with the document. Point (k) of their standing order 213A says, 'If the independent arbiter upholds the claim of privilege the clerk shall return the document or documents to the Chief Minister's directorate.'.[TBC] The Clerk is making a determination, almost based on the arbiter's advice rather than the parliament. All models have their intricacies so it's important for us to try to find a way that doesn't cause the problems you've suggested you'd be wary of but also provides appropriate scrutiny.

Prof TWOMEY - Yes, the committee really does need to have a look at the different ways of doing it. On the one hand, your interest is making sure that the government is not effectively cheating in relation to when it claims privilege but you want to make sure that, when there are genuine reasons for matters to be privileged, those are respected and that the information isn't just made public for party political purposes. That's the balance.

CHAIR - Yes. Also, the parliament, being the final decision-maker, as opposed to the -

Prof TWOMEY - Yes, although the problem with the House being the final decision-maker is that it depends very much on the political make-up of the House. If your House is comprised in a way that's opposed to the government, you potentially get back into those party-political fights

where the public interest runs second and political advantage in embarrassing the government runs first. That can be problematic as well.

Mr DEAN - Professor Twomey, you started off by saying that one side of you supports release, the other side does not. Have you been able to add the two sides up to see which one comes out on top?

Prof TWOMEY - I am completely conflicted on that. It depends particularly on whether I want to see it procured or not. All of us have self-interest in all of this. Yes, I am concerned about the process being overused and abused. I have seen that happen in New South Wales, and it is wrong. Equally, I am concerned about governments being unaccountable. Both of those matters deeply concern me, and where the balance is will often be different in relation to each particular example.

Sometimes governments are behaving outrageously and not producing documents, but at other times, upper Houses are behaving outrageously in requiring production where it is actually not in the public interest. With all of this, a balance is needed, but it is very hard to work out a mechanism to work out the perfect balance - and I have to say, I do not know what that is.

CHAIR - If there was a step in the process where the order is made, and the committee or member has to get the support of the House to refer the dispute to the arbiter. First of all, there is a House agreement that this is going to happen, then that may take the political heat out of it, unless you have an overly politicised upper House?

Prof TWOMEY - Yes. The New South Wales upper House has been highly politicised for a long time. It may well be different in Tasmania, if you need a majority of the House and the majority is comprised of a majority of Independents.

Having said that, my suspicion is always that the Independents would err in favour of release of documents. One of the things about being an Independent and not being part of the government is that you are more interested in revealing things, so that you can act upon them, and you do not have the same interests as governments in being able to govern in a manner that does not cause difficulties, by publicly revealing things that should not be revealed at that time.

Independents are always going to have a different perspective on this than people who are either in government, or expecting to be in government in the future.

Mr DEAN - My next question is in relation to joint House committees requesting documentation from government, versus an independent person simply requesting information. Should they be treated any differently? One of the matters bringing this inquiry to where it currently is, was a joint House committee, a public accounts committee requiring a document of the Government.

Prof TWOMEY - A joint House committee is a difficult area, because on the one hand it has greater legitimacy in that it has representatives of both Houses in it. From that point of view, it is a bit more parliament than only simply a House.

Having said that, it would depend very much on how your joint House committees are comprised. We hear they have a majority from the lower House, or a majority from the upper

House, or is there a majority of Government on them, or is there a majority of non-government on them? That makes a difference as well.

As a general principle, particularly for things like public accounts committees, normally they have statutory provisions that give them greater powers. At the Commonwealth level, the Public Accounts Committee does have more extensive powers, so not only relying on standing orders, but actua; statutory requirements, so that may make a difference as well.

Mr DEAN - The Public Accounts Committee here does have a statute that we operate under, and we certainly had some additional powers in, that is for sure.

Prof TWOMEY - Like the Auditor-General, public accounts committees are also often, in fact, incredibly important in keeping governments responsible in spending. There is a big issue as well at the Commonwealth level, and great powers are given to the Auditor-General in relation to access to documents, for the same reason that it is important that governments are kept accountable when it comes to spending.

There can also be a greater justification for giving a public accounts committee more extensive powers in relation to production of documents than perhaps other committees that deal with perhaps more partisan political matters rather than questions of government spending.

Mr DEAN - It has been suggested and a lot of evidence has been given to us if senior state service who are corresponding with ministers and Cabinet, were of the view their documents and information will or could be released to the public or media, they would be more careful - is that the right way to put it - but would be restricted somewhat in what they might say in their written documentation. Did you experience this in your position at Parliament?

Prof TWOMEY - Absolutely. 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.

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.

Mr DEAN - True, absolutely right. Thanks for that, Anne.

Ms WEBB - Hello Anne, it is Meg Webb here. Can I discuss this more with you? 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 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 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 the 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, then 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.

I am conscious of the fact that particularly at the Commonwealth level I am frequently told by people these days that the public servants are quite cowered by government and are extremely reluctant to tell government things that they don't want to hear and I think it is a real problem at the Commonwealth level at the moment and I have heard reports on that from many ex-public servants saying that the position at the Commonwealth levels for various other reasons have got worse and that is not so much because of risk of it appearing in Parliament because indeed the Senate doesn't actually really push terribly hard for access to documents. It is much gentler than the New South Wales or much less aggressive that the New South Wales Legislative Council. There are a whole lot of other reasons as well why public servants are wary about what they write but I think it is a genuine issue.

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? Our State Service Act requires public servants to act impartially, with integrity and honesty but particularly with impartiality. To do that, you need to be able to stand by your advice, to say that you asked me to do this job and here it is. If a minister chooses to accept it, your job is done at that point.

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.

CHAIR - I couldn't agree more. We are nearly out of time, Anne, is there anything else you wanted to add that we have not covered?

Prof TWOMEY - No, I am fine. I hope I was helpful.

CHAIR - Thank you very much for your time. It has been interesting hearing what you have had to say. We appreciate that.

THE WITNESS WITHDREW.