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The Hon Ruth Forrest MLC, Chair
Legislative Council Select Committee
Parliament of Tasmania
Parliament House
HOBART TAS 7000

Friday 28 June 2019

Dear Chair

We are pleased to have the opportunity to make a submission to the Legislative Council Select Committee on the Production of Documents inquiry.

We consider that the Committee may find the experience of a Joint Investigative Committee of the Parliament of Victoria, combined with recent revisions to the Victorian Department of Premier and Cabinet's *Guidelines for Appearing Before and Producing Documents to Victorian Inquiries* that were updated in December 2017, informative.

We published an academic journal article in the *Australasian Parliamentary Review* in 2018 outlining the challenges faced by the Environment, Natural Resources and Regional Development Committee in 2015-16 in accessing documents during an inquiry into the Country Fire Authority (CFA) Training College at Fiskville. Both of us worked as researcher officers for the Committee conducting this inquiry.

The challenges faced by that Committee in accessing documents led them to include a recommendation in their final report that the government amend the guidelines for how government agencies interact with parliamentary committees. The guidelines were subsequently substantially revised and our article evaluates the revisions, and concludes that while they are a significant improvement, the revised guidelines may not completely solve the problems faced during the Fiskville inquiry. Further suggestions for reform are canvassed.

We have attached our article and the guidelines for the consideration of the Committee.

Best wishes

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A Watershed in Committee Evidence Gathering: Victorian Parliament's Inquiry into the CFA Training College at Fiskville*

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Abstract

In 2015-16 the Environment, Natural Resources and Regional Development Committee—a Joint Investigatory Committee (JIC) of the Parliament of Victoria—conducted an inquiry into the Country Fire Authority (CFA) Training College at Fiskville. The complexity of the inquiry led to this becoming the first JIC to table a report in Parliament about challenges faced when accessing documents from government agencies. The Committee's final report recommended that the Victorian Government's guidelines on how government agencies interact with parliamentary committees be amended, a recommendation that was accepted by the Government. Revised guidelines that, for the first time, dealt with the provision of documents to parliamentary committees, were issued in December 2017. This article considers the likely effectiveness of these guidelines in resolving the types of problems that arose during the Fiskville inquiry should they arise again in future inquiries. It argues that, notwithstanding the improvements brought about by the 2017 revised guidelines, JICs will need further powers if future inquiries that reach the level of complexity encountered by the Fiskville inquiry are to be conducted without hindrance.

¹ Legal Research Officer for the Environment, Natural Resources and Regional Development Committee from September 2015 – May 2016. The views expressed in this article should in no way be taken to represent the views of the Committee. The authors are grateful for the research assistance carried out by Jacob McCahon.

² Legal Research Officer for the Environment, Natural Resources and Regional Development Committee from March – September 2015. The views expressed in this article should in no way be taken to represent the views of the Committee.

INTRODUCTION

Joint Investigatory Committees (JICs) are established under the *Parliamentary Committees Act 2003* (Vic). The Act sets out the subject area that each is responsible for,³ the composition of the committees (generally a total of seven Members drawn from both houses, with membership from a range of political parties) and the procedures and powers governing committees. In the 58th term of the Victorian Parliament ten JICs were established. Some inquiries have been narrow in scope, such as the 2016-17 *Inquiry into lowering the probationary driving age in Victoria to seventeen* by the Law Reform, Road and Community Safety Committee. Others have addressed complex problems, such as the 2015-16 *Inquiry into abuse in disability services* by the Family and Community Development Committee, and the 2015-16 *Inquiry into portability of long service leave entitlements* by the Economic, Education, Jobs and Skills Committee.

More recently the Victorian Parliament has tasked JICs with inquiring into long-term systemic failures or wrongdoing. For example, in 2013 the Family and Community Development Committee tabled its report of its *Inquiry into the handling of child abuse by religious and other non-Government organisations*.⁴ This inquiry had commenced in April 2012, some months prior to the announcement, on 12 November 2012, of a national Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission ran for five years and produced a final report in 17 volumes⁵—a clear indication of the complexity of this subject.

The inquiry by the Environment, Natural Resources and Regional Development Committee that is the subject of this article falls into the more complex category. This was the 2015-16 *Inquiry into the Country Fire Authority (CFA) Training College at*

³ There is a provision in the *Parliamentary Committees Act 2003* (Vic) setting out the functions of each committee. For example, the functions of the Family and Community Development Committee are outlined in section 11, the functions of the Law Reform, Road and Community Safety Committee are outlined in section 13 and the functions of the Electoral Matters Committee are outlined in section 9A. The committees may change when a new term of Parliament commences.

⁴ Family and Community Development Committee, *Betrayal of Trust. Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*. Parliament of Victoria. Tabled 13 November 2013.

⁵ Royal Commission into Institutional Responses to Child Abuse, *Final Report*, Commonwealth of Australia, 2017.

Fiskville. This complexity, including the broad scope of the Inquiry's terms of reference, led the Committee to seek access to an unprecedented amount of documentation from the Victorian Government—15-20,000 documents in total.⁶ The Committee's commitment to accessing these documents was unwavering in the face of many obstacles (see below). Part way through its deliberations, in December 2015, it saw fit to table a Special Report to Parliament specifically on the production of documents.⁷ It also made recommendations to the Government in its final report intended to prevent future inquiries from facing the same challenges.

The Committee's persistence in this regard, and its consequent recommendations, have proved to be very significant. Revised guidelines governing the provision of documents by government agencies to all future inquiries have been developed.⁸ The guidelines apply to Victorian Royal Commissions and Boards of Inquiry in addition to parliamentary inquiries.⁹

OVERVIEW

The article commences with an outline of the Fiskville Inquiry and explains why the Committee sought to access many documents from government agencies. It also outlines the nature of the challenges the Committee faced with accessing the documents. The article then examines the steps taken by the Committee to access the documents and to ensure that future JIC inquiries do not face similar challenges. Next, the article analyses the Government's response to the recommendation by the Committee (namely, the issuing of revised guidelines for government agencies appearing before and providing documents to parliamentary committees), the new content of the guidelines and how they differ from the previous guidelines, dated

6 Environment, Natural Resources and Regional Development Committee, *Inquiry into the CFA Training College at Fiskville Final Report*. Parliament of Victoria. Tabled 24 May 2016: 39 (hereafter *ENRRDC Final Report*).

7 Environment, Natural Resources and Regional Development Committee Inquiry into the CFA Training College at Fiskville Special Report on Production of Documents. Parliament of Victoria. Tabled 12 November 2015 (hereafter *ENRRDC Special Report*).

8 Department of Premier and Cabinet, *Guidelines for Appearing Before and Producing Documents to Victorian Inquiries*, Victorian Government, December 2017 (hereafter *2017 Guidelines*).

9 *2017 Guidelines*, see Part 2 'Types of Inquiries and their Powers'.

October 2002.¹⁰ The ability of the 2017 Guidelines to resolve the types of problems that arose during the Fiskville inquiry for future similarly complex inquiries is considered. The article concludes with some suggestions for further powers that may further strengthen the 2017 Guidelines.

THE FISKVILLE INQUIRY AND ACCESS TO DOCUMENTS

In December 2011, a newspaper article was published suggesting links between cancer and other diseases and firefighter training practices at Fiskville. The article placed particular emphasis on the views of the late Mr Brian Potter, a former Chief Officer of the CFA, who believed exposure to chemicals at the site had caused his cancer.¹¹ The CFA responded by announcing an independent inquiry into Fiskville chaired by Professor Robert Joy.¹² Professor Joy's appointment was criticised for several reasons, including that he was a former Deputy Chief Officer at the Environment Protection Authority (EPA).¹³

A second newspaper article was published in June 2012, raising questions about the quality of the recycled water used in training activities.¹⁴ A WorkSafe investigation followed¹⁵ and the United Firefighters Union raised concerns on behalf of its members.¹⁶ Due to concerns about contamination, the site was closed in March 2015. This occurred three months after the parliamentary inquiry, which had been announced on 9 December 2014,¹⁷ commenced deliberation.¹⁸

10 Department of Premier and Cabinet, *Guidelines for Appearing Before State Parliamentary Committees*, Victorian Government, October 2002 (hereafter *2002 Guidelines*).

11 R. Lamperd, 'Cancer Town'. *Herald Sun*, 6 December 2011. The content of this newspaper article was discussed in *ENRRDC Final Report*, p. 6.

12 Professor Robert Joy, *Understanding the Past to Inform the Future: Report of the Independent Fiskville Investigation*, 2012.

13 *ENRRDC Final Report*, p. 6.

14 R. Lamperd, 'Water Contamination Scare in Fiskville'. *Herald Sun*, 25 June 2012.

15 *ENRRDC Final Report*, p. 6. See Chapter 7 of the *Final Report* for more details about WorkSafe's involvement.

16 *ENRRDC Final Report*, p. 7.

17 Premier of Victoria, 'Fiskville Inquiry Will Tell Firefighters the Whole Truth', Media Release, 9 December 2014.

18 *ENRRDC Final Report*, pp. 23-26.

Given this background, the terms of reference for the inquiry, issued on 23 December 2014, were broad. They required the Committee to investigate wide-ranging topics over a long time frame. They also required an examination of a complex regulatory framework including a range of Victorian legislation (such as occupational health and safety law and environmental law)¹⁹ and regulatory bodies (such as WorkSafe and the EPA).²⁰ Matters to be addressed included pollution, contamination and unsafe activities (paragraph 1), health impacts on ‘employees, residents and visitors’ (paragraph 2) and the role of executive management both past and present (paragraph 3). All the foregoing terms of reference applied from 1970 (when the CFA opened the training centre) to the present; that is, to a period of more than 40 years. The Committee was also tasked with considering the prospect of the site being decontaminated (paragraph 4) and options for providing redress or justice to those who had been adversely affected (paragraph 5).²¹

The Committee employed the usual types of evidence gathering carried out by JICs, including:

- inviting submissions from individuals and organisations—the Fiskville inquiry received 450 submissions;²²
- public hearings where a range of witnesses give evidence—in the Fiskville inquiry this included people adversely affected by the practices, CFA management, scientific experts, representatives from regulatory agencies and experts on compensation schemes;
- evidence-gathering trips—as part of the Fiskville inquiry the Committee visited Canberra and Germany;²³ and

19 See particularly Environment, Natural Resources and Regional Development Committee, *Inquiry into the CFA Training College at Fiskville Interim Report*. Parliament of Victoria. Tabled 24 June 2015, p. 23-38 (hereafter *ENRRDC Interim Report*).

20 See particularly *ENRRDC Final Report*, Chapters 7 and 8.

21 *ENRRDC Interim Report*, p. vii.

22 A call for submissions was placed on the Committee’s website, newspaper advertisements were issued, and the *Interim Report* notes that ‘the Committee also wrote to a range of organisations inviting submissions, including government departments, local councils, and emergency management organisations’. *ENRRDC Interim Report*, p. viii.

23 There is very little experience in Australia of decontaminating and remediating sites similar to Fiskville. This was something that paragraph 4 of the Committee’s terms of reference required them to report on. The

- site visits.²⁴

It soon became apparent that a document discovery process would be needed to complement these strategies. Early in the inquiry the Committee heard evidence that individuals were having trouble accessing information from the CFA about whether their health might have been affected by training practices and by chemicals used in firefighting foams at the Fiskville training centre.²⁵ Therefore, from the outset the Committee resolved (in the words of the Chair) to 'find out the truth'.²⁶ This led to the Committee requesting documents from the CFA, as well as a range of other regulatory agencies, including the local Council,²⁷ the EPA and WorkSafe.²⁸

Access to documents also became particularly important for addressing paragraph (3) of the terms of reference: 'a study of the role of past and present executive management at Fiskville'. For this purpose, the Committee decided to access the minutes of the CFA Board meetings for the time frame being canvassed by the inquiry.²⁹ Some of the content in the minutes and their attachments contradicted the evidence the Committee heard during public hearings. A number of executives gave evidence during these hearings that they were not aware of contamination at Fiskville prior to 2011 (when the first newspaper article was published). For example, Mr Mick Bourke, Chief Executive Officer from September 2009 to February 2015, told the Committee that '[w]hen the story broke in 2011 it was like a bombshell in CFA, and people initially did not seem to want to put up their hand and say that there were things that could have been wrong at Fiskville'.³⁰ The Board minutes revealed that there had been some negotiations between 2008 to 2010 between Airservices Australia and the CFA about use of the Fiskville site,³¹ but that on 31 May 2010 Mr

Committee chose to visit Germany because it was considered to be 'a world leader in decontaminating sites similar to Fiskville'. *ENRRDC Final Report*, p. 34.

²⁴ *ENRRDC Interim Report*, Chapter 5; *ENRRDC Final Report*, Chapter 2.

²⁵ *ENRRDC Interim Report*, p. vi.

²⁶ *ENRRDC Interim Report*, p. vi.

²⁷ Moorabool Shire Council.

²⁸ *ENRRDC Final Report*, p. 426.

²⁹ *ENRRDC Final Report*, p. 40.

³⁰ *ENRRDC Final Report*, p. 174. Other examples include Mr Euan Ferguson, Chief Officer from November 2010 to November 2015, and Mr Peter Rau, Officer in Charge at Fiskville from April 2005 to July 2008.

³¹ *ENRRDC Final Report*, pp. 175-77.

Bourke reported to the Board that Airservices had withdrawn from these negotiations because of 'issues of potential chemical contaminations at Fiskville'.³² This directly contradicted Mr Bourke's oral evidence.

The Committee's final report concluded that:

the documentary evidence shows an awareness of significant problems at Fiskville at all levels of executive management from the 1970s to December 2011. However, witnesses that appeared before the Committee at public hearings consistently claimed that they had a lack of knowledge.³³

The Committee formed the view that witnesses were claiming lack of knowledge about four areas of which they should have been aware, based on the minutes of CFA board meetings. These were (1) chemical contamination, (2) occupational health and safety, (3) dangerous goods storage and disposal and (4) concerns surrounding water supply and quality.³⁴

When referring to the value of the documents more broadly, the Committee described them as 'indispensable'.³⁵ The Committee noted that the documents had been used for a range of purposes, including:

- to either verify or refute claims made in traditional sources of evidence relied upon by Parliamentary Committees (that is, submissions and transcripts of witnesses' evidence before the Committee). The documents have also been used to fill in gaps in the evidence. In some cases the documents provide the only source of non-anecdotal evidence for certain matters relevant to the inquiry.³⁶

JICs have broad evidence-gathering powers under the *Parliamentary Committees Act 2003*. Section 28(1) of the Act provides that a JIC 'has power to send for persons, documents and other things'. Prior to the Fiskville inquiry this power had proved to

³² ENRRDC Final Report, p. 177.

³³ ENRRDC Final Report, p. 194; See also generally Chapter 5.

³⁴ The information contained in the CFA Board documents about these four areas is outlined in Chapter 5 of ENRRDC Final Report, pp. 174-93.

³⁵ ENRRDC Final Report, p. 44.

³⁶ ENRRDC Final Report, p. 43.

be sufficient even in complex inquiries. The Family and Community Development Committee, when conducting the child abuse inquiry that also involved document gathering, did not experience any problems accessing information. That Committee noted in its final report:

The Committee did not need to resort to its powers to compel documents or witnesses. All of the organisations and individuals approached cooperated fully. Ultimately, no individuals or organisations refused a request to attend a hearing or to provide information.³⁷

In stark contrast to this, the Fiskville Committee faced multiple challenges. These were summarised in its final report as follows:

The Committee had to request certain documents multiple times, received inadequate responses to summonses and received multiple versions of the same documents (for example, a version containing redactions due to a potential claim of executive privilege, followed by a complete (un-redacted) version after the Victorian Government determined that it would not claim executive privilege over the material).³⁸

Additionally, the Victorian Government Solicitors Office (VGSO) informed the Committee in correspondence dated 11 September 2015 that Board papers for the first 26 years of the CFA's operations from prior to 1996 'no longer exist'.³⁹ After the Committee Chair asked for an explanation of why this was the case, the VGSO conceded on 25 September 2015 that the statement was inaccurate.⁴⁰

The major challenge faced by the Committee when attempting to access the CFA Board papers was the Government's claims of executive privilege over the content of some of them. Because of these claims, the VGSO redacted large parts of board papers, and refused to provide some documents in their entirety, because of the 'potential' for the executive to claim executive privilege over the content.⁴¹

³⁷ ENRRDC Final Report, p. 32.

³⁸ ENRRDC Final Report, p. 47.

³⁹ ENRRDC Special Report, p. 8.

⁴⁰ ENRRDC Final Report, p. 50.

⁴¹ ENRRDC Special Report, p. 10.

These claims of executive privilege led to significant delays. The Committee's Special Report noted that 'the VGSO also advised that the process to determine whether such a claim will be made is time consuming'.⁴² The claims of executive privilege ultimately resulted in the Committee requiring two extensions to the inquiry due date.⁴³

In the Committee's final report, the Committee reflected on the release of CFA Board papers after the executive had had an opportunity to decide whether it in fact wished to claim executive privilege or not. The Committee noted that the majority of the documents had eventually been provided to the Committee and 'of the minutes containing material redacted by the VGSO, the Government formed a contrary view about executive privilege in around 85 percent of cases'.⁴⁴

The Committee also expressed its displeasure at the redaction in one instance of material in one set of minutes that had been provided in full to a member of the public pursuant to a Freedom of Information request.⁴⁵ The Committee noted that it 'believe[s] that the VGSO should know that if material can be provided in full to a member of the public, there is no justification for providing a redacted version to a Parliamentary Committee'.⁴⁶

As noted above, the Board papers led to significant findings in the final report in response to the term of reference concerning the role of executive management both past and present (paragraph 3). The Committee's persistence was clearly justified. The way the Committee met the challenges it faced in accessing documents therefore merits more detailed consideration.

THE COMMITTEE'S RESPONSE

As noted in the Introduction, the Committee tabled a *Special Report on Production of Documents* in Parliament in December 2015. This was its first main response. The

⁴² ENRRDC *Special Report*, p. 10.

⁴³ ENRRDC *Final Report*, pp. 39 and 47.

⁴⁴ ENRRDC *Final Report*, p. 47.

⁴⁵ ENRRDC *Final Report*, p. 48.

⁴⁶ ENRRDC *Final Report*, p. 48.

second was to outline the challenges it faced in accessing the documents in the final report that was tabled in May 2016. The third was to make recommendations to the Government in that report aimed at ensuring that future JICs did not face the same challenges. Each of these will be considered in turn.

In many ways, the first response was the most attention-grabbing. It was unprecedented for a Victorian parliamentary committee to table a report dealing specifically with obstruction of evidence-gathering.⁴⁷ When tabling the Special Report, the Committee Chair expressed the Committee's 'disappointment' that this step had to be taken.⁴⁸ It was described by the Committee as necessary for the following reasons:

The Committee has promised to undertake a transparent inquiry. In view of its commitment to transparency, on 5 November 2015 the Committee unanimously determined a need to inform the Parliament of Victoria that the non-disclosure of CFA Board papers has implications for the Committee's capacity to adequately and transparently inquire into key aspects of the terms of reference for the inquiry.⁴⁹

The Special Report summarised the extensive correspondence that had taken place between the Committee and the VGSO,⁵⁰ listed the number of minutes that had been received by the Committee at that point,⁵¹ then outlined each of the following challenges that the Committee had experienced as follows:

- slow production of documents
- ad hoc production of documents
- the use of a filtering system for determining information to be produced

⁴⁷ There had been problems experienced by the Victorian Legislative Council with access to documents in 2007, but this did not result in the tabling of a special report. Rather, the Council had passed a motion. See G. Taylor, 'Parliament's Power to Require the Production of Documents—A Recent Victorian Case', *Deakin Law Review*, 13(2), 2008, pp. 17-48.

⁴⁸ *ENRRDC Special Report*, p. vii.

⁴⁹ *ENRRDC Special Report*, p. 1.

⁵⁰ *ENRRDC Special Report*, pp. 4-5 and Appendix 1.

⁵¹ *ENRRDC Special Report*, Table 1.

- duplication of documents
- claims that existing documents no longer exist
- extensive redaction of material due to potential claims of executive privilege.⁵²

In short, it publicised the Committee's unanimous displeasure at the lack of cooperation by a government agency (the CFA) and its legal representative (the VGSO) with the inquiry. This resulted in further media attention to an inquiry that already had a high profile.⁵³ Most importantly perhaps, it was effective. The Board papers sought were supplied.

The Committee's second response—sections of its final report—went into further detail about these matters. The majority of Chapter 2—the Chapter outlining the inquiry process—was dedicated to the document discovery process. There was a heading about 'challenges associated with accessing CFA documents' followed by an eight-page discussion.⁵⁴ The challenges related to both the board minutes and accessing financial information.

Following the discussion, one of the Committee's findings was '[t]hat the Victorian Government Solicitor's Office was obstructive and uncooperative in the document discovery process'.⁵⁵ This is a serious finding for a committee to make in relation to a government agency's legal representative.

The Committee dedicated a further four pages of its final report⁵⁶ and formulated two recommendations with the purpose of 'addressing challenges with accessing documents', noting that:

If a similar inquiry arises in the future—that is an inquiry that requires the Parliamentary Committee to access documents in order to address the Terms of Reference provided by the Parliament—there needs to be

⁵² ENRRDC *Special Report*, p. 5.

⁵³ D. Gray, 'CFA Blasted by Parliamentary Committee over Fiskville'. *The Age*, 12 November 2015; J. Edwards, 'Victoria's CFA Denies it Refused to Give Fiskville Evidence to Parliament'. *ABC News*, 12 November 2015; R. Lamperd and A. White, 'CFA Refuses to Hand over Fiskville Inquiry Files'. *Herald Sun*, 12 November 2015.

⁵⁴ ENRRDC *Final Report*, pp. 46-53.

⁵⁵ ENRRDC *Final Report*, p. 53, Finding 18.

⁵⁶ ENRRDC *Final Report*, pp. 54-57.

increased clarity surrounding the provision of documents to Parliamentary Committees.⁵⁷

These two recommendations amount to the third element of the Committee's response to these issues.

The first recommendation (*Recommendation 2* in the Report)⁵⁸ concerned proposed amendments to the *Victorian Model Litigant Guidelines*, which apply to Government lawyers during litigation.⁵⁹ The Government judged this recommendation to be irrelevant. In its response to the Fiskville inquiry report, it made the following comments about this recommendation.

The *Model Litigant Guidelines* relate to litigation and the conduct of Government agencies in dealing with claims made by citizens/private entities, rather than appearances before, and the production of documents to, Parliamentary Committees.⁶⁰

The Government chose instead to focus its response to the Committee's other main recommendation on this subject (*Recommendation 3* in the Report), which was as follows:

That the Department of Premier and Cabinet amend the Guidelines for Appearing Before State Parliamentary Committees so that they contain some standards for conduct when a Parliamentary Committee requests information and documents. The standards should reflect relevant principles contained in the Model Litigant Guidelines.⁶¹

The *Guidelines for Appearing Before State Parliamentary Committees* were outdated—they were issued in October 2002 and pre-dated the 2003 Act that currently regulates the operation of JICs. The Committee observed that the 2002 'Guidelines

⁵⁷ ENRRDC Final Report, p. 54.

⁵⁸ ENRRDC Final Report, p. 56.

⁵⁹ The guidelines stem from Appendix B to the Commonwealth's *Legal Services Directions*, issued pursuant to section 55ZF of the *Judiciary Act 1903* (Cth). See generally G. Appleby, 'The Government as Litigant', *University of New South Wales Law Journal*, 37(1), 2014, pp. 94-124.

⁶⁰ Victorian Government, *Victorian Government's Response to the Environment, Natural Resources and Regional Development Committee's Inquiry into the CFA Training College at Fiskville*, 24 November 2016, p. 4.

⁶¹ ENRRDC Final Report, p. 57.

do not encourage agencies to provide information in a timely and cooperative fashion' and provided only a few brief references to the provision of documents to JICs by government agencies.⁶²

The Victorian Government acted on this recommendation (*Recommendation 3*). The next section of this paper notes this response, compares the revised (2017) Guidelines with those they replace, and considers their likely effects. The discussion provides an assessment of whether the 2017 Guidelines are likely to address the types of obstacles faced by the Committee during the Fiskville inquiry. It also analyses the likely impact of the revised Guidelines on future inquiries by JICs with particular emphasis on complex inquiries.

THE REVISED GUIDELINES

The Victorian Government response to the Fiskville inquiry report (issued 6 months after the final report that is, 24 November 2016) made the following comments about the Committee's recommendation to update its Guidelines:

The Government is currently revising and updating its Guidelines for Appearing Before State Parliamentary Committees to reflect relevant principles of the Model Litigant Guidelines. [...]

Therefore, the revised Guidelines will:

- promote early engagement with inquiries to minimise the potential for misunderstandings;
- include standards of conduct for responding to requests for documents that reflect relevant principles of the Model Litigant Guidelines; and
- encourage departments and agencies to consider other options available to provide inquiries with the information they need where documents are subject to claims of executive privilege.

The revised Guidelines are expected to be released in early 2017.⁶³

⁶² ENRRDC *Final Report*, p. 56.

⁶³ Victorian Government, *Victorian Government's Response*, p. 4.

The new Guidelines, entitled 'Guidelines for appearing before and producing documents to Victorian inquiries' became available in December 2017'.

COMPARISON OF THE 2002 AND 2017 GUIDELINES

The first difference to be observed between the two guidelines is a matter of scope. The 2002 Guidelines were predominantly confined to parliamentary inquiries, with only a brief discussion about appearance before Victorian Royal Commissions included at the end of the document.⁶⁴ The 2002 Guidelines had not been updated to align with the introduction of the *Inquiries Act 2014* (Vic). That Act provides for Boards of Inquiry and updated the framework governing Royal Commissions. The 2017 Guidelines have been expanded and provide guidance on dealing with Boards of Inquiry and Royal Commissions established under the 2014 Act, in addition to Parliamentary inquiries. The guidance provided relates both to appearances before committees at public hearings and to provision of documents to all three types of inquiries.

As the focus of this article is parliamentary inquiries, it will not deal with the Guidelines about Boards of Inquiry and Royal Commissions, other than to note that there are distinct differences between these three types of processes and the clear distinctions made in the Guidelines are welcome.⁶⁵

The second difference is that the 2017 Guidelines go into significantly more detail about the provision of documents to parliamentary committees. In the 2002 Guidelines, references to the provision of documents tend to envisage documents being referred to, or requested, during a public hearing. For example, they included a heading 'What Documents Should be Disclosed in Committee Hearings?'⁶⁶ In the 2017 Guidelines, there is an entire Part (Part 3) entitled 'Requests for documents' that provides direction about requests made prior to public hearings, in addition to some brief references to requests for documents during hearings.⁶⁷ There is also a

⁶⁴ 2002 Guidelines, pp. 23-25.

⁶⁵ See, for example, guidance on answering questions that may incriminate the witness. 2017 Guidelines, paragraphs 127-131.

⁶⁶ 2002 Guidelines, paragraph 12.

⁶⁷ 2017 Guidelines, paragraph 132.

heading in this Part about requests for documents that details how the Model Litigant Guidelines apply. This encourages compliance with principles such as ‘acting fairly’, ‘dealing with requests promptly’ and considering the inquiry’s resources when determining how to provide documents.⁶⁸

The third difference is that guidance is provided in the 2017 version on privileges claimed by the executive. The 2002 Guidelines contained a section entitled ‘Can a witness claim public interest immunity?’ and defined this as ‘a traditional legal doctrine which allows Government to prevent the disclosure of certain evidence in legal proceedings if it is in the public interest to keep that evidence undisclosed’.⁶⁹ The Guidelines went on to list the types of documents and oral evidence over which immunity may have been claimed during a parliamentary committee inquiry.⁷⁰ There was no reference to ‘executive privilege’ in the 2002 Guidelines.

In contrast, the 2017 Guidelines clarify that public interest immunity only applies in legal proceedings and ‘executive inquiries including a Royal Commission or Board of Inquiry’.⁷¹ With respect to parliamentary committee inquiries however, the relevant type of privilege is executive privilege.⁷² The latter is not precisely defined in the Guidelines. They contain broad-brush statements such as ‘[e]xecutive privilege is a privilege held by the Executive Government’⁷³ and ‘[i]t is similar to public interest immunity, but applies in the context of parliamentary committee inquiries (as opposed to litigation before the courts and executive inquiries such as Royal Commissions).’⁷⁴ On the other hand, the Guidelines helpfully contain two separate appendices, one on ‘Executive Privilege’ (Appendix A) and another on ‘Public Interest Immunity’ (Appendix B). Each lists the types of information over which respective claims might be made. The Guidelines also clearly distinguish between provision of documents and oral evidence in relation to both public interest immunity and executive privilege (the relevant paragraphs are provided at the end of each of the

⁶⁸ 2017 Guidelines, paragraph 36.

⁶⁹ 2002 Guidelines, paragraph 66.

⁷⁰ 2002 Guidelines, paragraph 71. There is also a reference to Cabinet processes at paragraph 46.

⁷¹ 2017 Guidelines, paragraph 69.

⁷² 2017 Guidelines, paragraphs 49 and 69.

⁷³ 2017 Guidelines, Appendix A.

⁷⁴ 2017 Guidelines, paragraph 49.

two appendices). Further discussion about the guidance on executive privilege in relation to the problems faced in during the Fiskville inquiry is provided below.

A fourth difference between the 2002 and 2017 Guidelines is that the level of autonomy granted to public officials or individual departments interacting with parliamentary committees is reduced. The 2017 Guidelines introduce new processes for coordinating government agency input to inquiries where there is more than one agency involved. The Guidelines specify that the Department of Premier and Cabinet (DPC) will nominate a 'lead department that will be responsible for coordinating the Government's response to requests for documents made by the committee'.⁷⁵ The Guidelines detail the duties of the lead department, such as writing to the chair of the committee,⁷⁶ seeking Cabinet approval for claims of executive privilege⁷⁷ and considering ways to provide a committee with as much information as possible where claims of executive privilege are involved.⁷⁸

The 2002 Guidelines did refer to a 'lead agency', but they did not provide any guidance as to that agency's role. The Guidelines simply provided that '[w]here more than a single Department (not including DPC) is involved, officials must inform DPC and co-ordinate involvement in committee hearings with the lead agency (where DPC is not the lead agency)'.⁷⁹

The 2017 Guidelines provide more detail about when to seek legal advice than the 2002 Guidelines. A heading in the 2017 Guidelines entitled 'When to seek legal advice' is followed by four paragraphs about getting advice about documents.⁸⁰ The Guidelines note that in some cases executive privilege claims will be clear and legal advice will not be required.⁸¹ However, they also state that '[w]here there is any uncertainty', advice is required.⁸² If an agency is considering presenting a committee with evidence in a way that provides it with the information it needs but does not

⁷⁵ 2017 Guidelines, paragraph 44.

⁷⁶ 2017 Guidelines, paragraph 45.

⁷⁷ 2017 Guidelines, paragraph 53.

⁷⁸ 2017 Guidelines, paragraph 55.

⁷⁹ 2002 Guidelines, paragraph 32.

⁸⁰ 2017 Guidelines, paragraphs 30-42.

⁸¹ 2017 Guidelines, paragraph 41.

⁸² 2017 Guidelines, paragraph 42.

reveal information that is subject to a privilege claim (such as by 'making a presentation to the committee that excludes sensitive material'), legal advice is required.⁸³

The 2017 Guidelines also envisage situations where an official may need to ask the committee's permission to seek legal advice during a hearing, such as if considerations relating to 'secrecy provisions of Acts' or 'court orders or sub judice issues' arise,⁸⁴ or if the witness is concerned that they are being asked to provide a document that may incriminate them,⁸⁵ or to give evidence that may incriminate them.⁸⁶

There was a total of four references to obtaining legal advice in the 2002 Guidelines. Two of these related to claims of public interest immunity, with one paragraph advising that legal advisors or the VGSO can provide 'a more detailed understanding of the above exemption provisions'.⁸⁷ A third concerned information that might be covered by a court order,⁸⁸ and the fourth related to an individual getting 'independent legal advice' if they felt their evidence may incriminate them.⁸⁹

The more detailed specifications as to when legal advice is required, and the involvement of a lead agency, may impact the timeliness of provision of information to committees, a point that will be returned to below.

THE 2017 GUIDELINES AND THE FISKVILLE INQUIRY

Given this background, it is natural to ask whether and to what extent the 2017 Guidelines address the concerns that arose during the Fiskville inquiry. They do so in two ways. The first is the explicit reference included in the Guidelines to the Model Litigant Guidelines. The second is the clarification of the scope of executive privilege

⁸³ 2017 Guidelines, paragraphs 55-56.

⁸⁴ 2017 Guidelines, paragraph 117.

⁸⁵ 2017 Guidelines, paragraph 67.

⁸⁶ 2017 Guidelines, paragraph 131.

⁸⁷ 2002 Guidelines, paragraph 73. See also paragraph 68.

⁸⁸ 2002 Guidelines, paragraph 75.

⁸⁹ 2002 Guidelines, paragraph 96.

and the process to be followed when claims of executive privilege are made. These need to be weighed against the new requirements to seek legal advice in a range of circumstances.

The Committee recommended that principles from the Model Litigant Guidelines be incorporated into the Guidelines for agency's appearing before parliamentary Committees. The key principles mentioned by the Committee are:

2(a): Act fairly in handling claims and litigation

2(c): Deal with claims promptly and not cause unnecessary delay

2(g): Where it is not possible to avoid litigation, keep the costs of litigation to a minimum.⁹⁰

The 2017 Guidelines refer explicitly to these three principles.⁹¹ They add that the provision of documents should be done in such a way that government agencies 'foster cooperation', avoid acting 'in an inflexible manner', consider 'alternative options' where claims of executive privilege are to be made and ensure 'timely provision of information to inquiries and communicating with inquiries early on about any potential difficulties in responding within the requested timeframe'.⁹²

As noted above, the 2002 Guidelines were silent on executive privilege, the source of the majority of the obstacles faced during the Fiskville inquiry. It is therefore a significant improvement to have a definition of the scope of the privilege⁹³ and details about the process to be followed when a claim of executive privilege may be made over documents.⁹⁴ Welcome, too are guidelines about how to proceed when a claim in relation to documents is sustained, as well as when it is not,⁹⁵ and the process if privileged matters arise during oral evidence in a public hearing.⁹⁶

⁹⁰ ENRRDC Final Report, p. 55.

⁹¹ 2017 Guidelines, paragraph 36.

⁹² 2017 Guidelines, paragraph 37.

⁹³ 2017 Guidelines, Appendix A.

⁹⁴ 2017 Guidelines, paragraphs 49-52.

⁹⁵ 2017 Guidelines, paragraphs 53-61.

⁹⁶ 2017 Guidelines, paragraphs 123-126.

Importantly, however, the 2017 Guidelines suggest that agencies redact privileged content in documents and provide them to the parliamentary committee⁹⁷ while a Cabinet submission is prepared to resolve the claim of executive privilege.⁹⁸ However, one of the major problems faced by the Fiskville inquiry was receiving a redacted version of documents, only to receive the entire document after the Government determined that the potential claim of executive privilege was not upheld. This occurred in 85 percent of cases where a redacted version was initially received.⁹⁹ Unless there is a significant improvement in the assessment process, so that the VGSO identifies potential claims of executive privilege that align better with the actual claims of executive privilege, delays to committee inquiries will not be reduced.

The definition of the scope of executive privilege in the 2017 Guidelines may assist this process. During the Fiskville inquiry the VGSO would not provide the Committee with details about the types of privilege claims—only that there were potential claims. The Committee noted in its Special Report that '[d]espite requests for information about the specific nature of executive privilege the state may claim over the CFA Board papers, no advice has been forthcoming from the VGSO'.¹⁰⁰

The Committee's final report gave two examples of material that had been redacted from the CFA Board minutes in the first instance, then later provided to the Committee after it was determined that there was no claim of executive privilege over the content. One of these related to a meeting between the Minister and the CFA Chief Officer and the other related to approval of some amendments to Regulations by the relevant Minister.¹⁰¹ These are both matters that are unlikely to be covered by any of the examples in the 2017 Guidelines. It is therefore possible to be cautiously optimistic that the Guidelines may result in content of this nature not being redacted during future inquiries.

It was noted in the previous section that the 2017 Guidelines require legal advice to be obtained in a variety of circumstances, particularly in relation to potential claims

⁹⁷ 2017 Guidelines, paragraph 52.

⁹⁸ 2017 Guidelines, paragraph 53.

⁹⁹ ENRRDC Final Report, p. 47.

¹⁰⁰ ENRRDC Special Report, p. 11.

¹⁰¹ ENRRDC Final Report, p. 48.

of executive privilege. Much will depend on how the VGSO responds. The Fiskville inquiry made the following finding about the VGSO: '[t]hat the Victorian Government Solicitor's Office was obstructive and uncooperative in the document discovery process'.¹⁰²

There were many reasons for this finding, but there are three particularly pertinent examples. The first is that incorrect information was provided to the Committee about legal expenditure versus expenditure on remediation in response to a summons, as follows:

The VGSO advised the Committee that they had erroneously:

- Included expenditure that was not associated with Fiskville
- Included remediation expenditure as part of the total spent on legal expenses.¹⁰³

The second (noted earlier) is that the VGSO refused to provide the Committee with CFA Board minutes pursuant to a claim of executive privilege when those same minutes had already been provided to the Committee by the CFA directly.¹⁰⁴ The third (also noted earlier) is that the VGSO advised the Committee that the meeting papers for all meetings between 1970 and 1996 'did not exist'. When the Committee questioned this, they VGSO advised that they had located the papers and retracted the claim.¹⁰⁵

The principles from the Model Litigant Guidelines that have now been incorporated into the government agency guidelines *may* ameliorate these concerns with the VGSO. The VGSO has been required to abide by the Model Litigant Guidelines in litigation since they were introduced in 2001 and it should therefore be familiar with the requirements.

However, the primary source of enforcement of the Model Litigant Guidelines is a pronouncement or cost order by a court.¹⁰⁶ When it comes to the Guidelines for

¹⁰² ENRRDC Final Report, p. 53, Finding 18.

¹⁰³ ENRRDC Final Report, p. 53.

¹⁰⁴ ENRRDC Final Report, p. 48.

¹⁰⁵ ENRRDC Special Report, p. 9.

¹⁰⁶ Z. Chami, 'The Obligation to Act as a Model Litigant'. *AIAL Forum*, 64, 2010, pp. 55-56.

provision of documents to parliamentary committees, it remains an open question as to what will be the result of non-compliance with the principles imported from the Model Litigant Guidelines.

There is one further and major gap in the Guidelines. They do not provide a mechanism to resolve an impasse where the executive refuses to provide a JIC with a document that the latter considers necessary for its inquiry and is potentially not covered by privilege, but the JIC cannot assess the privilege claim or the relevance to the inquiry because they cannot view the contents. That is, the executive remains the sole arbiter in deciding whether content is withheld. The Guidelines contain the same flaw that Boughey and Weeks identify at the Commonwealth level when writing about Senate powers: '[a]llowing ministers to be the sole judges of whether or not release of a document is in the public interest has obvious implications for the ability of Parliament to hold them to account'.¹⁰⁷

ADDITIONAL POWERS FOR JICS

There are two key areas for improvement to the powers of JICs in the aftermath of the Fiskville inquiry: first clarifying the operation of parliamentary privilege¹⁰⁸ as it applies to requests for documents over which there is a Cabinet-in-confidence or broader executive privilege claim; and second, providing committees with powers for dealing with failures to respond to a request for documents.

These matters could be addressed by drawing from the experience of other jurisdictions where there is greater clarity—particularly New South Wales (NSW) (see next paragraph). Alternatively, a solution may be found in Victoria by borrowing from the approach of the Victorian Auditor-General's Office (VAGO).

¹⁰⁷ J. Boughey and G. Weeks, 'Government Accountability as a "Constitutional Value"', in R. Dixon (ed.), *Australian Constitutional Values*. Oxford: Hart Publishing, 2018, p. 110.

¹⁰⁸ For an overview of parliamentary privilege and its interaction with other privileges, such as executive privilege, see R. Macreadie and G. Gardiner, 'Research Paper An Introduction to Parliamentary Privilege'. Parliamentary Library of Victoria, No.2 August 2010. For an explanation on the powers of the Victorian Parliament to deal with breaches of its privileges, see J. Waugh, 'Contempt of Parliament in Victoria'. *Adelaide Law Review*, 26(1), 2005, pp. 29-53.

There is more clarity surrounding disputes over documents in NSW, a matter over which there has been a High Court decision.¹⁰⁹ NSW also has an 'independent legal arbiter' mechanism that allows a 'Queen's Counsel, Senior Counsel or a retired Supreme Court judge' to make a legal assessment of the 'validity of a claim for privilege' when the Legislative Council is seeking documents over which a claim of privilege is made.¹¹⁰ For a variety of reasons however, this is not a model that is transferable to Victoria (Boughey and Weeks highlight that the Senate's and NSW legislature's powers 'rest on different foundations').¹¹¹ A specifically Victorian solution is therefore required.

A possible solution would be to borrow from the well-enshrined, approach used for the audits conducted by the VAGO. There are some similarities in the approach adopted by VAGO and JICs. However, the powers of the Auditor-General and staff under the *Audit Act 1994* (Vic) (Audit Act) provide explicit and better-defined powers over access to documents than those in the *Parliamentary Committees Act 2003*, even when read in conjunction with the 2017 Guidelines.

Under the Audit Act, VAGO has specific powers over documents, including those for which executive privilege is claimed. Specifically, section 11 of the Audit Act provides a VAGO auditor with the power to request and copy documents that are Cabinet-in-confidence in draft form and, importantly, documents that are held by a person although they do not belong to them. This distinction is important, because it extends the power of auditors to request and receive documents that might otherwise be protected as not being controlled or owned by the public servant or entity.

In fulfilling the obligation to disclose these documents to the VAGO, a public servant does not need to comply with the obligations that would otherwise apply in releasing documents (including Cabinet-in-confidence and any other secrecy requirement or restriction on the release of documents imposed by an enactment or rule of law).¹¹²

¹⁰⁹ *Egan v Willis* (1998) 195 CLR 424.

¹¹⁰ A. Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council', *Australasian Parliamentary Review*, 23(1), 2008, p. 261.

¹¹¹ J. Boughey and G. Weeks 'Government Accountability', p. 111. This was also the conclusion of a Senate Committee inquiry on the subject: Senate Finance and Public Administration References Committee, *Independent Arbitration of Public Interest Immunity Claims*. Commonwealth of Australia, 2010.

¹¹² *Audit Act 1994* (Vic), s 12.

Additionally, the Audit Act has an offence section that makes it an offence to fail to produce documents requested by the VAGO.¹¹³ The construction of the section provides that the offence and penalties can be applied to both a public entity (defined as a body corporate) and to individual public servants.¹¹⁴

Clearly, there are differences in the powers available to JICs and VAGO auditors that are justified by the substantive difference in the type of investigations conducted by them. VAGO investigations are narrower in scope and audits do not extend to investigating questions of policy, policy implementation or government malfeasance. Indeed, it can be argued that importing VAGO powers would be an inappropriate expansion of parliamentary power, primarily because VAGO powers, while wider and deeper, are more narrowly focused. Therefore, providing these types of powers to JICs could unduly affect government decision-making. It would allow members of JICs to debate policy decisions as they are made.

Nevertheless, the recent move towards referring to JICs complex inquiries with a focus on identifying and dealing with systemic and individual failure, as seen in the *Inquiry into the handling of child abuse by religious and other non-Government organisations* and the Fiskville inquiry, clearly require changes to the powers of JICs if JICs are to successfully conduct similar inquiries in the future.

The proroguing of Parliament and the JICs for the 2018 Victorian election provides a new opportunity to review the statutory and policy settings that regulate JICs and introduce changes. These could include amendments to the *Parliamentary Committees Act 2003*, to clarify existing powers and to provide new powers to ensure that future inquiries undertaken by JICs are not subjected to the same challenges faced during the Fiskville inquiry.

CONCLUSION

The Fiskville inquiry, with its focus on document discovery, is the highest profile and most recent example of the challenges that can be faced by JICs. The challenges for JICs undertaking inquiry work is due, in part, to the traditional tension that exists

¹¹³ *Audit Act 1994* (Vic), s 14.

¹¹⁴ *Audit Act 1994* (Vic), s 14(1).

between the parliament exercising an oversight and review function over the executive branch and its performance. This function, as exercised by a JIC, forms part of the broader tension in the parliament-executive relationship that is an essential aspect of the separation of powers inherent in a Westminster system.

One possible interpretation of the actions of the Government during the Fiskville inquiry is that they were aimed at deterring investigation of possible executive government failure. If that is correct, the question of whether these actions to avoid oversight were an appropriate exercise of power within the context of the Westminster tradition is important and requires further investigation. Such investigation is beyond the scope of this article.

What can be addressed here is the question of whether the Fiskville inquiry has changed the way that JICs and executive government interact, particularly when the inquiry is into long-term systemic failure or wrongdoing. Will the updates to the Guidelines ensure that a JIC has adequate and timely access to documents that are necessary for it to complete its inquiries?

The answer is somewhat mixed. The December 2017 Guidelines do provide greater clarity and direction for public servants. However, the executive branch remains in control of how documents are, if at all, provided to JICs. It also retains complete control over how it interprets the operation of its own privilege with respect to those documents.

Thus, while recognising that the new Guidelines are a significant improvement on the earlier Guidelines, they do not overcome all the challenges that faced the Fiskville inquiry—an inquiry that subjected the executive government to scrutiny concerning potential policy or operational failure in important matters. Improvements are required to better manage access to documents as JICs carry out their oversight and investigation role. This article has presented some options for further consideration.

Guidelines for appearing before and producing documents to Victorian inquiries

December 2017

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PART 1: INTRODUCTION

1.1 Overview

Scope of and application of these Guidelines

1. These Guidelines provide guidance to officials when they are required to **appear** before or **produce documents** to **Victorian**:
 - Parliamentary Committees;
 - Royal Commissions; and
 - Boards of Inquiry.
2. These Guidelines replace the *Guidelines for Appearing before State Parliamentary Committees* (October 2002).
3. Separate Guidelines are available on the DPC website about:
 - making written submissions and responses to inquiries; and
 - appearing before **Commonwealth** Parliamentary Committees.
4. These Guidelines are intended to have general application, and apply to all **government bodies**. For the purpose of these Guidelines, a government body is a Victorian public service body, or a public entity that is explicitly subject to ministerial direction or control. Whether a public entity is explicitly subject to ministerial direction or control is usually indicated in the documents creating an entity (e.g. its establishing legislation, or relevant Governor in Council documents). For the purpose of these Guidelines, a government body *does not* include exempt bodies and special bodies (except Victoria Police), such as the Victorian Auditor-General's Office, the Independent Broad-based Anti-corruption Commission and the Victorian Ombudsman.¹ For the purpose of these Guidelines, Victoria Police *is* considered a government body.
5. If these Guidelines do not apply because a body is exempt, that body is still responsible for appropriately briefing their Minister, public service body Head or a person with the functions of a public service body Head on the matter which is the subject of the request. Government bodies are expected to exercise judgment to ensure matters are considered and approved at the appropriate level.
6. For the purpose of these Guidelines, an **inquiry** refers to:
 - an inquiry undertaken by a Victorian Parliamentary Committee; and
 - a Royal Commission or Board of Inquiry established under the *Inquiries Act 2014* (Vic).
7. The Guidelines are not intended to apply to regular or periodic requests for information (such as from the Victorian Parliamentary Public Accounts and Estimates Committee, questionnaires or budgetary inquiries). They are also not intended to apply to Formal Reviews established under the *Inquiries Act 2014*, internal government inquiries or reviews established outside of the *Inquiries Act 2014*.

¹ Please refer to sections 4-6 of the *Public Administration Act 2004* for definitions of public service bodies, public entities, exempt bodies and special bodies.

Further information and contacts

8. For further information about these Guidelines, please contact the Office of the General Counsel, DPC.
9. Additional sources of information are also set out at Appendix C.

PART 2: TYPES OF INQUIRIES AND THEIR POWERS

2.1 Parliamentary Committees

What are Parliamentary Committees?

10. Parliamentary Committees are committees made up of Members of one or both Houses of Parliament. Parliamentary Committees inquire into particular issues and report back to Parliament with findings and recommendations.
11. In Victoria, Parliamentary Committees may be established under:
 - the *Parliamentary Committees Act 2003*;
 - the *Legislative Assembly of Victoria Standing Orders* (August 2016);
 - the *Legislative Council of Victoria Standing Orders* (2017); or
 - the *Joint Standing Orders of the Parliament of Victoria*.
12. The *Parliamentary Committees Act 2003* and the Standing Orders of the Houses of Parliament outline the membership requirements, purposes and powers of the committees.

Different types of Parliamentary Committee

Committee type	Description
Joint Investigatory Committees	<ul style="list-style-type: none">• Made up of members of both Houses• Can either be:<ul style="list-style-type: none">◦ Joint House Committees established under the <i>Parliamentary Committees Act 2003</i>, which are permanent committees; or◦ Specific Purpose Committees, which are established by a resolution of both Houses of Parliament for a specific purpose and whose functions are time limited.²
Standing Committees	<ul style="list-style-type: none">• Made up of members of the Legislative Council.• Appointed at the commencement of each Parliament pursuant to Council standing orders.³• Government departments are allocated to Standing Committees of the Council for Committee oversight.
Select Committees	<ul style="list-style-type: none">• Made up of members of one House.• Appointed by a resolution of either House.⁴• Established to inquire into specific issues within specified timeframes.

² *Joint Standing Orders of the Parliament of Victoria*, Joint Standing Order 15.

³ *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.01.

⁴ *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 201; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.10.

Domestic Committees

- Internal committee of either House, procedures or Parliament's administration (e.g. Privileges (Assembly/Council), Procedure (Council), Standing Orders (Assembly), and Dispute Resolution Committees).
- Domestic Committees meet privately and usually do not ask for submissions or hold public hearings.
- Domestic Committees are concerned with the operation and administration of Parliament and rarely hold public hearings.

Powers of Parliamentary Committees

13. Parliamentary Committees have the power to request persons, documents and other things.⁵

What are the consequences of failing to comply with a Parliamentary Committee request?

14. Failure to appear before a committee when summonsed, or to produce requested documents, may be a contempt of Parliament, which is punishable at the discretion of the relevant House.
15. Acts or omissions which obstruct or impede the work of a committee or any of its members or officers may also be treated as a contempt of Parliament.

2.1 Inquiries under the *Inquiries Act 2014*

2.2.1 Royal Commissions

What is a Royal Commission?

16. A Royal Commission is an ad hoc advisory body appointed by the Government to obtain information and report on findings about a particular matter. Royal Commissions are often required to make recommendations to the Government.⁶
17. The Governor, on the advice of the Premier, has a power to issue letters patent to establish a Royal Commission.⁷ The letters patent define the scope and terms of reference of a Royal Commission and are published in the Government Gazette.
18. A Royal Commission may also issue practice directions, statements or notes in relation to its inquiry.⁸
19. Royal Commission appearances are similar to court proceedings. The functions and powers of Royal Commissions are set out in Part 2 of the *Inquiries Act 2014*.

Powers of Royal Commissions

20. A Royal Commission has the power to:⁹
- compel a person to attend to produce documents or give evidence;
 - require a witness to give evidence on oath or affirmation;
 - apply for a warrant to enter and search premises, and take documents or things relevant to the inquiry;

⁵ *Parliamentary Committees Act 2003*, section 28(1); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 214; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.19; *Joint Standing Orders of the Parliament of Victoria*, Joint Standing Order 15(9).

⁶ Hallett, L, *Royal Commissions and Boards of Inquiry*, LBC, 1982, p 1.

⁷ *Inquiries Act 2014*, section 5(1).

⁸ *Inquiries Act 2014*, section 16.

⁹ *Inquiries Act 2014*, sections 17, 21, 22, 24, 25, 26, and 30.

- prohibit or restrict the publication of information or evidence;
- compel a person to produce documents;
- retain documents for the purposes of its inquiry; and
- exclude or expel people from its proceedings.

What are the consequences of failing to comply with a Royal Commission request?

21. A witness commits an offence if they:¹⁰

- do not, without reasonable excuse:
 - produce documents or give evidence when required to do so;
 - take an oath or make an affirmation when required to do so;
 - answer a question when required to do so;
- contravene an order:
 - excluding a person from inquiry proceedings;
 - prohibiting the publication of information or evidence given to the inquiry;
- intentionally or recklessly hinder, obstruct, or seriously disrupt proceedings of the inquiry; or
- knowingly make a false or misleading statement, or provide a false or misleading document, to the inquiry.

2.2.2 Boards of Inquiry

What is a Board of Inquiry?

22. A Board of Inquiry is, like a Royal Commission, an ad hoc advisory body appointed by the Government to obtain information and report on findings about a particular matter.
23. The Governor in Council, on the recommendation of the Premier, may appoint any one or more persons to constitute a Board of Inquiry to inquire into and report on the terms of reference specified in the order.¹¹ The order defines the scope and terms of reference of the Board of Inquiry and is published in the Government Gazette.
24. A Board of Inquiry may also issue practice directions, statements or notes in relation to its inquiry.¹²
25. Board of Inquiry appearances are similar to court proceedings. The functions and powers of Boards of Inquiry are set out in Part 3 of the *Inquiries Act 2014*.

Powers of Boards of Inquiry

26. A Board of Inquiry has the same powers as a Royal Commission (see para 20 above), except for the power to issue a warrant to enter and search premises and take documents or things relevant to the inquiry.¹³

What are the consequences of failing to comply with a Board of Inquiry request?

27. The same offences for failing to comply with a Royal Commission (see para 21 above) apply to failing to comply with a Board of Inquiry.¹⁴

¹⁰ *Inquiries Act 2014*, sections 46-50.

¹¹ *Inquiries Act 2014*, section 53(1).

¹² *Inquiries Act 2014*, section 63.

¹³ *Inquiries Act 2014*, sections 64, 68, 69, 71, 72 and 73.

PART 3: REQUESTS FOR DOCUMENTS

3.1 General information about requests for documents

What is a request for documents?

28. Inquiries often make requests for relevant documents to inform and provide evidence on the matter before the inquiry. These requests are often broad in scope. It is important to review the request as soon as possible after receipt to ensure that:
- you understand the scope of the request, including the amount of time it will take to produce such documents;
 - you are aware of any privileges, immunities or secrecy provisions that are likely to apply to the request for documents; and
 - you consider whether you will need to seek assistance or input from other departments or branches.
29. It is recommended that government bodies engage with the inquiry at the outset, to foster cooperation throughout the document production process and to ensure timeframes can be met wherever possible.

Is there a difference between requests from a Parliamentary Committee and a Royal Commission or Board of Inquiry?

30. All inquiries considered in these Guidelines have the power to compel the production of documents relevant to the inquiry.
31. This section (para 28-43) sets out considerations and procedures of general application to a request for documents by a Victorian inquiry.
32. However, there are also specific considerations and procedures for responding to a request for documents from:
- Parliamentary Committees (para 46-61); and
 - Royal Commissions and Boards of Inquiry (para 64-79).

Assessing which documents are relevant to the request

33. Documents created after the order is made are **not relevant**.
34. Drafts and duplicates of the same document need not be provided.

How do the Model Litigant Guidelines apply to a request for documents?

35. Victoria's Model Litigant Guidelines set standards for how the State should behave as a party to legal proceedings. The Model Litigant Guidelines include standards of conduct that should also be followed by government bodies when participating in an inquiry, including when responding to requests for documents.
36. Relevant principles in the Model Litigant Guidelines that should be followed when responding to requests for documents include:
- acting fairly when responding to requests for documents;
 - dealing with requests promptly and without unnecessary delay; and
 - providing, to the extent practicable in the circumstances, documents to the inquiry in a way that does not unduly increase the inquiry's need for resources.

¹⁴ *Inquiries Act 2014*, sections 86-90.

37. When an inquiry makes a request for the production of documents, government bodies should meet their obligations under the Model Litigant Guidelines by:
- engaging early with inquiries to establish expectations, minimise the potential for misunderstandings and foster cooperation throughout the document production process (see further para 45);
 - not acting in an inflexible manner in an attempt to frustrate an inquiry's right to access to witnesses or documents;
 - considering alternative options available to give inquiries the information sought, where documents are subject to a claim of executive privilege or public interest immunity (refer to paras 54-56 and 72-74); and
 - ensuring timely provision of information to inquiries and communicating with inquiries early on about any potential difficulties in responding within the requested timeframe.
38. Timeframes for responding to requests for documents can be short. A government body should contact the lead department as early as possible to discuss a request for documents. Government bodies should always endeavour to meet the timeframes but can seek to negotiate the timeframes if they honestly believe they will not be able to meet them.

When to seek legal advice

39. In some cases, it will not be necessary to seek legal advice before releasing or withholding documents.
40. For example, it is not necessary to seek legal advice in respect of documents that are publicly available (e.g. reports published on a government body's website or transcripts of publicly broadcast radio interviews). These documents should be released in response to an order.
41. In contrast, some documents will clearly attract a claim of executive privilege (refer to **Appendix A**) or public interest immunity (refer to **Appendix B**). For example, documents that were prepared for consideration by Cabinet or Cabinet Committees will generally be subject to executive privilege or public interest immunity and should not be released. Where there is a clear claim it will not be necessary to seek the Victorian Government Solicitor's Office's advice in respect of these documents.
42. Where there is any uncertainty, to ensure that potential claims of executive privilege are not inadvertently waived, government bodies should always consult with their legal teams about whether to release or withhold a document.

Redacting documents to protect personal privacy

43. Government bodies should ensure that personal or private information (such as the names of junior VPS officers and personal contact details of all officers) are redacted from documents proposed for release to inquiries.

3.2 Parliamentary Committee requests for documents

Immediate steps following a request from a Parliamentary Committee

44. At the commencement of a Parliamentary Committee's inquiry, DPC will nominate a lead department that will be responsible for coordinating the Government's response to requests for documents made by the committee.
45. The Minister or Secretary of the lead department should write to the relevant inquiry, in consultation with DPC's Office of the General Counsel, and:

- offer assistance with formulating requests for documents, to ensure any potential issues with the requests are identified early;
- note that requests for documents will require government bodies to seek appropriate approvals;
- ask that sufficient time is provided to respond, including by suggesting achievable timeframes for responding to requests; and
- if appropriate, draw the inquiry's attention to publicly available documents that may assist the inquiry, or suggest documents available to the inquiry that would not be subject to a claim of executive privilege.

Do I have to produce a document if it might incriminate me?

46. While you may request not to produce a document to a Parliamentary Committee on the basis that it might incriminate you, there is no requirement for a Committee to grant such a request.¹⁵ However, there are persuasive arguments to support the view that a Committee should carefully consider such a request, taking into account factors such as the principles of natural justice, merits of the request, significance of the information sought and any alternative means of accessing that information.
47. If you are asked to produce a document that you think may incriminate you, you should request that:
 - you not be compelled to produce the document on the basis that producing the document may potentially incriminate you, and it would be against the principles of natural justice to compel you to do so; and/or
 - your evidence be given in private; and/or
 - you be given an opportunity to seek independent legal advice. You can request this at the outset, or if a request not to produce a document on the grounds of self-incrimination is denied.
48. See further paragraphs 130-131, in respect of a request to answer a question as a witness that might incriminate you.

Can a claim of executive privilege be made over the documents requested?

49. Executive privilege is a privilege that can be asserted to resist the production of certain documents held by the Executive Government. It is similar to public interest immunity, but applies in the context of Parliamentary Committee inquiries (as opposed to litigation before courts and executive inquiries such as Royal Commissions).
50. The Government may claim executive privilege in response to a Parliamentary Committee request for information when it considers the public interest in withholding the information outweighs the public interest in providing it to the Committee.
51. Further information about executive privilege is at **Appendix A**. Government bodies should, at first instance, speak with their legal teams about executive privilege claims and consider the Government's position in respect of making these claims.
52. Government bodies should endeavour to redact privileged material from documents, so that the remaining material can be provided to the Parliamentary Committee.

Approval process for claiming executive privilege

53. The lead department must seek Cabinet approval where it proposes to claim executive privilege over documents.

¹⁵ Neither the *Parliamentary Committees Act 2003* nor the Standing Orders expressly allow a person to refuse to produce documents on the ground that doing so might incriminate the person.

54. The lead department should consider what other steps are available to give inquiries the information that they need to operate effectively, particularly where documents are subject to a claim of executive privilege.
55. This includes considering whether sensitive documents may be able to be presented in a way that provides inquiries with the information they need without revealing information that is subject to claims of executive privilege. For example, the lead department should consider whether it is possible to:
 - make a presentation to the committee that excludes sensitive material;
 - consider whether, due to the special circumstances, a request could be made to the committee to take evidence about sensitive information in private; or
 - other means that are appropriate in the circumstances.
56. Government bodies should consult with their internal legal teams to ensure that the above measures do not constitute a waiver of executive privilege claims in each particular case.
57. Where departments propose to recommend that executive privilege be claimed over documents, they should detail in their Cabinet submission what other means they have considered to communicate the required information in an alternate form, and if there are no other feasible means of doing so, explain why this is the case.
58. Government bodies should engage with the lead department for further guidance about the Cabinet approval process.

Approval process for releasing documents that could be subject to executive privilege

59. Where a department considers that a document falls within one of the categories of document over which executive privilege could be claimed, but considers that the document should nonetheless be released to the Parliamentary Committee, the department must seek Cabinet approval to release the document.
60. Departments should detail in their Cabinet submissions the reasons why it is considered that the public interest in providing the document to the committee (e.g. transparent and open government, accountability of the Executive Government to Parliament, proper functioning of Parliament) outweighs the public interest in non-disclosure.

Approval process for releasing documents where there is no potential claim of executive privilege

61. Where a department considers that no claim of executive privilege can be made over a document, Cabinet approval is not required to approve the production of documents to a committee. However, before a document can be provided to a committee, the responsible Minister must be briefed on and approve the release of the documents.

3.3 Royal Commission or Board of Inquiry requests for documents

Immediate steps following a request from a Royal Commission or Board of Inquiry

62. At the commencement of a Royal Commission or Board of Inquiry, DPC will nominate a lead department that will be responsible for coordinating the Government's response to requests for documents.
63. The lead department will provide guidance on engaging with the inquiry.

Do I have to produce a document if it might incriminate me?

64. This will depend on the type of inquiry.

65. Boards of Inquiry. No. You may refuse to produce documents to a Board of Inquiry if doing so might incriminate you or make you liable to a penalty.¹⁶
66. Royal Commissions. No, **but only if** producing the documents might incriminate you or make you liable to a penalty **in relation to proceedings that are in progress and not yet finalised**.¹⁷
67. If you are asked to produce a document that you think may incriminate you, you should request that:
- you not be compelled to produce the document on the basis that producing the document may potentially incriminate you, and it would be against the principles of natural justice to compel you to do so; and/or
 - your evidence be given in private; and/or
 - you be given an opportunity to seek independent legal advice. You can request this at the outset, or if a request not to produce a document on the grounds of self-incrimination is denied.
68. See further paragraphs 127-131, in respect of a request to answer a question as a witness that might incriminate you.

Can a claim of public interest immunity be made over the documents requested?

69. Public interest immunity is a legal doctrine which allows the State to withhold information from production in legal proceedings or to executive inquiries including a Royal Commission or Board of Inquiry, if production of the information would be contrary to the public interest.¹⁸
70. Further information about public interest immunity is set out at **Appendix B**. Departments should, at first instance, speak with their legal teams about public interest immunity claims.
71. Consistent with the Government's commitment to transparency, government bodies should endeavour to redact privileged material from documents, so that the remaining material can be provided to the inquiry.

Approval process for claiming public interest immunity

72. The lead department must seek Cabinet approval to release documents where it proposes to claim public interest immunity over documents.
73. The lead department should consider what other steps are available to give inquiries the information that they need to operate effectively, particularly where documents are subject to a claim of public interest immunity.
74. This includes considering whether sensitive documents may be able to be presented in a way that provides inquiries with the information they need without revealing information that is subject to claims of public interest immunity. For example, the lead department should consider whether it is possible to:
- make a presentation to inquiries that excludes sensitive material;
 - consider whether material can be provided to inquiries subject to an undertaking of confidentiality; or
 - other means that are appropriate in the circumstances.

¹⁶ *Inquiries Act 2014*, section 65(2)(a).

¹⁷ *Inquiries Act 2014*, section 33.

¹⁸ See *Sankey v Whitlam* (1978) 142 CLR 1, 38-39.

75. Where departments propose to recommend that public interest immunity be claimed over documents, they should detail in their Cabinet submission what other means they have considered to communicate the required information to the inquiry in an alternate form, and if there are no other feasible means of doing so, explain why this is the case.
76. Government bodies should engage with the lead department for further guidance about the Cabinet approval process.

Approval process for releasing a document that could be subject to public interest immunity

77. Where a department considers that a document could be subject to public interest immunity but considers that the document should nonetheless be released to the inquiry, the department must seek Cabinet approval to release the document.
78. Departments should detail in their Cabinet submissions the reasons why it is considered that disclosure of the document or its content is in the public interest.

Approval process for releasing documents where there is no potential claim of public interest immunity

79. Where a department considers that no claim of public interest immunity can be made over a document, Cabinet approval is not required to approve the production of documents to an inquiry. Departments should follow the same process used for approving the release of documents to a court or tribunal.

PART 4: APPEARING BEFORE INQUIRIES

4.1 Before your appearance

Do I have to appear?

80. You may be called to appear before a Parliamentary Committee, Royal Commission or Board of Inquiry to provide evidence about the subject matter of an inquiry.
81. Generally, only employees with an employment classification of EO1 and above should appear. If you are below this classification, you should seek advice from senior officials.
82. You will usually be invited to appear voluntarily. If you do not appear voluntarily, you may be compelled by summons to appear.
83. Requests for an official to appear or to provide material should be made through the relevant Minister (who may delegate this responsibility to the relevant department or agency head).
84. It is not uncommon for officials to be required to appear before a Parliamentary Committee at short notice with, for example, only 2-3 days to prepare. This is ordinarily because the Committee has been asked to report to Parliament in a relatively short time frame and must commence hearings as soon as possible.

Immediate steps following a request for attendance

85. You should:
 - seek advice, comment or direction from senior officials, DPC and, if necessary, your government body head;
 - notify DPC of a proposed appearance;
 - familiarise yourself with the composition of the committee or appointees of the inquiry and its procedures for witness appearances; and

- prepare for an appearance by:
 - having a clear understanding of relevant Government policy;
 - determining the amount of time for which you may be required to appear and, if possible, whether anyone else will be appearing before the inquiry;
 - anticipating probable lines of questioning;
 - familiarising yourself with these guidelines, particularly in relation to rules concerning when executive privilege or public interest immunity can be claimed; and
 - considering, in the case of a committee hearing, any interests of the committee members relevant to the inquiry.

86. Useful sources of information for appearing before a:

- Committee include the committee's terms of reference, Government submissions to the committee, transcripts of committee hearings, Hansard, and previous committee reports. The committee secretariat may also be able to answer questions you have about committee hearings.
- Royal Commission include the Letters Patent establishing the Royal Commission, and any Government submissions to the Royal Commission. Often the Royal Commission will have its own website, which is a further source of useful information.
- Board of Inquiry include the Order in Council establishing the Board of Inquiry, and any Government submissions to the Board of Inquiry.

Can I make an appearance in a personal capacity?

87. You are not restricted from appearing in your personal capacity. However, if you appear in a personal capacity, you should be aware of your obligations under:

- the *Constitution Act 1975* (Vic);
- the *Public Administration Act 2004* (Vic);
- the *Inquiries Act 2014* (Vic);
- the *Code of Conduct for Victorian Public Sector Employees 2015* (**2015 Code of Conduct**);
- your employment contract; and
- any other legislation or code of conduct that regulates your official functions and duties.

88. If you are considering a personal appearance, you should be aware that comments made to committees are likely to become public. Accordingly, you should be aware of the following confidentiality requirements:

- clauses 6.2 and 6.3 of the *2015 Code of Conduct*, which require public sector employees with access to confidential information to ensure that the information remains confidential;
- clause 3.5 of the *2015 Code of Conduct*, which requires public sector employees to only make public comments when specifically authorised to do so in relation to their duties, a public sector body, or government policies and programs, and to restrict such comments to factual information only;
- section 95 of the *Constitution Act 1975*, which prevents a person employed in the service of the State of Victoria from using information obtained during their employment except in the performance of duties;
- any confidentiality requirements that apply under your employment contract; and

- any legislation that defines your functions, duties or professional obligations, or imposes restrictions on the disclosure of information you have received in your official capacity.
89. If you are appearing before a Royal Commission, you should be aware that section 34 of the *Inquiries Act 2014* overrides other legislation which imposes duties of confidentiality or secrecy. Witnesses can therefore be compelled to provide information to a Royal Commission, despite confidentiality provisions in other legislation. However, section 34 does not apply in certain situations, for example, where the other Act specifically deals with the giving of information to Royal Commissions.
90. If you are a senior official, you should consider the impact, by virtue of your position, of any comment that you might make. Heads of agencies and other senior officials should consider whether it is possible or realistic to appear in a “personal” rather than an “official” capacity (particularly if you are likely to be asked to comment on matters that relate to your responsibilities as an employee). If you make a personal appearance, you should make it clear to the committee that your appearance is not in an official capacity.

When to consult with Ministers

91. Depending on the importance of the inquiry, you should consider consulting with the relevant Minister (including Ministers representing the relevant Minister in the other House of Parliament) prior to your appearance. You should consult with senior officials and/or your government body head to determine whether and how you should consult with the relevant Minister.
92. You should always consult with the relevant Minister/s and DPC if you are considering making a claim of executive privilege or public interest immunity (see paras 49-61 and 69-79).

When to prepare a written statement

93. It will generally be useful to prepare a written statement on which your oral evidence will be based. You may wish to provide this statement to the Parliamentary Committee, Royal Commission or Board of Inquiry.
94. Written statements should be approved by the appropriate levels within the department and usually by the Minister, in accordance with any arrangements approved by the relevant Minister.
95. You should be aware that all inquiries can compel the production of any written statement or material that you rely on, although it is unusual for inquiries to exercise this power. Materials should be prepared with this possibility in mind.
96. For further information, refer to the *Guidelines for Submissions and Responses to Inquiries*, which are available at: <http://dpc.vic.gov.au/index.php/policies/governance/guidelines-for-submissions-and-responses-to-inquiries>.

When evidence may be given in private

97. Parliamentary Committees, Royal Commissions or Boards of Inquiry generally hear evidence in public.¹⁹ However, they can choose to hear evidence in private.²⁰
98. A request for a private hearing may be made when:

¹⁹ *Parliamentary Committees Act 2003*, section 27(1); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22.

²⁰ *Parliamentary Committees Act 2003*, section 28(2), (3); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22; *Inquiries Act 2014*, sections 24 and 71.

- a claim of executive privilege or public interest immunity could be justified, but the Minister considers that the balance of the public interest lies in making the relevant information available (see further paras 49-61 and 69-79);
 - similar or identical evidence has been previously given in private; or
 - there is another reason for giving evidence in private.
99. If your evidence is sensitive and you would like to give it in private, you should consult with senior officials so that a Minister (or departmental Secretary on the Minister's behalf) can make the request prior to your appearance.
100. If, when giving evidence, you believe that your evidence should be heard privately, you should:
- make a request if the possibility has been foreshadowed with the Minister; or
 - ask to postpone giving the evidence until the Minister can be consulted.

Will my evidence be made public?

101. Transcripts of evidence to a Parliamentary Committee, Royal Commission or Board of Inquiry are generally public documents unless declared otherwise. This means that your evidence may be published and/or may be quoted in reports.
102. The particular publication rules applying to different types of committee are that:
- A Joint Investigatory Committee must make a transcript of oral evidence available to a member of the public on request, unless the committee informed the person who gave the evidence that the evidence was received on the basis that it remain private.²¹
 - Evidence given to Legislative Council Standing and Select Committees may be published unless the Legislative Council or relevant committee determines otherwise.²²
 - Evidence taken by a Legislative Assembly Select Committee in public may be published unless the Legislative Assembly or Select Committee determines otherwise.²³ Evidence that is not taken in public will not be disclosed unless it is reported to the Assembly.²⁴
103. A Royal Commission or Board of Inquiry will publish transcripts of evidence unless it makes an order prohibiting publication. An order prohibiting publication may be made on a number of grounds, including if publication would cause prejudice or hardship to any person, or if the evidence is sensitive.²⁵
104. If your evidence is sensitive and you would like it to be kept private, you should request this before your appearance.
105. If the committee, Royal Commission or Board of Inquiry decides that your evidence will be confidential, you should obtain a written statement confirming this.
106. If the committee, Royal Commission or Board of Inquiry seeks your permission to publish confidential evidence, you should consult senior officials, your government body head or the Minister.

²¹ *Parliamentary Committees Act 2003*, section 37.

²² *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22(3).

²³ *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217(1).

²⁴ *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 217(4).

²⁵ *Inquiries Act 2014*, sections 26 and 73.

4.2 During your appearance

Conduct and behaviour during an appearance

107. When making an appearance before a committee, Royal Commission or Board of Inquiry, you should:
- listen carefully to the question that is asked;
 - answer carefully and precisely;
 - be courteous;
 - be cooperative and frank in giving factual information;
 - be measured and patient; and
 - only answer questions within your expertise, knowledge or authority – if you do not know the answer to a question, you should say so.
108. You should provide accurate and truthful evidence as:
- giving false or misleading evidence to a Parliamentary Committee may constitute a contempt of Parliament for which an individual may be punished;
 - giving false or misleading evidence to a Parliamentary Committee, Royal Commission or Board of Inquiry may constitute grounds for disciplinary action under the *2015 Code of Conduct*; and
 - serious penalties, including imprisonment, can apply for intentionally providing false or misleading information to a Parliamentary Committee, Royal Commission or Board of Inquiry.²⁶

Do I need to provide evidence on oath or affirmation?

109. A committee, Royal Commission or Board of Inquiry can choose to have evidence heard before it on oath or affirmation.²⁷ When a witness is called to the stand, they may be asked to either take an oath on a religious text, or to make a solemn affirmation to tell the truth.
110. A witness before a Royal Commission or Board of Inquiry commits an offence if he/she refuses to be sworn when required.²⁸
111. A failure to tell the truth on examination under oath or affirmation may constitute:
- a contempt of Parliament (if before a Parliamentary Committee); and/or
 - a criminal offence punishable by imprisonment (if before a Parliamentary Committee, Royal Commission or Board of Inquiry).²⁹
112. Even if you haven't been asked to provide your evidence under oath or affirmation, you should give your evidence as if you had. Being found guilty of a criminal offence punishable by imprisonment constitutes express grounds for termination of any non-executive employee and will typically be grounds for termination of an executive

²⁶ *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 200; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 17.11; *Inquiries Act 2014*, sections 50 and 90.

²⁷ *Constitution Act 1975*, section 19A(3); *Parliamentary Committees Act 2003*, section 28(4); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 194; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22(8); *Inquiries Act 2014*, sections 21 and 68.

²⁸ *Inquiries Act 2014*, sections 47 and 87.

²⁹ *Constitution Act 1975*, section 19A(8); *Crimes Act 1958*, section 314.

employee.³⁰ It is also highly likely that a failure to give truthful evidence under oath (even if it does not result in a conviction) may constitute grounds for dismissal of an employee.

Do I have to answer all questions, and to what extent?

113. You should generally be as open as possible with the committee, Royal Commission or Board of Inquiry and provide the information sought (consistent with these Guidelines).
114. If you are:
- unsure of the facts, or do not have information at hand, you should qualify your answers as necessary (if appropriate, you should give undertakings to provide further information); or
 - asked questions that fall within the administration of another department or agency, you should request that:
 - the questions be directed to that department or agency; or
 - your answers be deferred until that department or agency has been consulted.
115. You may not be able to provide a committee, Royal Commission or Board of Inquiry with all the information they seek, or you may need to request restrictions on providing information if the information:
- involves matters of policy (see further paras 118-122);
 - is subject to public interest immunity or executive privilege (as applicable), which includes the disclosure of Cabinet-in-confidence material (see further paras 123-126); or
 - should be kept confidential (where, for example, giving evidence in private is desirable) (see further paras 97-106).
116. You should also be aware of relevant:
- secrecy provisions of Acts; and
 - court orders or sub judice issues.
117. You should seek legal advice if these considerations apply. If these matters emerge during your appearance, and you need to seek legal advice, you should ask the inquiry for an opportunity to seek that advice.

Dealing with "policy" or opinion questions

118. You should provide factual and background material to a Parliamentary Committee, Royal Commission or Board of Inquiry.
119. Under the *2015 Code of Conduct*, you are not expected to answer questions from a Parliamentary Committee that:
- seek your personal views on government policy;
 - seek details of matters considered in relation to ministerial or government decisions, or possible decisions (unless those details have already been made public or the giving of evidence on them has been approved); or
 - would require a personal judgement on the policies or policy options of the Victorian or other governments.
120. The *2015 Code of Conduct* should also be used as a guide when appearing before a Royal Commission or Board of Inquiry.

³⁰ *Public Administration Act 2004*, section 33(1)(c). Termination of executive employees are dealt with differently under section 34, where the starting point is that the relevant decision-maker may terminate an executive's employment 'for any reason consistent with the terms and conditions of [the executive's] contract of employment'.

121. If you are directed to answer questions relating to your views on policy, you should:
- advise that you are unable to provide the information sought because it involves an assessment of the merits of the policy;
 - offer to answer questions of fact relating to the policy; and/or
 - defer your answers until you have obtained further advice and/or approval from the relevant Minister.
122. Agencies that are not bound by the *2015 Code of Conduct* may wish to contact DPC for further advice, as these restrictions may not necessarily apply to those agencies.

Evidence that may be subject to executive privilege or public interest immunity

123. You should not give evidence containing information that may be subject to public interest immunity or executive privilege (see further **Appendices A and B**).
124. Decisions to claim public interest immunity or executive privilege are typically made well in advance of a public hearing. It is therefore unlikely that you would be asked a question subject to public interest immunity or executive privilege suddenly in the course of the hearing.
125. However, if you are asked a question and believe that your answer may reveal information subject to public interest immunity or executive privilege, you should:
- advise that you are unable to provide an answer because it involves information that may be subject to a claim of public interest immunity or executive privilege; and/or
 - request a postponement of the hearing, or the relevant part of the hearing, until the Minister can be consulted.
126. Before making a claim of public interest immunity or executive privilege, a Minister may explore with a Parliamentary Committee, Royal Commission or Board of Inquiry the possibility of providing the information in a form or under conditions which would not require the claim to be made.

Do I have to answer a question if it might incriminate me?

127. This will depend on the type of inquiry. Further information is set out below.
128. Boards of Inquiry. No. You may refuse to answer a question if doing so might incriminate you or make you liable to a penalty.³¹
129. Royal Commissions. No, **but only if** doing so might incriminate you or make you liable to a penalty **in relation to proceedings that are in progress and not yet finalised**.³² See also paragraphs 134-135.
130. Parliamentary Committees. The position is less clear.³³ You may request not to answer a question on the grounds that it might incriminate you. There is no requirement for a Committee to grant such a request, although there are persuasive arguments to support the view that a Committee should carefully consider such a request, taking into account factors such as the principles of natural justice, merits of the request, significance of the information sought and any alternative means of accessing that information.
131. If you are asked a question that you think may incriminate you, you should request that:

³¹ *Inquiries Act 2014*, section 65(2)(a).

³² *Inquiries Act 2014*, section 33.

³³ Neither the *Parliamentary Committees Act 2003* nor the Standing Orders expressly allow a witness appearing before a Parliamentary Committee to refuse to answer a question on the ground that the answer might incriminate the witness (although the Standing Orders do protect evidence produced by a witness to a Committee from being used in other proceedings – see paras 130-132).

- you not be compelled to answer the question on the basis that the answer may potentially incriminate you – you may do this by respectfully asking the inquiry to consider your request on that basis that it would be against the principles of natural justice to compel you to answer; and/or
- your evidence be given in private; and/or
- you be given an opportunity to seek independent legal advice. You can request this at the outset, or if a request not to answer a question on the grounds of self-incrimination is denied.

132. See further paragraphs 46-48 and 64-68, in respect of a request to produce a document that might incriminate you.

Can I be sued or prosecuted for evidence that I have provided?

133. Anything said or done by a witness in the course of a Committee's proceedings cannot be used against a person in legal proceedings or a prosecution.³⁴
134. Evidence given to a Royal Commission or Board of Inquiry is not admissible in other proceedings against a witness, unless:
- the proceedings relate to an offence against the *Inquiries Act 2014*; or
 - the proceedings relate to an offence against section 254 (destruction of evidence) or section 314 (perjury) of the *Crimes Act 1958* in relation to the Royal Commission or Board of Inquiry; or
 - the evidence was or could have been obtained independently of its production to the Royal Commission or Board of Inquiry by the person seeking to use it in the other proceedings.³⁵
135. However, you will only be protected from legal action if your evidence is given to a Parliamentary Committee, Royal Commission or Board of Inquiry. As such, you should not repeat your evidence outside the hearing.

When "off the record" evidence may be given

136. No evidence that you provide is "off the record". Any evidence you give will form part of the inquiry's records and may expose you or the Government to adverse consequences.³⁶
137. In the unlikely event that you are asked to give evidence "off the record", you should request that the evidence be given on the record. If necessary, you should seek a postponement and consult with the relevant Minister/s.

Legal representation during your appearance

138. A person is not entitled to legal representation at a public hearing of a Joint Investigatory Committee unless both Houses of Parliament resolve otherwise.³⁷
139. In relation to Select Committees and Standing Committees, the Standing Orders do not prohibit legal representation. In this case, a witness should seek express permission from the committee to have representation during proceedings.

³⁴ *Constitution Act 1975*, sections 19(1), 19A(7); *Parliamentary Committees Act 2003*, sections 4(1), 50; *Legislative Assembly of Victoria Standing Orders* (August 2017), Standing Order 196; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 17.09.

³⁵ *Inquiries Act 2014*, sections 40(2) and 80(2).

³⁶ *Parliamentary Committees Act 2003*, section 28(9); *Legislative Assembly of Victoria Standing Orders* (August 2016), Standing Order 219; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 23.22(1).

³⁷ *Parliamentary Committees Act 2003*, section 27(3).

140. You should not usually need legal representation when appearing before a committee. You should consult DPC if you believe that you require legal representation when appearing before a committee.
141. If you receive a request to appear before a Royal Commission or Board of Inquiry, it may allow you to be legally represented.³⁸ You should seek advice from your relevant legal branch about whether it is appropriate for you to be legally represented when appearing before a Royal Commission or Board of Inquiry.

Can I be reimbursed for expenses I incur in giving evidence?

142. It will depend on the type of inquiry.
143. Parliamentary Committees. No regulations regarding witness expenses have been made under the *Parliamentary Committees Act 2003*.³⁹ The Standing Orders do not make provision for reimbursement of expenses in relation to Standing Committees or Select Committees. If a witness wishes to claim for expenses for appearing before a committee, the matter should be discussed with senior officials. If warranted, a formal written request should be made to the committee for reimbursement of the expenses.
144. Royal Commissions or Boards of Inquiry. Regulations regarding witness expenses have been made under the *Inquiries Act 2014*.⁴⁰ These regulations allow witnesses attending an inquiry at the request of a Royal Commission or Board of Inquiry to claim expenses relating to loss of income, childcare, meals, accommodation and travel in accordance with prescribed scales.

Appearances before the Bar of a House of Parliament

145. In both Houses of Parliament in Victoria, the main entrance to each House can be “barred” by the lowering of a heavy rail. This “Bar” of the House is a point outside which no Member may speak to the House or over which no “stranger” (people who are not Members of Parliament) may cross and enter the Chamber unless invited by the House. Historically, the Bar is the place to which persons are brought so that the Speaker may address them on behalf of the House, or at which persons are orally examined.
146. Both the Legislative Assembly and the Legislative Council can summon witnesses to be examined at the Bar of the House.⁴¹
147. It would be only in exceptional circumstances that an official would be summoned to the Bar of a House of the Parliament and each case would need individual consideration. In addition to following these Guidelines, such a case would require specific guidance, depending on the particular circumstances.

4.3 After the hearing

Reviewing your evidence and making further submissions

148. You will be provided with a proof copy of your evidence. You should carefully review this for accuracy. You should bring any inaccuracies to the attention of the committee, Royal Commission or Board of Inquiry and request that it be corrected.
149. You will not be permitted to alter the substance of your evidence.
150. In some cases, it may be necessary to make a further appearance or submission. If relevant evidence has not been provided, you should consult with senior officials, your

³⁸ *Inquiries Act 2014*, sections 15(1)(b) and 62(1)(b).

³⁹ *Parliamentary Committees Act 2003*, section 28(7).

⁴⁰ *Inquiries Regulations 2015*.

⁴¹ *Legislative Assembly Standing Orders* (August 2016), Standing Order 190; *Legislative Council of Victoria Standing Orders* (2017), Standing Order 17.04.



department/agency head, and/or the Minister about a further appearance or submission.

Can a committee request further information after my appearance?

151. Following your appearance, a committee, Royal Commission or Board of Inquiry may request further information or written answers to questions that were posed during a hearing. If a request is made, you should follow the processes in the *Guidelines for Submissions and Responses to Inquiries*.

Appendix A: Executive Privilege

Executive Privilege

What is executive privilege?

Executive privilege is a privilege held by the Executive Government. It is similar to public interest immunity, but applies to Parliamentary Committee inquiries (as opposed to litigation before courts or executive inquiries such as Royal Commissions or Boards of Inquiry).

The Government may claim executive privilege in response to a committee request for information if it considers the public interest in withholding the information outweighs the public interest in providing it to the committee.

When can a claim of executive privilege be made?

In assessing whether the public interest in withholding the information outweighs the public interest in providing it, the Government (during the 58th Parliament) has informed Parliament it will consider whether providing the information would:

- reveal, directly or indirectly, the deliberative processes of Cabinet;
- reveal high-level deliberative processes of the Executive Government, or otherwise genuinely jeopardise the necessary relationship of trust and confidence between a Minister and public officials;
- reveal information obtained by the Executive Government on the basis that it would be kept confidential, including because the documents are subject to statutory confidentiality provisions that apply to Parliament;
- reveal confidential legal advice to the Executive Government;
- otherwise jeopardise the public interest on an established basis, in particular where disclosure would:
 - prejudice national security or public safety;
 - prejudice law enforcement investigations;
 - materially damage the State's financial or commercial interests (such as ongoing tender processes, or changes in taxation policy);
 - prejudice intergovernmental and diplomatic relations; or
 - prejudice legal proceedings; or
- reveal the contents of a document that is not "public and official", such as a Ministerial diary.

Do I have to produce documents or provide evidence that is subject to a claim of executive privilege?

In relation to requests for document that are subject to a claim of executive privilege, refer to paragraphs 49-60.

In relation to providing other evidence that might be subject to a claim of executive privilege, refer to paragraphs 123-126.

Appendix B: Public Interest Immunity

Public Interest Immunity

What is public interest immunity?

Public interest immunity is a legal doctrine which allows the State to withhold information from production in legal proceedings, or to executive inquiries, if production of the information would be contrary to the public interest.⁴²

When can a claim of public interest immunity be made?

Public interest immunity may be claimed over information that would be prejudicial to the public interest if released, because disclosure would:

- reveal the deliberations of Cabinet (this includes documents prepared for the purpose of consideration by Cabinet or a Cabinet Committee or that otherwise reveal the decisions or deliberations of Cabinet);
- reveal high-level deliberations of the Government (this category includes advice to Ministers or senior departmental officers);
- reveal information obtained on the basis that it would be kept confidential;
- reveal confidential legal advice;
- prejudice the State's commercial or financial interests;
- prejudice national security or public safety;
- prejudice law enforcement investigations;
- prejudice legal proceedings;
- prejudice intergovernmental relations; and/or
- reveal personal information (this category includes personal information of third parties or non-executive Government officers).

Do I have to produce documents or provide evidence that is subject to a claim of public interest immunity?

In relation to requests for document that are subject to a claim of public interest immunity, refer to paragraphs 66-75.

In relation to providing other evidence that might be subject to a claim of public interest immunity, refer to paragraphs 69-78.

⁴² See *Sankey v Whitlam* (1978) 142 CLR 1, 38-39.

Appendix C: Further Guidance and Information

Additional Guidance for Witnesses

The Parliament of Victoria has published the following guidelines that may assist witnesses who appear before Parliamentary Committees:

- “Giving evidence to a Parliamentary Committee at a public hearing”
- *Guidelines for the Rights and Responsibilities of Witnesses*.

These are available at <<http://www.parliament.vic.gov.au/committees/get-involved>>.

Further Information

Additional information can also be located at:

- Campbell, Enid, *Parliamentary Privilege* (Federation Press, 2003)
- *Code of Conduct for Victorian Public Sector Employees 2015*
- Hallett, Leonard Arther, *Royal Commissions and Boards of Inquiry* (Law Book Company, 1982)
- *Inquiries Act 2014*
- *Inquiries Regulations 2015*
- Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria
- Legislative Assembly of Victoria, ‘Fact Sheet G2 – Parliamentary Committees’
- *Legislative Assembly of Victoria Standing Orders* (August 2016)
- Legislative Council of Victoria, ‘Information Sheet 6 – Committees’
- *Legislative Council of Victoria Standing Orders* (2017)
- Parliament of Victoria, “Giving evidence to a Parliamentary Committee at a public hearing”, available at <<http://www.parliament.vic.gov.au/committees/get-involved>>
- Parliament of Victoria, “Guidelines for the Rights and Responsibilities of Witnesses”, available at <<http://www.parliament.vic.gov.au/committees/get-involved>>
- *Parliamentary Committees Act 2003* (Vic)
- Prasser, Scott, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006)
- Taylor, Greg, *The Constitution of Victoria* (Federation Press, 2006)
- Waugh, John, ‘Contempt of Parliament in Victoria’ (2005) 26 *Adelaide Law Review* 29