THE LEGISLATIVE COUNCIL SELECT COMMITTEE INQUIRY ON PRODUCTION OF DOCUMENTS MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON FRIDAY 6 SEPTEMBER 2019

Mr LEIGH SEALY SC WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Forrest) - Welcome. This is a public hearing and is being broadcast. Everything you say will be recorded by Hansard and published on the parliamentary website as part of our public hearing process. You are covered by parliamentary privilege while you are before this committee but if there is anything you want to comment on in camera, you can make that request and the committee with consider it. I assume you understand and probably have read the instructions for witnesses. Do you have any questions before we start?

Mr SEALY - No, I do not.

CHAIR - Thank you. We have a work experience student with us today too, so you are aware of who the other person in the room is.

Thank you for your submission. Personally, I found it very informative and quite historical, and it is great to have some of that background. We invite you to speak to your submission if you wish to add or further clarify anything, and the committee will have questions about this. I assume you have taken time to read other submissions to the inquiry?

Mr SEALY - Some more closely than others but I have at least skimmed all of them, yes.

CHAIR - We may ask questions about what other witnesses are suggesting. We may seek your opinion as well.

Mr SEALY - The main point I wanted to make in the submission was, first, that parliament doesn't exist solely for the purpose of making laws. Its other really important function, particularly under the Westminster style of government, is to hold the government of the day to account.

It does that in a number of ways.

One is by asking questions of government ministers, who under the Constitution must be members of parliament. So questions can be asked on the Floor of the House. Ministers, and indeed everyone else within a jurisdiction, are subject to the command of parliament to attend before it to give evidence, answer questions and produce documents and information. That is a very important part of parliament's functions. Indeed, it is inseparable from the lawmaking function because, as I tried to point out in the submission, you can't make wise and just laws unless you have good information.

Unless you can get information particularly about how current laws are functioning - usually you get that information from government - you can't make evidence-based decisions about whether the law needs to be changed, or whether you need new laws or whether some laws are past their use-by date. It is a core function of the parliament and its committees to hold the government to account not only in relation to those matters but also, as all members know, in relation to

appropriations and things of that sort. This is to ensure that public moneys are being spent for the purposes for which the parliament has authorised their expenditure and not otherwise.

All of that, of course, gives rise to tensions between the parliament and the government. It shouldn't but it does, and I think we have to accept that in some circumstances some information at times ought not to be made available publicly. That is perhaps a different thing from saying that it shouldn't be made available to the parliament. I think those two questions are often entangled with one another.

The response of government is often that 'We can't give it to members of parliament because particularly those opposition members can't be trusted and they are likely to leak it'. At some point we have to have some faith in our elective representatives, it seems to me, and that, as far as I am concerned, really isn't a sufficient excuse. There are some circumstances - for example, in the midst of litigation involving the Crown - in which the Crown having to release publicly its legal advice would be unwise, the same as any private individual wouldn't want to disclose the advice they are receiving and relying on in litigation to their opponent.

Historically, as everyone would know, the deliberations of Cabinet, not documents that have been to Cabinet, but the deliberations of Cabinet - the things actually said by ministers sitting around a Cabinet table which lead to a concluded government policy - have been regarded as, at least for a period of 30 years, I think, under Commonwealth law - I am not sure if there is any law in Tasmania; someone is indicating it could be five years - that Cabinet documents or the deliberations of Cabinet can't be made public.

I then pass on, almost by way of analogy in the submission, to the rules that the courts have worked out because problems also arise when the Crown gets involved in litigation and the opposing party in that litigation says, 'Well, I want to see all the documents you have in relation to this issue'. The Crown typically will say, 'No, some of these are covered by public interest immunity'. That is to say it is not in the public interest that these documents should be made available either publicly or even to you or your legal representatives.

It used to be the law that if that claim were made, it would be accepted unquestioned but the law in this country and in the United Kingdom changed in about the 1960s or the early 1970s. The law now if there is a dispute about whether it is contrary to the public interest for certain information or documents to be produced to an opponent in litigation, the court will view the documents and make a determination about whether that claim is well founded or not.

That doesn't happen in the parliamentary sphere for two reasons. First, the question of whether the government should or must produce documents to the parliament isn't just issuable, which is to say it is not a matter capable dealt with by the courts because of provisions of the Bill of Rights which gave rise to parliamentary privilege. So no-one can inquire into the proceedings of parliament - no-one outside of parliament, not even a court, subject to some minor qualifications.

The result is therefore that it's not possible for parliament to go to court to get a ruling on whether the government needs to produce a document or vice versa. The problem for parliament is that, as things are presently constituted, there is no-one like a judge who can take a neutral position and determine whether the claim made on behalf of the executive government that the documents are covered by a form of public interest immunity is a good claim or not.

When I wrote my submission I was aware of only one jurisdiction in Australia that had attempted to grapple with that problem, and that was New South Wales, and I won't rehearse what I said in the submission about that. It has since been brought to my attention that Victoria now also has a similar - well, they started off with a sessional order in 2007, I think it was, but that has now become a standing order. It is in very similar terms to the New South Wales standing order, but is slightly and subtly different. I don't know whether you want me to talk about that -

CHAIR - It would be good to elaborate on that, thanks.

Mr SEALY - Under the New South Wales standing order, as I understand its operation - I should preface all this by saying that the problem of the production of documents almost always arises in relation to the executive government and the upper House. Of course, by definition, the government controls the lower House and so ordinarily there is no hostile action taken against the government downstairs, if I can use that expression. So, it almost always falls to the upper House to bite the bullet in relation to these sorts of difficult questions.

Under the New South Wales standing order, if a request is issued by, ordinarily, a committee of the Legislative Council, that request goes to government; the government is obliged to produce all the documents, or at least to list them initially, and, in respect of that list, to identify those documents in respect of which a claim is made that they are subject to public interest immunity.

That claim having been made, the documents are then referred to an independent arbiter who, historically, has been a retired Supreme Court judge in New South Wales, who then makes a determination about whether the claim is a valid claim. In many ways, it is similar to the process that happens in court, except this is being undertaken by someone who is not actually a serving judicial officer. So that determination is made and, generally speaking, the committee will accept that determination, although it is not bound to do so, for one reason or another. I don't think it ever has, to my knowledge, in New South Wales, taken a different view.

I should say that the New South Wales standing order also provides for every member of the committee or, I think, ultimately of the House, of the Legislative Council, to view the documents, so that they can make their own determination with the assistance of the advice of the arbiter as to whether they will vote to require the production of the document or not.

In Victoria it is slightly different, as I read their standing order, in that only the mover of the motion for the production of the documents gets to inspect the documents. Now, that leaves the remaining members of the Chamber in the difficult position of, although they have the advice of the arbiter, not seeing the documents themselves, so they are flying blind to some extent. They really have to place their trust either in the arbiter or in the party whip, I suppose, if those considerations arise.

CHAIR - Or it would be the chair of the committee more likely in our House -

Mr SEALY - Yes, I guess here. I do not think there are whips in upper Houses but presumably -

CHAIR - No, not in ours anyway.

Mr SEALY - political pressure can be brought to bear. As I point out in my submission, historically the way these things have been dealt with is as a battle of political wills. I haven't read

closely the submission from the Senate because, as I understand it, they are really saying, 'Look, the status quo works reasonably well. We work this out on a case-by-case basis.'

CHAIR - They have had the same committee look at it twice and I think they are about to review it again.

Mr SEALY - Really, there is not much difference between looking at things on a case-by-case basis than having the system that's in place in New South Wales and Victoria because that is on a case-by-case basis and having the system that is in place in New South Wales and Victoria. They are on a case-by-case basis which avoids the unseemly political chest-beating that generally occurs where, on the one hand, the Government is saying 'Oh, no, these people cannot be trusted with this important information' and on the other, the parliament is saying 'Well, we need this information to do our job.' Eventually someone makes a political judgement about who is suffering the most damage and backs down.

As I said in my submission, some people would say that is precisely as it should be. My own view is there is a more civilised way to deal with this, particularly having regard to the importance of parliament having access to documents. We have to recognise some classes of documents may be sensitive and may contain information that is not in the public interest to make public.

Speaking for myself, and it might be regarded as a somewhat radical view, I do not see any good reason there is any information in the possession of government that cannot be disclosed to members of parliament - subject to confidence. There is no reason why this parliament should not know what the government is doing in relation to any matter.

CHAIR - There appears to be a great deal of resistance to this. As you would be aware from what has happened in a couple of cases more recently in Tasmanian Parliament, documents have been requested that clearly are not revealing the deliberations of Cabinet. Clearly, from the nature of the document you can see that. This is one of the reasons this committee was formed - to look at a mechanism to break the deadlock, because as much as you could try to shame the government of the day, they just say, 'No, you cannot have it'. It becomes a childish game in some respects.

Do you have a preference with the Victorian and New South Wales examples? Do you think one has superiority over the other? You mentioned that in Victoria, only one member gets to see the document. We can flesh that out because our terms of reference are about looking at a mechanism, and for us to understand the pros and cons of each model we are aware of in Australia at the moment might be helpful.

Mr SEALY - I do not have any extensive personal experience of how either system operates; I am only looking at the standing orders themselves. I have spoken to some people about how things operate in New South Wales so I have a little knowledge, but not a great deal. My view is that the New South Wales model is more satisfactory because every member has access to the documents and has an opportunity to make a reasoned decision about how they are ultimately going to vote on the question of whether the document should be produced or not. The limitation, it seems to me, inherent in the Victorian model is you have to rely pretty much on the arbiter and the report you receive from them in order to cast your vote.

The other thing that impinges on this I touched on in the submission - the power to make standing orders in this state arises under section 17 of the Constitution Act 1934; each House is empowered to make standing orders for itself but those standing orders are subject to the approval

of the Governor. Section 43 of the Acts Interpretation Act - this from memory but if it becomes important, I will find it for you - contains a definition of the phrase 'the Governor': it basically means the Governor acting with the advice of the executive council.

Of course, the executive council is in effect the ministry of the day, so that it is a very nice question as to whether, given the wording of section 43, the Governor acts upon their own discretion in determining to approve the standing orders of a House or whether that approval is subject to the advice of the executive council. If it is the latter, and I am inclined to think it may be, there is plainly an opportunity for the government of the day to advise the Governor not to approve a standing order with which it is not happy. This is purely speculation, but I wonder whether the Victorian standing order was the result of a political compromise.

CHAIR - We are talking to those two jurisdictions, so we will follow it up with them.

Mr SEALY - It may be a matter worth raising whether it was thought more palatable to the government that it has to disclose or show the documents in respect of which they claim privilege only to one member, not to the whole House. I can understand a government might draw some comfort from that, in supposing at least it is only one person and they will know who leaks, if the document is leaked, rather than running the risk that you have a whole House, some members of which may be hostile, and you never knowing whom to blame.

Interestingly enough though, since this protocol, or standing order, has been in place in New South Wales - this information goes back to about January or February this year - there is not a single instance in which any member has breached the confidence of the government by disclosing. The reason is pretty obvious. The whole system would fall to the ground if it were abused in that way.

Mr DEAN - Thinking of the position with the Victorian situation, which is disclosure to one person only in confidence - perhaps it would be the chair - I do not see its value because that person is not able to share it with the rest of the committee. Or will they?

Mr SEALY - No, they will not, not at that point. This is at a point before the determination is made by the arbiter. You are quite right.

My personal experience when I was solicitor-general - and I need to be careful about what I say - is there were occasions when the government took the position that it did not want to disclose certain, for example, legal advice. Indeed, my own view is that as a general rule government should not make public their legal advice.

I draw a distinction between making things public and making disclosures to parliament.

There is good reason why you should not do it. One is that governments should not be seen to be picking and choosing which advice they release and which advice they do not.

There is a temptation for governments to release legal advice that favours them, but not to release legal advice that does not favour them. If they are in a tight spot and have some advice that supports their position, they are usually more than happy to make it public. If they have advice that this does not suit their position, usually they are not happy to make it public.

As a general position of principle, my view is that governments should not ever release legal advice publicly simply as a matter of principle and consistency. However, it is appropriate that legal advice obtained by the government is disclosed to parliament in proper circumstances and subject to a duty of confidentiality. That, in some ways, may take the steam out of those members who are politically motivated to embarrass the government, and it does at least mean parliament receives the information it needs to make a decision. It may not necessarily be able to make it public and therefore use it for political purposes.

CHAIR - We saw that happen when TasRail was being bought back from Pacific National. During an Estimates committee hearing we received that information in camera, so it does happen at times.

Ms WEBB - It is only a clarification around the New South Wales and Victoria distinction. Finish that first if you like.

Mr SEALY - Going back to what Mr Dean said: I understand that in Victoria the documents are disclosed to the person who moved the motion for the production of the documents, and only that person.

Ms WEBB - That is what I want to clarify.

Mr DEAN - That would be the chair. For example, when you were previously involved with the Public Accounts Committee, it was the chair writing to you.

CHAIR - The chair of the PAC.

Mr DEAN - They would raise a motion, as it were, from the mover as a motion. The Chair would receive that information and, therefore, if it were in confidence, it would be of no value because they could disclose it anywhere, even back to the committee. That is the point I am trying to make.

Mr SEALY - Yes, I think that is probably right. Whether it is possible in the course of the ensuing debate about whether the parliament, irrespective of the report from the arbiter -

CHAIR - Can I clarify a point? You may be getting a little confused here. As I read through the Victorian submission and their standing order model, when this document is provided and this process is kicked off, when the arbiter is involved, they consider the document. At that time, the person who moved the motion, whether it be the chair of the committee or a member asking for a document on the Floor regarding legislation, they are the other person who gets it.

Mr SEALY - That is as I understand it.

Ms WEBB - This is what I would like to clarify. I read it as: documents have been called for, and they do not want them to be given. What happens is that they are tabled. They are not tabled as complete documents; they are tabled, indexed, dated, details provided as to who created them and things of that nature. A list of the documents is tabled. It is that detail somebody can request be sent to the arbiter. In New South Wales, any member could make that request; in Victoria, it has to be one person, who may be the chair of the committee or the person who requested the document on the Floor. A sole person is then in a position to make a request which is sent to the arbiter, and they are the only person who looks at the totality of the documents and makes a recommendation

to the parliament. Is my understanding of the process correct? I understood that the whole document was not seen before the arbiter step came into play. Perhaps correct me on that; I may have read this incorrectly.

Mr SEALY - I am not sure I can answer that question. My understanding was that the mover of the motion was entitled to see the document as was the arbiter. It may be the position that no one but the arbiter sees it, but it seems a peculiar position that the House is then invited to vote only on the basis of a document prepared by someone else in relation to a document those voting have never seen.

CHAIR - The process of how it works in Victoria will need to be followed up with them when we meet with the former clerk involved in the establishment of it.

Mr WILLIE - It has never been used in Victoria.

CHAIR - No, because now they have produced the documents willingly, saying 'We are not being forced to'. Anyway, it has had the desired effect. In terms of the nuts and bolts, it might be better to clarify that with the people working with it.

Mr SEALY - How it works on the ground may be different from how it looks on paper.

CHAIR - The problem is it has not been used in full measure in Victoria. In Victoria, they have produced the documents, saying that they are doing it voluntarily.

Mr SEALY - Which is as it should be.

CHAIR - Exactly. Before we move on to other areas, you mentioned records related to decisions of Cabinet under section 26 of the Right to Information Act, which deals with exemptions in relation to Cabinet records - the exemption ceases to apply after the end of 10 years. I think you said five. Or are you suggesting there may be another move?

Mr SEALY - That is for the purposes of that act. That act has nothing to do with this parliament in the sense that the parliament is not bound by the provisions of the act. In the past, I have seen attempts by ministers to rely upon the provisions of that act as forming a basis for refusal to produce documents to the parliament. That is an act about production of documents to citizens.

CHAIR - So there is no provision for the production of documents relating to the official record of deliberations of Cabinet?

Mr SEALY - Not that I am aware of; that's not to say there isn't one. I have recently been doing a lot of work on the Tasmanian Constitution and all of the related acts. I did not come across any provision anywhere in relation to that. Interestingly, not that it is directly relevant to this committee, insofar as I am aware the Tasmanian Government has no system of classifying documents. In other words, we do not have 'Secret', 'Top Secret' or 'Confidential' within the State Service. There is no system for classifying documents. I raise that only because there might be some circumstances in which, if a document came across that was stamped Top Secret or words to that effect, it might add some weight to a claim of public interest immunity. Documents which, on their face, for example, are correspondence between two ministers, while one can't without seeing the document make any definitive conclusion, it's inherently unlikely that such a document would contain material that was not in the public interest for the public to know.

CHAIR - Leigh, you mentioned earlier that you believe the power of the parliament to call for papers and people and the powers to ask for the production of documents is sound. We have had another submission that suggests there may be some question about that in the ability to bind the Crown. Are you able to comment on that more fully? In your submission you go some way to that in talking about court decisions that have been made. I would like you to expand on that if you could.

Mr SEALY - In my view there is almost no doubt that the power conferred on the parliament by the Parliamentary Privilege Act extends to the Crown. Indeed, I deal with the history of how that act came to be passed in some little detail. It was in circumstances where the controller of prisons had refused to appear before the then Legislative Council; that is, someone who is in the employ of the Crown. The very purpose of the Parliamentary Privilege Act when it was passed in 1858 was to enable the parliament to obtain documents from the Crown.

It used to be the law in this country that no act bound the Crown unless there was - and you still see it in some of the older acts - 'this Act binds the Crown'. It will sometimes say 'in all of its capacities'. In the early 1980s, there was a decision called *Bropho v State of Western Australia* in which the High Court of Australia said, no, there is no longer in Australia any presumption that legislation does not bind the Crown; it is a matter of looking at the particular enactment and determining what the intention of parliament was, whether the enactment was intended to bind the Crown. If that intention can be discerned, then it binds the Crown.

Having regard to the role of parliament and the system of what we call responsible government and parliament's role of holding government to account, it seems to me inherently unlikely that you could conclude that when parliament passed the act and allowed it to remain on the books, it did so in the belief that it doesn't bind the Crown.

I come back to this point about it being just issuable facts. I would have to think about this, but you might have some difficulty in going to court and seeking a declaration or some sort of order from the court that the government of the day was bound by the terms of the Parliamentary Privilege Act, which is to say the Crown. I think the better view is that clearly the act was intended to bind the Crown from the very outset. Having regard to the fact that one of the principal functions of parliament is to hold the government to account, it would be close to absurd to suggest that somehow parliament meant to exclude the Crown from the operation of the act and put the government, as it were, beyond reach of the parliament. It is unthinkable, quite frankly.

While I recognise there's that general area of concern, in some cases where the act is silent whether it binds the Crown or not, the modern view now generally is that all legislation binds the Crown, unless there is some discernible indication in the legislation that the Crown is not to be bound.

Mr WILLIE - If we change the Standing Orders and it is approved by the Government and they give that advice to the Governor, and we potentially end up with a scenario like New South Wales, where members of the Legislative Council are allowed to look at the document in collaboration with the arbiter. The government of the day in that scenario could still refuse to produce the document even though that process is in place, couldn't it?

Mr SEALY - Yes, it could.

Mr WILLIE - And the Legislative Council still doesn't have the power to compel a government minister in the other House to appear before the Legislative Council to then be subject to the Parliamentary Privilege Act.

Mr SEALY - I think generally that is true; on the one hand, yes, you do, you can issue a summons to a minister or a member of the lower House, but that House asserts its privileges against your House and says, 'No, you are not going to have him or her'. Yes, that can occur.

That also raises another question, something else I have been looking at more recently, as to whether or not, as exists in some states in their constitution acts, a facility to require ministers to appear in another House to answer questions and/or to appear sometimes to champion a bill or to explain its provisions. For example, it might, on occasion, be useful for the Legislative Council to have access to the Attorney-General to explain a particularly difficult piece of legislation. At the moment, that might happen at an informal level, but there is no opportunity for that to happen in -

When I say there is no opportunity, I dare say that Standing Orders could be suspended and arrangements could be made for it to happen.

CHAIR - We have done that, Leigh, when we have had ministers in our House who have gone to the other place to answer questions in question time, so that has happened.

Mr SEALY - I know that there is advice this parliament has obtained from several sources on that particular question and nothing has ever come of it. The advice from very eminent people would be around.

That is an indirect way of answering your question, but, yes, as things presently stand, if push comes to shove, the government can just say no, if it judges that it can wear the political cost of doing so. In the end, it all comes down to the question of people making political judgments about it.

You might shift things a little bit, but with the existence of a standing order, which has the appearance of a settled rule about how people are to play the game, it might be felt to make it somewhat more difficult for the government of the day to be seen to be breaking the rule and therefore it might visit a bit more political odium on them than otherwise. Ultimately, if they can make a good enough argument that enough people accept and say, 'Oh yes, that seems a reasonable thing to refuse to do', then, if they think they can get away with them - I don't mean to sound too cynical about this, but if the reality of it is that those are the sorts of judgments made in these circumstances about whether this is doing us more harm than good; it can sometimes be the case that withholding the information does a lot more harm than disclosing it.

Ms WEBB - Invariably the presence of that arbiter arrangement takes it out of the argy-bargy of political contest between parties. If a finding is made by an external independent arbiter that a document doesn't meet the public immunity test and the government still refuses to disclose it, that's a different level of political risk they are bringing on themselves and it takes it out of just a party-political contest.

Mr WILLIE - It's not party-political, it could be an independent member -

Ms WEBB - It could be, indeed.

Mr WILLIE - In some cases, it has been.

Ms WEBB - Yes, true.

Mr SEALY - With respect, I think that's exactly right. As I say, once people understand there is a set of rules by which everyone has agreed to play and someone seemed to be breaking those rules or not respecting them, that does create a different perception.

CHAIR - Leigh, are you aware of an instance where the standing orders of a Legislative Council have been proposed? The Standing Orders Committee goes through the Standing Orders at times and rejigs them to modernise them, or whatever, and it is a process as you've described: it goes to the Governor, but the Governor then, arguably, has to seek advice from the government of the day. Have you ever had a circumstance where they have actually rejected a proposed change?

Mr SEALY - I had a bit of a quick look at this last night because the question of the making of the standing order, in particular the difference between Victoria and New South Wales, got me thinking as to why it had come about and it occurred to me that it might have been as a result of some sort of political compromise, along those lines.

So far as I can ascertain, the position appears to be this: both Houses of the United Kingdom parliament make their standing orders, and they are not subject to the approval of the Crown at all. Both Houses make their orders and that's it; they are self-governing, as it were. However, the position, certainly in New South Wales and certainly in Tasmania, is that the standing orders have to be approved by the Governor. I didn't check the other states but I had hoped to see whether or not there was the position that any of the other parliaments had the power to make their orders without approval of the Governor, but I suspect the answer to that question will be no, for this reason: the parliament at Westminster, for purely historical reasons, has long been held to have an inherent jurisdiction, an inherent power. Indeed, both Houses in England were historically treated as courts - literally; indeed, the House of Lords was a court until 1975 and it was the highest court of appeal, oddly enough, but the House of Commons is also regarded as a true court and hence having the same powers to subpoena witnesses and to imprison - to do all of those things that a court may do.

It has been clear since this Tasmanian decision - it's the Privy Council's decision but the facts arose in Tasmania in *Fenton v Hampton* in 1856 that colonial parliaments, whether created either by royal warrant or by imperial legislation, are a form of subordinate creature - I say that with the greatest respect of course to the parliament. They don't have those same inherent powers, only those powers conferred upon them by the instrument which creates them.

As I point out in the submission, in the Tasmanian Constitution there is no provision as there is in every state except us and New South Wales; all those state parliaments have conferred upon them all the powers of the House of Commons, inherent and otherwise. Tasmania and New South Wales, for historical reasons, haven't and never have. Indeed, New South Wales is, in some respects - and the New South Welsh would disagree; they would say they are in a better position by reason of being unconstrained entirely, but minds can differ about that. The important point is that none of the Australian parliaments and even the federal parliament has these inherent powers necessarily and therefore, I think, on full inquiry one would find that the making of standing orders would be subject to approval of the executive - by which I mean the governor, acting on the advice of the executive council.

Sorry, that was a very long and torturous answer, but I am not aware, no. Again, there is some political cost, I suppose, in a government of any shade, at any time, being seen not to want to cooperate in putting in place what might be regarded as a sensible arrangement to deal with these sorts of things. Again, the same sorts of political judgments will be made from time to time when those issues arise.

CHAIR - We have a submission from the Government saying no change is needed, so that is an indication that there may be an unwillingness.

Mr SEALY - Governments are like that, may I say, with respect. Notwithstanding there is a provision in the Right to Information Act that instructs the Crown that it should err on the side of disclosure, but even each of us as a private individual probably has the same starting point that if someone wants information from us, we would naturally become defensive and I think governments become naturally defensive. As soon as anyone says, 'Okay, we want some information from you', people don't sit down, in my experience, saying, 'Ok, how can we best give this information to this person?' The starting point is to say, 'Okay, what are the restrictions that are applicable here that we can rely on to prevent us giving this information to this person?'

CHAIR - I remember the debate in the RTI act was all about the push; a former attorney-general at the time said it was about a push approach rather than a pull, but you're saying that it still doesn't really work?

Mr SEALY - I have not been closely involved in those things in some years now, but my broad perception is that governments are like ordinary human beings: we like to keep things private.

Mr WILLIE - It is the nature of the institution, isn't it? It is adversarial and withholding information can produce a political advantage in many instances. So is it the nature of that system and that pressure that makes governments that way inclined?

Mr SEALY - I think it is a whole complex of things but part of it seems to be the idea that something will be discovered that they don't know about. In other words, someone will look carefully at some documents they haven't looked at and that will disclose something they hadn't realised. In other words, if you play your cards close to your chest you are much less likely to get into trouble than if you lay them on the table and let everyone look at them.

Ms WEBB - Or disclose something that they did realise but would prefer not to have it in the public domain.

Mr SEALY - There is that too.

Ms WEBB - Can I ask a question around the next level of impact? We are talking about the impact of being requested to provide information and the impact that has on the government of the day. I suppose it is relevant to some of the disputes that may have arisen in times past. I am interested in your view on the idea that the prospect of documents being provided to parliament or the Legislative Council would potentially constrain the provision of frank and fearless advice and potentially even from consultants, say, who are doing work to provide advice to a department or the government of the day. Does the knowledge that those documents could be withheld and not shared with the parliament allow that advice to be of a better quality in terms of being frank and fearless? Is that a view you would concur with or do you see there's a risk of affecting the quality of information or advice provided by the very possibility that information could be disclosed?

Mr SEALY - Short answer, no. The argument you articulate is an extension of the central or the core argument in favour of public interest immunity which has to do with the system of Cabinet government. That rule exists because under the system of Cabinet government and let's assume we were a Cabinet all sitting around discussing opening what our policy on a particular matter was going to be and I argued forcefully against a particular proposition which ultimately finds favour with the majority and so becomes government policy. My choice is simple. I either support what has become the government policy even though I argued very heartily against it or I resign from Cabinet. Let's assume I stay in Cabinet and have to go out and persuade the people of this new government policy. It would undermine confidence in government if it were known that I had forcefully argued against the proposition I now appear to support.

It is matter for my own conscience, of course, what I am doing, but that is a really well understood area of public interest immunity. It would bring the system of government into disrepute but I don't think you can extend that to those who are engaged by Cabinet, whether as members of the public service or as private consultants, to provide advice to government. Advice should always be fearless and independent. It should never be toadying and made to accommodate the wishes of the person you think you are providing advice to.

Speaking as a legal practitioner, it would be a complete abdication of your duty to provide advice to a client that you thought they wanted rather than advice that was correct. You are doing your client a disservice apart from professional disservice. I think that argument about frank and fearless advice can be closely confined to Cabinet.

CHAIR - Cabinet deliberations?

Mr SEALY - To Cabinet deliberations, yes.

Ms WEBB - Not necessarily to advice?

Mr SEALY - Not to a document that has made its way to Cabinet and Cabinet has had a look at it and said, 'Well, no-one can see that now'. Speaking for myself, if I were asked to provide advice to Cabinet, I certainly wouldn't tailor it to what I thought Cabinet wanted to hear. I would tell them what I thought the correct answer was.

Ms WEBB - More importantly, would you tailor it or would it change the nature of the advice, or the scope of the advice, if you knew whether it would absolutely not be shared further, say to other members of parliament, or whether it may be? I think that is the argument being made.

Mr SEALY - Yes, I suppose that's true. I suppose I might say things I might be prepared to say things in an advice that I wouldn't otherwise be prepared to say if I thought the advice would never see the light of day.

It seems to me it is preferable that, and I don't mean to personalise this, but if you assume I am providing this advice, it is better that I should understand that what I am writing may well be made public than have an understanding that what I am writing will never be made public. That would sharpen the mind of anyone who thought, 'Well, hang on, this is going to be open to public scrutiny'.

CHAIR - You said earlier that you thought, almost without exception - and correct me if I am misrepresenting you here - that legal advice to the government should not be disclosed and you

were talking with Meg about how you might prepare advice knowing that it could become public. Do you think there is a difference here between legal advice to Cabinet and advice from another departmental head about health or justice policy?

Mr SEALY - There may be. It is difficult to talk in terms, as we used to, of class documents and contents documents. There used to be this old artificial division between what we call documents of this class - that is, the deliberations of Cabinet are always exempt. You do not need to go any further if it passes that test.

The law now certainly in the courts when this question arises is: the court will look at the document even if it involves Cabinet deliberations and determine whether it is in the public interest that the information should not be disclosed. It is a case-by-case evaluation of things. There is no longer a class of documents that is automatically exempt. To answer your question, I do not know the answer. That is not to say that legal advice should never be made public. What I am saying about legal advice is that there are often circumstances when, while that advice remains current, there are good reasons in public policy it should not be made public, but not necessarily good reasons why it should not be disclosed to the parliament.

I understand that raises another difficulty about what can we do with information that we, as members of the parliament, are given on a confidential basis. The answer to that is that I really do not know what the answer to that is, but it does mean, at least, that the parliament knows and the members of parliament know. Even if they cannot say publicly what the advice is, they know whether the government is obeying the advice and can adjust their -

CHAIR - They could use that knowledge, whether it be one member, as Ivan was referring to, or whether it be all members, when they undertake a debate and subsequently vote on a matter of whether particular documents should be released. You can talk about a document without referring to the direct contents of it. I assume that is how it is intended to work in both jurisdictions in New South Wales and Victoria. We have not seen it in practice in Victoria yet.

Mr SEALY - Yes.

Mr DEAN - The point I want to make was in relation to the Cabinet and you refer to it in your submission and you have also referred today about minister-to-minister correspondence. Obviously, that is one of the issues with the Public Accounts Committee matter was what was Cabinet discussion -

CHAIR - Discussion or deliberations?

Mr DEAN - What was the Cabinet deliberations? What constitutes that? Here we had, as a good example, a minister-to-minister correspondence that was claimed to have been Cabinet deliberation. You make some reference here and you refer to a case, *Commonwealth v Northern Land Council*, and you have gone into some detail on that. Can you expand on that point?

Mr SEALY - The deliberations of Cabinet are quite closely confined. They are the discussions that occur around the Cabinet table, the detail of the discussion that occurred, who argued what. Not whether a report was received from some architects or a quantity surveyor or some health expert who recommended a particular course of action and then Cabinet did not follow it. It is what each of the Cabinet said to one another. Having, as it were, entered into a free and robust debate about

a particular policy topic, Cabinet having determined the position under our system of government, the way it works is, if you are going to stay in Cabinet, you then must support that position.

The rule about Cabinet deliberations is really intended to prevent the embarrassment that would flow from a member of Cabinet who had argued a contrary position now coming out publicly in favour of a position they had argued against. It is really that closely confined; Cabinet deliberations mean things said around the Cabinet table.

Mr DEAN - If there were Cabinet deliberations about the sale of some property and following from this, a minister - outside of the Cabinet room - then provides a report to another minister in relation -

Mr SEALY - That is not a Cabinet deliberation.

Mr DEAN - That is not a Cabinet deliberation.

CHAIR - Can I clarify, Leigh? Not having been in Cabinet and unlikely to ever be, how contemporaneous are the deliberations of the members recorded? Does it simply record the vote at the end or does it record some of the arguments put by members for or against a particular position?

Mr SEALY - You can look at the things released after the 30-year rule. Generally speaking, there are minutes of who said what; that is the sort of detail the record is kept in and the sort of thing subject to the public interest immunity, but only for a limited period. Some people might say 30 years is too long, others it is not long enough, but is a kind of a compromise. To find 30 years later that the treasurer in the Whitlam government voted against some particular policy is not now likely to bring the system of government into disrepute. To know though, for example, the attorney-general of South Australia argued violently against legislation now being promoted by that government tends to undermine the public's confidence in the legislation and the whole process itself. With current affairs, it is the knowledge that in the debate in Cabinet not everyone agreed with the government's ultimate position is what the rule is intended to protect.

Many of you have probably heard the legendary stories - Queensland is a little bit of a case apart because it only has one House so there is no upper House there, but they used to wheel documents through the Cabinet room on trolleys. They had been in Cabinet and they were Cabinet documents, so that was the high point, if you like, of what amounted to a Cabinet document.

Because people have adopted shorthand expressions, this has tended, as often happens, to corrupt meaning. The public interest immunity rule was always there to prevent the release of information it was not in the public interest should be made public. Now, minds can differ about that. Take, for example, the prosecution of the Witness K and his solicitor in relation to East Timor. The government clearly takes the view information about their apparent attempts to bug the government of Timor-Leste should not have been made public and was not in the public interest. I imagine this is a view not unanimously shared today. Whether at the time there was justification for saying it was a matter of national security and therefore it should not have been made public, again, minds might differ. This is the sort of issue that engages this question of the public interest and the public interest is not things that interest the public, it is a matter of what is for the general good.

When you couch it in those terms, it becomes pretty evident the classes of documents and of information the government can legitimately withhold from the parliament is very small.

Ms WEBB - To check some of the assertions made in other submissions. We have heard in one particular other submission, noting the Legislative Council has significant privileges to call for documents and others, the claims made that any changes to the existing privileges has to potential to distort the intended separation of roles between the executive function residing in the House of Assembly and the review responsibilities of the Legislation Council. Can you see any way that extending the privileges, as in setting up a dispute resolution process we are discussing, would in fact cause a distortion to the existing roles of the two Houses or have a negative impact?

Mr SEALY - No. Using words like 'distortion' is value-laden and tends to imply a pejorative connotation that this would be a bad thing. My own view, probably evident from what I have said, is the more-abled parliament is to hold the government to account, the better that is. Some people might regard that a distortion of what they see as the proper balance between the role of parliament and the government, but ultimately - and there is no way around this under our system - parliament is sovereign, parliament is the boss. The government is the government only because it has the confidence of the lower House; if it loses that confidence, it loses government. All members of the lower House were elected by the people; all members of this House were elected by the people. Some of the members of that House and some of the members of this House - because they enjoy the confidence of the lower House - have been sworn as ministers of the government to administer the government on behalf of all of us. That does not give them any special privileges and it certainly does not give them any immunity from answering to this place for their actions.

Ms WEBB - To be absolutely clear - in setting up a process such as they have in New South Wales or Victoria with standing orders that put in place a dispute resolution mechanism through an arbiter, for example, you do not see we would lose anything from our democratic process in doing so; that, in fact, we may gain from this?

Mr SEALY - To the contrary, you would enhance not only the authority, but also the role of parliament in its proper function of holding the government to account. That is why we call it responsible government because the government is responsible to this place.

Mr WILLIE - Touching on Ms Webb's line of questioning earlier about advice to government. Is there any evidence to suggest it curbs the commissioning of advice? I can think of some practical examples. A youth justice report commissioned by a former minister, probably with some predictable outcomes, but no doubt providing a lot of comprehensive information about that area. Another example would be health where a KPMG report has been discussed a lot. Knowing these pieces of advice would become public, is there any evidence in any other jurisdiction that it actually curbs ministers from commissioning that advice?

Mr SEALY - Not that I am aware of, not that I can say. It is often said, not only in the State Service, that it is better to seek forgiveness than permission. I think sometimes governments do not always seek advice before they act - contrary to what I think might be widely assumed - but whether or not advice, if obtained, such as commissioning someone to study something and produce some statistical data that turns out to be quite embarrassing for the government. There is also an old saying you never call a royal commission unless you know the answer.

It is a human institution and governments of all persuasions will make judgments about whether they want information collated or created based upon whether they think it will help them or it won't. Looked at in isolation, this is plainly not a rational way to administer anything.

Mr WILLIE - I was thinking about potentially unintended consequences.

Mr SEALY - Yes, I understand. I do not know. I would have to think about it a bit more but I am inclined to say I do not think it would change things much. I suspect it happens now. I suppose it does happen that governments obtain reports about things and never make them public so we never know the information obtained. Mind you, therein lies the answer. They may not have made it public but you can call for its production. The parliament can call for its production.

Ms WEBB - It can be refused at the moment.

CHAIR - Yes, that's right, it can be refused. As long as someone knows it exists -

Mr SEALY - Well, you don't necessarily have to know it exists. You could call for all documents dealing with a particular question and, again, dishonest people might fail to produce the document or fail to list it but it's a risk that one runs. I am not sure I can answer your question directly except to say that I don't think the increased scrutiny is likely to make it more likely that government will fail to act - which is what I think it comes down to - or will fail to do things that it ought to simply out of a fear that the answer it gets will be unfavourable, but I could be wrong about that.

CHAIR - If you would like to make a closing comment I would like you to address the terms of reference. Do you believe the best way for our House to initiate some sort of dispute resolution process, if we were to, would be through the Standing Orders? Are there other mechanisms that you think will be equally effective?

Mr SEALY - I think the answer to the first part of your question is, yes, I do. I think along the New South Wales model is preferable to how I understand the Victorian model works. I gave some consideration in a different context to the question of whether you could constitutionalise this, that you could put something in the Constitution Act, for example, along those lines. I am inclined to think that's a little bit unwieldy. You would be better off with Standing Orders that are relatively more simply amended if they prove to be not working out so well than if you put something in the Constitution Act, which can be changed pretty easily as it happens but it's an act and because it is called the Constitution Act there is a sense around it that -

CHAIR - You shouldn't change it lightly.

Mr SEALY - Exactly, you shouldn't change it a lot. It is likely to be a dynamic area in the sense that things might change depending upon the attitudes of different governments from time to time. It may be the best course is to do this by way of the Standing Orders which can be more readily changed and adapted to meet circumstances as they change.

CHAIR - Thank you very much for your time. Could you please clarifying the section of the Acts Interpretation Act?

Mr SEALY - Yes, I will.

CHAIR - It is an important point to follow up with the other jurisdictions.

Mr SEALY - In Tasmania, the power of each of the Houses to make standing orders is conferred by section 17 of the Constitution Act 1934. The effect of section 17 is that standing

orders made by either House shall 'become binding and of force' only after they have been laid before the Governor by the House making them and being approved by him.

I wonder about those words. I actually don't know formally how this happens. It may simply be that the President of this place takes the Standing Orders to the Governor and asks for them to be approved or whether it goes by way of Executive Council meeting.

Section 43(1) of the Acts Interpretation Act contains definitions, and I will read what I have written here -

> It is unclear whether, in considering the approval of a standing order, the Governor must act, 'with the advice of the Executive Council', as required by section 43(1) of the Acts Interpretation Act, or whether the Governor is entitled to exercise an independent discretion.

I am inclined to think -

CHAIR - How would you suggest we clarify that point? Should we ask the Governor?

Mr SEALY - I suppose someone in the Cabinet Office would know or someone here might well know how -

Ms WEBB - Maybe we start with our Clerk.

Mr SEALY - Yes, the Clerks would probably know of the formal process for the approval of a standing order. If it does involve the Executive Council, that would no doubt require an Executive Council minute document to be drawn up to go to an Executive Council meeting but it may not. I wonder whether Ms Vickers is in a position to -

CHAIR - We can clarify this later, that will be great. Thank you.

Mr SEALY - One way to do it would be to approach the Supreme Court for a declaration about the meaning, but having regard to the history of court proceedings of this kind in New South Wales, I would not recommend that course.

CHAIR - You might have had some expectation, but we will follow it up as a committee and I appreciate your comments on that point. Thank you for your submission and your time today. It has been very valuable and very interesting.

Mr SEALY - Thank you.

THE WITNESS WITHDREW.

Professor RICHARD HERR OAM WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Thank you, Professor Herr, for joining us today, and thank you for your submission. You are very well versed with parliamentary privilege and how committees work but, for the record, everything you are saying is recorded for the purposes of *Hansard* and will be published on our website. The hearing is being streamed today so some people might be watching in other places. Everything you say is protected by parliamentary privilege while you are here. If you want to make any comments in camera, make that request and the committee will consider it. Otherwise, I will invite you to make some opening comments and speak to your submission and the committee will have questions for you.

Prof. HERR - First, to apologise to the committee, I inadvertently woke up in the middle of the night and I spent much of the evening helping Steve Smith get his 200. I do apologise to the committee, I couldn't get that second wicket in the last 10 overs. I couldn't get back to sleep either, so if I am incoherent I apologise to you for that.

More seriously, I have to apologise for the brevity of my submission. Timing has been very difficult for me of late. I have to confess my submission to the committee in the other room was my first priority. Part of why I am appearing before you now is to try to make sure parliament has sufficient control over its home affairs to keep the executive responsible; that is my reason for being here.

In some ways, when I was looking at this and wrestling with the issue - and I know you want to talk mainly about amending the Standing Orders. On the other hand, it is difficult to tell the institution that is supposed to have all the strength that it needs to have more strength because you have it all, yet people forget this. This is when I find it difficult. We don't have the American system, there is not a co-equality between the legislature and the executive. Responsible government means that the government is subordinate; it is responsible to the parliament. You can't have a subordinate who has authority over the superior. The river can't rise above its source and all that sort of thing.

In a lot of ways, it seems to me that what you are trying to do is make sure you can do your job and that shouldn't be a difficult thing to argue. That is the point I wanted to make in my comments to you, not that you necessarily needed them, but I wanted to make the point. The supremacy of the parliament requires that the government accept its position of being responsible to you, not telling you what it's going to allow you to do to be able to do your job.

CHAIR - On that point, is there no doubt in your mind that the Legislative Council, which we are focusing on here, has the power under the current legislative framework and our current practises to request and expect to receive documents?

Prof. HERR - To my mind, given our constitutional situation, executive privilege is essentially is a nested priority, if you like. The broadest priority is the parliament's privilege to look after the people's interest. Nested within that is an area which belongs to the executive to be able to do its job in a prudent and reasonable way. The relationship between the two privileges is one of prudence, not of primacy.

The problem we have in part, of course, is that we have a system that is extraordinarily dependent on conventions and people knowing what the conventions are. This is something that,

when your House allowed a treasurer to sit in your Chamber, that was, to my mind, a parliamentary abomination - it should never have happened. No other parliament outside Australia and outside the United States does it; we were the second one to do it.

With everything we know in terms of statute and constitution, money bills have to be in the lower House et cetera. To allow a treasurer not to sit in the Treasury benches just doesn't even - but, again, people didn't adhere to the conventions on which the rest of the system depends. There is nothing in our Constitution Act that says the government is responsible to parliament, nothing that says you can legislate. These are things we depend on people respecting constitutional conventions to adhere to and, to me, the most egregious one was that you were complicit in allowing it to happen.

CHAIR - Three of us at this table were not here.

Prof. HERR - Sorry, I meant you as a collective.

CHAIR - Not as individuals.

Prof. HERR - Yes. The point here is that parliament is the enabler of government. The government doesn't exist if you don't pass laws; the government does not exist if you don't pass money bills. You are the enablers. They are the supplicants to you, you are not supplicants to them. I am putting in fairly historic and clear terms because I find it frustrating at times - why should you have to - ?

The question is, how do two arms of government work in a prudent way to achieve the public will? If push comes to shove, it should be the parliament that does the pushing and the shoving because you are the ones who are responsible, ultimately, to the people.

The government isn't responsible to the people, it can't be responsible to the people. Our whole system depends on it being responsible to the people through parliament.

I asked the other committee - I don't think there are any ministers here, so it's okay - how many ministers go into parliament and vote as MPs. Ministers don't vote as MPs and you don't expect them to vote as MPs; they vote as members of the executive and they bloc vote. If I wanted to be more provocative, I would remind you that when parliament defeated Charles I, it closed down the House of Lords because the House of Lords was the House that was the King's Chamber, yet if we did it today, we would have to close down the House of Assembly because the House of Assembly belongs to the Crown. Government business controls what goes through the House of Assembly, the government has the numbers and especially if we don't get a parliament large enough to have a backbench to bring the government under some control in terms of parliamentary terms, it is still basically the government's House.

Again, I am being provocative because I need to make the point that when we are looking at it in terms of democratic values, there is a point at which this House has to assert its authority to make sure that our democracy works.

A couple of points so that you can interrogate me - I am not trying to lecture you, by the way.

Mr WILLIE - You have lectured me in the past, as a student.

Prof. HERR - All I can say is, you have survived and that wasn't my fault either.

The reason I made my submission, in terms of your inquiry, I was content that I couldn't add to the arrangements made in New South Wales and Victoria, other than I prefer the New South Wales version because of the wider scope it gives members to see the material.

CHAIR - Can you flesh that out a little for us? That is directly related to our terms of reference - maybe not now but when you finish, I would like you to do that.

Prof. HERR - If I can, I will.

I was going to go to the Norwegian parliamentary security committee because it goes to the extent of giving every member of that committee a security clearance. Its security clearance is so high that it actually allows them to see top secret or at least - I don't know what level of secrecy it is - North Atlantic Treaty Organization - NATO - documents. That would require legislative change; it would require a lot of things, including things you wouldn't like, like being obliged for the rest of your life to observe the Official Secrets Act, all the way to your grave. It would be a difficult thing to do. That would be one way of assuring the government that it couldn't assert that you weren't up to the standard to receive these documents. I stuck with those two because you are going to ask me about the details and I have to confess I didn't swat up to answer specifically on those details. I apologise but I will respond if you guide my attention.

The second point I want to make is a point I have already made, in a way. It is something that I have a dispute over with some of my friends in another place; that is, when ministers vote in the House of Assembly, they vote as ministers, they don't vote as parliamentarians. One of the problems we have in the Westminster system is that it involves a huge conflict of interest. Ministers vote on whether they are doing a good [inaudible] or not, and when you have a parliament as small as we have, the numbers are gone, there is nothing. That's a conflict of interest and we wouldn't allow that to happen in private enterprise. We did it because at the time of the Glorious Revolution in 1688, which I am sure Mr Willie has burned into his brain, after two goes of trying to bring the king under control, the parliament said, 'All right, we tried being a republic and that didn't work. We restored the monarchy, that didn't work. What do we do next?' What we do is make sure that the only advice the king gets is that which the parliament wants - so we'll appoint our own members to be the advisers because at least if they are sitting amongst us we can control them.

In one of my favourite countries, Norway, when you join the ministry, you leave the parliament and your place is filled by the next person on the party list. The parliament has a clearly separate role in oversighting the executive rather than the one we have, but we forget where we came from so we just assume that, of course, ministers are going to protect the Crown against the parliament and that's not what why we set up the system that we have. We didn't set it up deliberately and again, if we know how much trouble there would be if we ever tried to put the Westminster system into a coherent constitution framework, we would end up with something like what Norway has because we just have to work on ways of preventing these things from happening. My point here is: when you invite a minister to appear before you, there is this sense that they can say, 'Oh, no, you can't call a member of another place to appear before us because of the comity between us'. Well, you are not. You are not calling a member of another House, you are calling a minister of the Crown, and they're wearing a different hat. They shouldn't be allowed to change livery in the middle of the battle. That was what happened literally during the English Civil War. You went into battle and if you were wearing the king's livery, you couldn't then throw it off and say, 'By the way, I'm a member of parliament so I am one of the Roundheads'. Yet, in a curious sort of way - again

I know I am being provocatively extreme here - how can you change your livery in the middle of the fight? You can't just suddenly say, 'You can't talk to me because I'm a member of another Chamber'. 'Well, we didn't invite you as a member of another Chamber; we invited you as a minister of the Crown'.

CHAIR - On that point then, we've had a few battles and none of us have changed our armour.

Prof. HERR - Well, you can't. Well, you could, but you have had a few.

CHAIR - When we have invited ministers responsible for their portfolios to come and present to a committee, the previous government always said no. The current Government has been more cooperative, generally, in turning up as the minister. I am trying to be clear about the power, if you like, that enables us to call a minister to produce a document. What you are suggesting is that they should not be able to say no. That is what I am hearing.

Prof. HERR - The logic of the relationship is that they shouldn't be able to say no. They can't claim the protection of wearing one hat against - they didn't get their ministerial hat from the parliament. You didn't elect them, or the other Chamber didn't. The parliament didn't elect them. The Crown appointed them and the parliament has agreed to support them with Supply and confidence. The commission they carry is one that you can't -

Even if the House of Assembly expressed a want of confidence in a minister, it isn't the House that would be sacking them; it would be the Crown acting on advice from the Crown saying, if we want to keep the parliament on side to give you the advice that you require of us, you need to revoke this commission.'

Again, I understand that a lot of this has been lost in the fog of changes that have occurred over three centuries-plus now. I am not suggesting that you turn the comity between the Houses on its head, but you ought to be aware that when you are inviting them, you are not inviting someone from another place to come to you. You are asking the minister who has a commission from Government House to act for the Crown.

CHAIR - So, from what you've described in Norway, when you are appointed to a ministry you leave parliament and then someone else fills that seat. Clearly, then you have a minister who's not a member of that parliament, they're a minister.

Prof. HERR - Yes.

CHAIR - At the moment, we have a minister who is a minister for whatever but they are also the member for whatever electorate. They do work in their electorate as the member for whatever. I don't understand how we can demand they be one when we acknowledge that they also are another.

Prof. HERR - That's the schizophrenia of our system, that's all. If we are watching what is going on in the UK at the moment, you can see that ministry is embattled. They have enough numbers that the parliament can assert its authority in a way that makes sense to a government that isn't able to tell them to shut up and behave themselves.

Ms WEBB - Picking up on what you were saying, Ruth, would it be right to say that in calling them as a minister to appear before a committee, we are not disavowing that they are actually a member for a particular electorate, but we are calling them in their capacity as a minister with that

particular hat on, not as the member for the electorate that they represent. That should be a fairly ready distinction that could be made that this is the capacity in which they are being called to the committee. What you are saying, Professor Herr, is that we the right to do that, and there should not necessarily be a reason to do so.

Prof. HERR - I believe you have the right to do it.

Mr WILLIE - There is no way of enforcing it, though.

Prof. HERR - No. That is why in my submission I said that the thing you might want to do with regard to changing legislation just doesn't make sense, it is really restricted.

Remember your standing orders only apply to you; you are not enforcing them. At the end of the day, the levers you have to enforce your standing orders still depend on the levers that give parliament control of the executive, legislation and finance.

CHAIR - I don't think you were here for the latter part of the discussion with Mr Sealy. He was talking about changing standing orders in our House - each House has its own - and that the Constitution Act refers to the Acts Interpretation Act. It talks about the standing orders being approved by the governor. It is questionable in his mind whether the governor would, in that case, take advice from the executive government -

Prof. HERR - That's right. The governor wears two hats as well. Her Majesty, the Queen of Australia, is acting under direction when she is in council. When she is exercising her prerogative powers, she is exercising Queen in Parliament. In our Constitution Act the definition of 'parliament' is 'members of the two Houses and the Queen'.

CHAIR - Currently our governor, on behalf of Her Majesty, could act to accept revised standing orders without going to the executive?

Prof. HERR - They should not go to Executive Council at all; you should resist that. No way should you allow the executive to dictate to parliament what it can do to control the executive. So, yes.

CHAIR - Mr Sealy was questioning whether the interpretation of that section of those two acts could indicate that, that could happen, but you are saying there are two roles for the Governor on behalf of the Queen -

Prof. HERR - Yes.

CHAIR - and that she would exercise different powers in relation to -

Prof. HERR - Depending on which role was being played. This is why, for example, Harry Holgate wanted to prorogue parliament to get over the embarrassment he had of losing the numbers on the Floor. If the Governor, Sir Stanley Burbury, had been acting on direction of the Executive Council, he could have done nothing about that, but he had the absolute right of the prerogative powers of the Crown to exercise responsibility to a parliament to protect the parliament and its right.

CHAIR - What is happening in the United Kingdom at the moment is interesting. I was listening to a commentator, I don't recall who it was, saying that when the current prime minister

of the United Kingdom went to Her Majesty to prorogue parliament, she had no option but to prorogue.

Prof. HERR - I disagree with that, but I don't know.

Elements of that may relate to executive actions that follow. For example, the dissolution of parliament. When parliament is dissolved, it is done at the advice of her first minister, but not at the direction of it. Again, it gets complicated when you go back to the relationship between the Crown and the parliament. Originally, you were invited to advise the monarch so he could fleece his flock - raise money - but you were an advisory body. Since then, the parliament has changed. After 1688, they decided that Crown will follow, but it didn't combine both the parliamentary and the executive functions. They remained in a single person, but with two separate capacities.

I was disturbed by the same thing happening following this because I saw the Privy Council was engaged in it and I still do not know whether the commentators were at fault for misunderstanding. Again, Mr Sealy and I had this discussion at a meeting to discuss the need to upgrade our Constitution Act and deal with some of the things that should not be left solely to convention in our Constitution Act.

I do not know whether the commentators misunderstood advice as direction or whether the advice was essentially the Queen taking soundings and taking the sense of - 'I have to support my government, otherwise I will not have a government' - and doing it as an act of protest.

CHAIR - She might have made her own determination; we will never know.

Prof. HERR - That is the key part of my submission to you, to distinguish between what is absolute and what is prudential. It is prudent to have a system that works, it is prudent to respect confidentialities, but there are all sorts of privileges. We have encountered the one with the privilege of the confessional seal now having to be reconsidered. If it is reconsidered by parliament and statutes are passed, a number of people may have to go to jail because they refuse to respect the authority of parliament, but is what will happen. It will not go the other way around.

Mr DEAN - Going back to the Standing Orders issue where you were saying there is no way the executive should be able to interfere with that process -

CHAIR - By Legislative Council Standing Orders.

Mr DEAN - Yes, the Legislative Council Standing Orders. Leigh Sealy referred to the Acts Interpretation Act where it says that while they have to be accepted by the Government, the Governor has a say in that. But the Governor under the Acts Interpretations Act can be overseen or there is some control of the executive in that process -

Mr WILLIE - Acts on the advice of the Executive Council.

Mr DEAN - acts on the advice of the executive. If that is legislated and written in the legislation, you cannot do anything about it.

Prof. HERR - Again, we have problems of sloppy interpretation. I will take you to Samoa since we all have an interest in what happens in Samoa. The Samoan constitution says the head of state will act only on the advice of the prime minister. Because it comes prior to defining what the

executive is and what the parliament is, it has been interpreted as meaning the executive actually controls the parliament. Yet, later parts of the constitution say the government is responsible to the parliament. It is a contradiction. Unfortunately, one of my lecturers at the ANU was one of the co-authors of this; he was an administrator, not a constitutional parliamentary lawyer. He did not see the consequences. Because it was so important to Samoans that the head of state be respected and the head of state come out of their [inaudible], they wanted to make sure they could avoid the problems, the fights between the four kings that Samoa had.

They put it up-front but then the consequences in the constitutional interpretation has actually reversed those things. I do not believe the Governor is, on behalf of Her Majesty the Queen, the representative of the Crown in parliament. Beyond that, the prerogative powers should belong to dealing with the parliamentary - those things that are outside of the executive. Once it is in the executive, it is Executive Council; the Crown is not in council and that is directive. You cannot avoid this, but is for the executive branch of government, not for the [inaudible]. These are just the first principles, the sorts of things that bother me when I see something like a treasurer sitting in the upper House.

Mr DEAN - We have had two treasurers sitting in the upper House.

CHAIR - Over the years.

Prof. HERR - Yes. When I see that, I wonder what other conventions are going to fall to the wayside. When two of the parliaments keep powers for making sure the government respects the people or that you control the money and control legislation and you almost give one of those away, it worries me. I know you have not quite given it away, but it shows those conventional pillars of our Westminster democracy are more fragile than they should be.

CHAIR - Can we take you back to the New South Wales and Victorian models and their standing orders.? I am not expecting a full expert opinion; we will meet with them at a later stage to explore further how it actually works in practice or what the intention is and how they decided on the process. You said you prefer the New South Wales model - can you talk more about that?

Prof. HERR - My understanding of the difference between the two is that New South Wales has been more successful than Victoria in obtaining documents because the documents have to be shared with the Chamber or those members of the committee, not just the person who asked for them. You can get around it by saying you will ask for it collectively, but that does not seem to be the way it works, and I do not know why there is this distinction.

CHAIR - What problems do you see with only one member notionally having access to a document as opposed to all members?

Prof. HERR - It goes back in part to the questions I see as problems with you taking briefings. That was one of the things I skipped over. Can I come back to that?

I would like to see you have briefings in committee, not in this private way they are done now because there is no record. I have to trust you; I can remember when we debated the Terrorism Bill and its parallel legislation- it was all done in briefings that the Australian Federal Police - AFP - made clear, and nobody knew what it was about. I will not say who at the state level was outraged, but there were people of substance who had to cooperate with it and felt they were excluded even from knowing why this parliament had agreed to things. That should not be the case. I would

prefer you make your own standing orders and your own committee arrangements such that any time the government offers to give you a briefing, they do it in a committee. You can do it instantly - you have the committee already formed. All you have to do is say 'All right, we will now adjourn the committee for such and such, we will meet and have the briefing'. You will have Hansard recording it; the record is there, and if the courts need to understand why you decided something, they can access the record.

CHAIR - That is something I am taking up in another forum because it has become an emerging issue.

Prof. HERR - Those briefings are an oral document.

Ms WEBB - There is no accountability to them at all.

Prof. HERR - Yes. If somebody says to you, 'I got legal advice and have no written record of it, no capacity to show what the legal advice was', you are supposed to back off. That is nonsense. The oral statement is a form of document and given governments have increasingly liked to use briefings as a way of expediting legislation, they should run through the same hoops.

CHAIR - Thank you. I appreciate the comment. Would you like to go back to the comment about the Standing Orders?

Prof. HERR - I would like it to be the committee because I think that puts the onus on one person to say, 'I can't tell you what I saw but, trust me, committee, I am a reliable person'. It just seems to me to make more sense for all to share the burden, as it were. The other thing is, of course, if you do go to an independent public interest immunities adjudicator, or whoever, to look at the documents, they have to be appointed by the parliament; not by the Crown, not by the executive.

CHAIR - In this parliament, being both Houses, if it is Standing Orders for the Legislative Council, wouldn't it be one appointed by the Legislative Council rather than -

Prof. HERR - Well, you would have to appoint your own, yes.

CHAIR - That is what I am saying.

Prof. HERR - That means that you have to work with the executive in some way to get them to - again, you can't keep fighting with the executive all the time. I know I've been a bit feisty this morning and I apologise for not getting more sleep and all the rest of it but, on the other hand, my point is you should start at the highest level of asserting your claims to privilege and then negotiate downward to what is a sensible and reasonable accommodation. You shouldn't start off by saying 'Well, in order to get the documents, yes, you appoint somebody that you like and they can make the decision'. In the end it will be someone that you both can agree is an independent, reasonably responsible arbiter of where the different levels of privilege should apply.

Mr DEAN - That was a last resort in that case.

Ms WEBB - We still can't compel. There is nothing then that still compels the production of those documents, even if they are deemed not to meet a public immunity test.

Prof. HERR - Again, that is one of the things I was going to say but I thought better of it. If you are going to force me to say it -

Ms WEBB - Yes, twisting your arm -

Prof. HERR - I would have to say please don't ask a question if you don't want the answer. If you are going to ask about your right to demand documents, don't ask it and then end up conceding to the executive - 'Yeah, you can have whatever you want'.

Mr WILLIE - There are processes in place now that could force the Government to produce documents; we have just never done it.

Prof. HERR - No, exactly. That's the point and that was what a former minister said to me the other day over coffee. They do not have the male genitalia to do this. That was sort of his expression, anyway. The point is if you don't have the nerve to protect your interests, who do the people go to then?

Mr WILLIE - The most likely scenario is the nuclear option of blocking government bills. There is a feeling, perhaps - and I won't speak on other members' behalf - but if you demand a document, say, through the Leader of Government Business in the upper House, they don't have a lot of power either. They might want to produce the document, but the ministers are still saying no. Then you are holding them to account for another member of parliament's decision, so it's a difficult one for members to negotiate.

Prof. HERR - Well, it is. Obviously, you would like to apply targeted sanctions, as we have seen in international affairs, and target the things the government's most sensitive on. Presumably, hopefully from the public's point of view, something directly relevant to the issue at hand.

CHAIR - Which is not always possible if it's a committee looking at a matter. If it's legislation you need information on, that's easy. Usually that is much easier to negotiate, which we have in the past, asking for more information before we deal with legislation. When, say, it's a health-related matter and you don't have any health-related legislation on the Table, you could block or not proceed with other legislation, but it can be difficult if the minister who is withholding the information is not responsible for the legislation you're dealing with.

Prof. HERR - What you are saying is part of my problem, which is that, in effect, when push comes to shove, the public will back the government rather than the parliament. Unfortunately, that's been true. That is what happened in 1998. When the parties wanted to change the electoral outcomes, it was easier to change the parliament than the Electoral Act. That shows you how much esteem the public has for the parliament, if that was the determination they could make. To me, that is appalling. That is where you have to have a relationship with the public. You have the committees. A point I make in class - and I make it in Samoa, Fiji, Solomon Islands, Bougainville and wherever I have had to talk about it: here, I am talking to members of parliament on the Floor of parliament, I have privilege, so far, this is the Floor of parliament, you have brought it down here for me this morning and that gives the public an enormous amount of power. They should appreciate the consequences of this, yet they don't seem to appreciate it and they don't always understand it. They need to understand better the amount of power you give them by having your committees.

Ms WEBB - It is a difficult argument to prosecute in the public domain, is it not?

Prof. HERR - It needs to be made. At the end of the day -

CHAIR - That is the beauty of a committee like this, so we can make those points.

Mr DEAN - On the sanctions that can be applied, advice we received as a committee was that we could have convinced the other members of our House, because we are in the destiny of our own House, not to accept any government business until such time as they handed the document over. None of those sanctions is reasonable to go down the path of.

Prof. HERR - You shouldn't go down it for the Dog Control Act or something like that. I like dogs, although it is the cat that rules our house. The point is that it depends on what the issue is and how nuclear you go for it. The Chamber ought to back up its committees. If the Chamber doesn't back up its committees, if the government is afraid of the committee, they will respond; if they know they can isolate the committee or its recommendations in the Chamber, it is simply -

CHAIR - That's why we need mostly independent members in our House.

Prof. HERR - Yes, I know.

CHAIR - No offence intended to those members of parties who are sitting here.

Prof. HERR - Part of the strength is that you have the independence to say to the government, 'No, you can't organise to control us'. Equally, you are pointing out that you can't control yourselves sometimes for that same reason. One of the first things I did when I arrived at the university was to analysis voting in the Legislative Council because I wanted to see if it was true. It turned out that there were, back in 1973-74, something like four or five identifiable voting blocs within a 19-member Chamber. It showed a great deal of fractured voting structure, and that can be a problem.

Ms WEBB - I would like to repeat a question I asked Mr Sealey and hear Professor Herr's response to it because it relates to other submissions we have had. As the Legislative Council, we have significant privileges to call all witnesses and documents and an assertion that any changes to those existing privileges, such that we are contemplating with setting up an independent arbiter or that dispute resolution mechanism, has the potential to distort the intended separation of roles between the executive function residing in the House of Assembly and the review responsibilities of the Legislative Council. Do you see that there is a danger in some sense to distorting those functions and the separation of the roles?

Prof. HERR - I don't understand why it is changing your privileges in any way.

Ms WEBB - This is an assertion made to us that this is the case, that we are changing the existing privileges and there is a potential to distort roles.

Prof. HERR - You are changing procedures; you are using your privileges in order to enforce -

Ms WEBB - So you see it as a natural extension of using the privileges we have rather than changing or -

Prof. HERR - I can't understand how you would be.

It comes back to all sorts of issues about where the privileges of this parliament come from and how they've developed. You couldn't, I think, legislate alone, you would have to legislate for the whole parliament to increase its privileges in some way but, generally speaking, I believe legislation has been more of a backstop to existing privileges rather than an extension of privileges. I suppose anything you do could limit your privileges at some point, but I don't see how you could extend them. You are really just using your existing privileges to better achieve procedures that work.

Again, I am being combative with regards to the executive because what we can see in all the Westminster parliaments is that some 300-plus years ago parliament fought the Crown to take control of the Crown. In the last hundred years, what we have seen is the Crown capturing the parliament again through the use of political parties, discipline and that sort of thing. It hasn't been offset, except for in the last 30-plus years now, the emergence of committee systems that actually work. We have seen that with the Senate. That has made governments far more open and transparent than they were previously. That is why I wanted to have my bit to support you here as committees to make sure you support the parliament.

Mr DEAN - On this point, it has happened only - and I am not quite sure how many times - on no more than four to five occasions over the past 16 years that I have been in this place. I guess from that, you would look at it and ask, 'Are we right now with the legislation with the positions that we had to seek this evidence and information, or do we now need to go down a stronger path to put something in place to ensure that we get the documents when we do ask for them?' How do you see that?

Prof. HERR - It depends. You use the powers you need to use to get the job done. You don't go nuclear if it's a small thing, but you should always make sure you haven't eroded your powers to the extent that you can't use them if you need to. I don't know if that has answered it.

Mr DEAN - That covers it fairly well.

CHAIR - Professor Herr, I would like to ask you about a couple of other submissions we have received. In one that Dr Brendan Gogarty put in, he was raising some concerns about whether the committee or the Legislative Council has the powers to call for documents and whether the Crown is bound by those powers. If you have had a chance to read it, do you have any comment on the comments made in that submission?

Prof. HERR - No, I haven't seen Brendan's submission; we have chatted but I haven't actually read his final one. I think that some of the arguments put are available in the *Cabinet Handbook*. If you read the *Cabinet Handbook*, it says that Cabinet is an informal structure, that we have a responsible government system and the government is responsible to parliament. The documents on the executive side all support your powers. I hope a court wouldn't undo what the executive already admits, for the last 100-plus years, it has seen as its position.

CHAIR - Could I just read you some of the submission? Maybe you would then like to comment. This is from submission No. 13, from Dr Brendan Gogarty -

> The *legal* power of the Legislative Council and its Committees to require the production of documents has been addressed to the Parliamentary Privilege Acts. Section 2 of the *Parliamentary Privilege Act 1957* clarifies that joint committees have all the powers of a committee of a single House.

> However, the Parliamentary Privileges Acts leave unclarified one key threshold issue, namely, whether the Legislative Council (including its committees and joint committees) has the power to compel the production of documents by an officer of the Crown, that is, a Minister or executive officer. This is because there is some *legal uncertainty* about the powers and privileges of the Council, and whether the *Parliamentary Privileges Acts* extend to the Crown, including its Ministers.

He went on to say -

> We recommend that this uncertainty be clarified as a matter of priority. In particular, we recommend that the scope of the power of the Legislative Council (including its committees and joint committees) to send for persons and papers, be explicitly extended to include the Crown.

He goes on to mention that the High Court clarified these powers in *Egan v Willis*. I would like you to comment on that submission.

Prof. HERR - As Leigh Sealy was saying, I would prefer that it does not go to court because the parliament is supreme. If we go down the path of trying to get the court to make decisions regarding the procedures of parliament, the procedures of parliament are being eroded, full stop.

CHAIR - Didn't it go to the court though?

Prof. HERR - In this case the privilege existed; the question was: did the privilege -

CHAIR - Bind the Crown?

Prof. HERR - Yes. Basically, it found that the Crown was obliged to provide the document and that the parliament was in order in using its authority to try to enforce the production of those documents.

CHAIR - The reasonable necessity argument?

Prof. HERR - Indeed. I believe that still applies. I don't necessarily believe you have to legislate for it.

CHAIR - You are not in any doubt about the Crown being bound?

Prof. HERR - No, as I said. What worries me is that if the parliament starts not operating on and enforcing the conventions that give it its authority, including the authority to make laws, you then create uncertainty for the courts and I'd rather not go that way. When you start legislating, the courts will then start interpreting for you whether you should or should not do things.

Mr DEAN - That would create a few problems.

CHAIR - But you believe the power exists?

Prof. HERR - I do, yes. Oh yes. I don't have any doubt about that. For me, the documents from the executive say that they have accepted it always; I think it exists by the ancient rights and powers of the parliament, as it were.

CHAIR - Just one other point, and this is going back to the matter of documents that can be called for. We had some discussion with Mr Sealy about Cabinet documents and what they relate to. One was mentioned in the Government's submission as saying that Cabinet confidentiality is crucial to ensure robust Cabinet deliberation et cetera, and it is generally accepted that Cabinet documentation should remain exempt. The question is about what Cabinet documentation is. It went on to say that because this responsibility of ministers was part of the system of responsible government that the majority of the court, in the matter of *Egan v Chadwick*, considered that it was not reasonably necessary for the New South Wales Legislative Council to call for documents that would conflict with the doctrine of ministerial responsibility - that is, the court held that the powers of the Legislative Council did not extend to the call for production of Cabinet documents.

There seems to be some disagreement about what Cabinet documents are referred to. Do you have a view on that?

Prof. HERR - Yes, well, I included in mine the Osmotherly Rules. The bottom line was that whatever the baseline for building upwards - not downwards - the Executive accepting that anything that was in the freedom of information or right to know legislation ought to be provided straightaway by public servants and that ministers shouldn't interfere with that. I thought that it at least established the baseline. As I said in my submission, beyond this it becomes again the question of prudence. If, as has happened, for example, in Australia in 1975 when the Whitlam government was discussing in cabinet ways of getting around supply, that should not have been protected because that was undermining the authority of the parliament. Most times that sort of things does not happen, but if you extend to the executive the respect for cabinet solidarity on the grounds they are not misusing it, you have the right to pull the chain if you think they are getting too far off the lead.

CHAIR - In your view, what should constitute cabinet documents?

Prof. HERR - We do not know. The right to information tells us what a cabinet document is.

CHAIR - That is for the purpose of the Right to Information Act, not for parliament.

Prof. HERR - Exactly. We do not know what a cabinet is.

CHAIR - A cabinet document?

Prof. HERR - No. We do not know what a cabinet is.

CHAIR - Right.

Prof. HERR - There is only one jurisdiction in the whole of Australia that knows what a cabinet is and that is Queensland. They have defined in law what a cabinet is.

Mr DEAN - You are saying there are no definitions.

Prof. HERR - That is right. We do not have any legal definition of what a cabinet is so we do not necessarily know what the legal -

Mr WILLIE - There are instructions on how to appoint them in the constitution?

Prof. HERR - No.

Mr WILLIE - Around numbers?

Prof. HERR - No, ministers, not a cabinet.

Mr WILLIE - Yes, okay.

Prof. HERR - A good example is from a few years ago. Some of you might recall when a certain leader of government business in your Chamber wanted to bowl up to an Executive Council meeting and was told, 'No, you can't come in'. He was a bit annoyed and said, 'I am a member of cabinet' and the government said 'What's a cabinet? You do not have a commission under the Crown, you are not a member of Executive Council. You might be in whatever the government of day wants to call a cabinet'. That tells you straightaway that we do not know what a cabinet is. If we do not know what a cabinet is in legal terms, how can we know legally what a paper is?

CHAIR - It's muddying the word [inaudible].

Prof. HERR - The right to information gives you one definition but not necessarily one that -

CHAIR - Applies to the parliament.

Prof. HERR - Yes.

Mr DEAN - One could almost expect a document coming out of cabinet, as we see or they see it, would be stamped cabinet-in-confidence or something. You would think it would be stamped cabinet.

Prof. HERR - It might be, but again you would not necessarily have to respect it.

Mr DEAN - No, not at all, but one would think if it came, if it was -

Ms WEBB - On your thinking, and correct me please, documents that had some association with what they call cabinet - people who are in cabinet call cabinet - should be accessible to us in the prosecution of our role anyway unless, potentially, it has involved that cabinet solidarity, the deliberation aspect, which may mean it should be kept.

Prof. HERR - My whole point is there are those things prudent to make good government work and a good relationship between parliament and government is prudent, full stop. Just because parliament knows something, however, does not mean it has to be public. This is where the government uses this argument it is in confidence. My view is, yes, you can see it but you do not have to make it public but you do have to have access. Any time you are denied access, you need to ask why and there has to be a good reason, not just a convenient reason.

Ms WEBB - The presumption should be on furnishing the reason not to rather than having to assert our right to potentially see it.

Prof. HERR - Yes, exactly. Thank you, you have summarised the whole of my submission. That is exactly my point.

CHAIR - You have said we already have the powers to call for documents and papers but further in the submission, it also said -

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> Any changes to existing conventions and process may not only create additional complexity and inefficiencies but also lead to unforeseen consequences and critically further administrative costs which cannot be estimated.

We are talking about potentially putting in an arbitration process or some sort of independent adjudicator, which has been done in other jurisdictions. Do you see this could create all sorts of unintended consequences?

Prof. HERR - That is the smokescreen government's throw up all the time. If you have seen *Yes Minister*, in every second episode Sir Humphrey's view is there are unintended consequences; it is the way of frightening the minister off doing anything. That and it is 'brave'.

CHAIR - Do you think this comment has no substance? Is what you are saying?

Prof. HERR - It is up to you to determine whether that is a sufficient reason for you not wanting to see the document. I do not think it is a sufficient reason for not doing it. You cannot have an adjudicator the government will not respect because you are going to constantly be at loggerheads trying to argue why your adjudicator should be able to obtain. I hope the government would want to work with the parliament, and 80 to 90 per cent of the time they do; perhaps they would argue more and you might feel less.

The point is you would hope it would work in a way which meant the whole objective - again, your job is not to govern, your job is not to make policy and to do things you wish the government had done. Yours is to say, 'Look, the people want to know what you are doing can be defended, that it can supported by their money, by their confidence and their support and our job is to make sure they feel that confidence'.

I would not agree that if you had an adjudicator, it is a problem. New South Wales and Victoria do and it's not a problem

CHAIR - They have not actually used the Victorian one yet, they have cooperated since it was put in place.

Prof. HERR - The point is the two larger state parliaments in Australia have accepted this is a way forward because it will reduce the tension between the parliament and the executive. I cannot see why we would have more difficulty as a consequence.

CHAIR - Thank you for your time, Professor Herr, we really appreciate it. If there are any further questions, I will send them to you but it has been really helpful.

Prof. HERR - I am not sure I have because I have not got to the nuts and bolts you want. I think you should not get so bogged down in the weeds that you forget what you are trying to achieve, which is the role of making sure we have responsible government that is responsible. Thank you.

THE WITNESS WITHDREW.

Dr BRENDAN GOGARTY, SENIOR LECTURER IN LAW AND DIRECTOR OF CLINICAL LEGAL PRACTICE, UTAS SCHOOL OF LAW, WAS CALLED, MADE THE STATURORY DECLARATION AND WAS EXAMINED.

CHAIR - Thank you very much for your submission and for appearing before us today. As you are aware, this is a public hearing. All evidence you give will be recorded on *Hansard* and published on our website. Everything you say here is protected by parliamentary privilege. If you do wish to make any comments in camera, you can make that request and the committee will consider that request. Do you have any questions before we start?

Dr GOGARTY - My colleagues and I have a draft paper, which does speak to what I am about to discuss, albeit in much longer detail, and this is intended for peer review submission. I am able to table it for the assistance of the committee but would request that the committee deliberate as to whether we are able to publish at a later date through an academic journal.

CHAIR - You can use that paper following the reporting of the committee, which we expect to be in a few months' time. If it was an issue with timing beyond that, we may need to reconsider whether we accept that as a document at this stage.

Dr GOGARTY - Yes, I expect that with academic journals, it would take more than three months through publication but it would be at the discretion of the committee as to whether they wish to allow us to do that.

CHAIR - We can discuss that once you have done your presentation, Dr Gogarty. If you feel it's important to add that to your evidence at the end, we can consider that at that stage.

Dr GOGARTY - Thank you, Chair.

CHAIR - If you would like to make some opening comments about the submission you are making today, members will have questions for you.

Dr GOGARTY - I make a submission not only on my behalf but also on behalf of Professor George Williams and Professor Gabrielle Appleby, both from the University of New South Wales Gilbert + Tobin Centre of Public Law. We have been granted discretion to appear twice on the submission that we have made. Professor Appleby will appear in Sydney and I will appear by videoconference. We hope to speak to the quantum of our submission at that point.

However, on page 2 of our submission we have made some relatively nebulous notes about the current Parliamentary Privilege Act in relation to the Crown, and we sought permission to appear twice in a year to discuss that one single legal issue. It is a relatively complex legal issue. I am sure other lawyers may disagree, but we have certain concerns about the immunibility of the Crown and particularly ministers of the Crown to the coercive and punitive powers under the Parliamentary Privilege Act and Tasmania sits alone in this regard.

Rather than muddy the waters and spend all our time on that issue in one submission, in Sydney Professor Appleby and I will speak to our major recommendations from page 3. I was hoping to take the committee through the legal issues with the current privileges legislation in Tasmania to explain why there may be a significant issue that may need more than merely certain orders being made but actually legislative reform in Tasmania led by this Chamber. I have set out a PowerPoint presentation. This is the only way I can go through something so complex.

You are probably across the Parliamentary Privilege Act. It says there that Tasmania has the oldest parliamentary privileges act. Victoria passed an act in 1857 that subsequently was repealed. As far as I can tell, all the imperial acts other than the Tasmanian one have been repealed. Victoria's and South Australia's acts have been repealed, so the only privileges acts that exist apart from the Tasmanian one are post-Federation privileges legislation. That factor creates what we see as some significant problems in combination with Tasmania's Constitution Act and that Acts Interpretation Act.

Not wearing my academic hat - I am wearing my legal hat - I give quite a bit of advice on public law issues in Tasmania. Often these things are missed because the Tasmanian Constitution is very bare bones, is missing a number of provisions and you actually have to look outside the Constitution Act itself to understand how our constitutional framework operates. The big one that most lawyers miss is the Acts Interpretation Act and, in fact, quite a few of our constitutional provisions are not in the Constitution but in the Acts Interpretation Act, and that is where we run into some problems.

Those acts - the Acts Interpretation Act, the Constitution Act and the Parliamentary Privileges Act - in combination suggest very strongly and, in fact, indicate directly in the Acts Interpretation Act, which is relatively unique in Australia, that legislation such as the Parliamentary Privilege Act 1858 does not apply to the Crown; I will go through that in a second. When it was drafted by the colonial parliament, it couldn't have bound the Crown, so we look at the original intent of the enacting parliament. If it did have the capacity to bind the Crown, the act continues to have that effect.

I heard Professor Herr talking this morning about *Egan v Chadwick*, and I raise some caution about that. *Egan v Chadwick* - this is in our draft paper - is based on the particular constitutional circumstances of New South Wales. New South Wales has a very different constitutional system. It also has no privileges act. Now, the irony there is that allowed the court to determine the privileges of the Chambers based on an evolved constitutional status. Because we have a colonial Parliamentary Privilege Act in Tasmania, we have time-locked ourselves and there are points of distinction between particularly *Egan v Chadwick* but also *Egan v Willis*.

That means that on a bare reading of the Parliamentary Privilege Act, it, at least, would not apply - this is on a legal interpretational alone - to government ministers at the narrowest interpretation of the Crown, but because the Crown is a bit of a nebulous term, the Acts Interpretation Act doesn't define it, the Constitution Act doesn't define it - it could also apply to the whole of the executive branch, which could include the public service. In certain circumstances, the word 'Crown' does cover the entirety of the executive branch.

That is the overview, and to give you a visual representation of how we end up with these inquisitorial powers, we are talking today about coercive or punitive powers. That is, the power to demand documents to order people to attend. I understand that, in most cases, convention dictates the executive will attend and will act in good faith, but in any good negotiation you need to know what your backstop is, certainly your legal backstop, which allows you to set the parameters for your negotiated compromise. In terms of the order of how you end up with inquisitorial privileges, in each of the post-colony Australian and New Zealand jurisdictions, you end up with this order. You have either an express statement that the privileges act, including the inquisitorial or punitive powers, binds the Crown. New Zealand, in 2014, did this very expressly in its privileges legislation,

which is interesting because New Zealand doesn't have a binding constitution, it only has a constitution act, like Tasmania.

Neither the Commonwealth nor the Western Australian acts, the only other jurisdictions with privileges legislation, contain the term 'this act binds the Crown', but as you see in their Acts Interpretation Act, they don't have the exclusion that we have. The implication is that the act is intended to bind the Crown. That is the strongest indication that your privileges legislation is intended to bind ministers. The second is what most jurisdictions post-Westminster do, and this is the House of Commons fallback.

The House of Commons developed privileges over a thousand years and rather than try to write them all down in legislation, we rely on the common law. Either in the constitution of the state or in the privileges legislation itself, it sets a fallback date. It says that the privileges of the Houses and their committees will be as at 1901 if you are in the Commonwealth and that subsumes all of those privileges in the common law into the Senate or the House. That can usually be done by constitution or by privileges legislation. Our Constitution has no reference to privileges or a fallback date and our Parliamentary Privilege Act, section 12, also doesn't do that.

Section 12 says -

> The Act is not meant to modify privileges existing as they related to the colonial houses, not the House of Commons.

It is a strange overview but we do not have that in our Constitution Act.

The third is one that I heard Richard Herr talking about and it is 'reasonable necessity'. New South Wales doesn't have a privileges act. The question of whether the Legislative Council of New South Wales could demand documents and sanction a member of the government sitting in the Legislative Council was taken all the way to the High Court; two cases, which you heard about before, *Egan v Chadwick* and *Egan v Willis*. I will try to go through those relatively quickly. The essential features were that in *Egan v Chadwick* in particular, the court was able to extract certain functions and powers from the clear legislative function of the House. Section 5 of the Constitution of New South Wales says -

> The Parliament has the power to make laws for the peace, order and good governance of New South Wales.

I don't know why but Tasmania does not have an express legislative function in our constitution. It is a significant bugbear; it requires constitutional reform. The only way we can provide this Chamber with a legislative function is to imply one by virtue of the preamble. Arguably, preambles aren't binding, but even if they are, the preamble refers to the 1851 Colonial Imperial Act, which provided the Legislative Council its powers. But they were constrained as a colonial house. They were subordinate. They were the source of the very reason we have an imperial act in the first place. In *Fenton v Hampton*, a case that went to the Privy Council, this Chamber was found not to have the coercive and punitive privileges.

There are significant points of distinction to New South Wales. That leaves us in a very odd position, which needs some sort of clarification. That's the overview.

I don't know how much you know of the background of our privileges legislation. This is the very good looking Mr Hampton. He was the Comptroller-General of Convicts - I had to look that term up on Wiki, I'm afraid. He was basically the treasurer of the convict department. If you look at Wiki, there are a lot of allegations of corruption, abuse and other things in the department so the Legislative Council ordered him to attend in front of a committee; he refused to do so. An arrest warrant was put out and the police refused to arrest him.

He agreed to home arrest and then basically left the country before anything could happen. The Governor constituted the first Supreme Court and ordered it to inquire into whether the Council had the power to demand the attendance of Mr Hampton and to find him in contempt for not appearing. The Supreme Court of Van Diemen's Land - that's before it became Supreme Court of Tasmania - is where the decision is found. Everyone will cite the Privy Council. The Privy Council just agreed with the Supreme Court of Van Diemen's Land. It was found that the Privy Council lacked those powers - the power to order, to demand, the power to punish. Those powers did not exist in the Privy Council.

The Tasmanian Parliament at the time the Colonial Parliament, was a creature of imperial statute. It was created by the Imperial Parliament. It was subordinate to it. It was not given by that statute all of those powers and privileges that existed in the United Kingdom. The Privy Council agreed that if it were to be given those powers, it would be elevating it to the same level as the British imperial parliament, contrary to the rule of law in the Imperial Empire. Also because it was a creature of statute, it had to draw its powers from that statute. The statute did not give any of the colonial parliaments the privileges of the House of Commons; it didn't give them coercive powers and didn't give them colonial powers.

Interestingly, as I said, Hampton left the colony before any of this could be resolved. It was resolved against the Legislative Council. The Council then passed what we have now - the 1858 act. The 1858 act, however, is the creature of that very parliament, the Tasmanian Parliament, which was found to lack those express powers so it can't legislate to give itself powers if it did not have power to give itself those powers. The 1858 act is a limited act. It was limited at the time, it is not expressed to bind the Crown. In the colonies there was a strong presumption against the Crown ever being bound, but you also have to note that in 1858 about half the Legislative Council was appointed by the Crown. The Crown had the right to overturn or repeal certain statutes so this was outside the capacity of the Van Diemen's Land parliament altogether -

> The Tasmanian Parliament is a legislative body consisting of members in part elected by the inhabitants and in part appointed by the Crown. The Governor's assent or dissent to bills is liable to be controlled by instruction from the Queen.

There has to be assent to which he is bound to conform. They can be disallowed by Her Majesty.

Necessarily, at the time, the bill would have had to say, 'this act binds the Crown'; it would never have passed through the House and it would have been disallowed. It was non-expressed to bind the Crown. The new act was never retested against the comptroller for convicts who was a member of the executive. We do not really know whether the new act would have been upheld either.

The act itself, at the time, could not have bound the Crown. We get through to 1931. Now Tasmania does something interesting; it legislates - this is the Acts Interpretation Act - to say in

1931, 'No Act shall be binding on the Crown unless express words are included therein for this purpose'. The Parliamentary Privilege Act necessarily does not include that; it has never been amended to include it so we would assume that it is not intended to bind the Crown. The Acts Interpretation Act applies to all statutes.

You compare that with section 6 of the New Zealand act which expressly says, 'this act binds the Crown' because of this problem. We do not have that here. You will note from section 1 of the Parliamentary Privilege Act that most of the provisions are expressed to persons - a person can be ordered to attend; a person can order to command documents. The only other reference to an entity is to a member, but mostly the punitive and coercive provisions are directed to persons. Section 41(1) of the Acts Interpretation Act in Tasmania, not elsewhere, says -

> In any Act the expressions person … shall include any body of persons … other than the Crown.

That is not the case in other jurisdictions. In the Commonwealth there is no expression that the Crown is not included in a person. In fact, an act includes the body politic - i.e. any member of the government or the Crown as a whole. You have not only a historical removal of the Crown from the Parliamentary Privilege Act but you have an express legislative removal of the Crown from that provision.

What we don't do is define Crown in the Acts Interpretation Act of the Constitution; we define it in the Crown Proceedings Act; that is limited to that act, but it is influential. In Tasmania, the main reference to the Crown is in this act. It says that the Crown includes a minister, an instrumentality, an agency of the Crown or a prescribed person. That is not binding because it is restricted to an act which is not of general application; it is only to that act, but it is highly influential in a court situation.

What the courts have done is give a range of narrow and broad definitions depending on the context. As I said, at its narrowest, the Crown will always include government ministers acting with executive power. In respect of immunities, general immunities, the courts have gone as broad as 'any exercise of executive power by any institution including the public service is included in the Crown'.

I feel I have talked about this. How do other jurisdictions deal with it? The other jurisdictions tend not to have privileges legislation. Western Australia and the Commonwealth are the exceptions to that rule. Both those jurisdictions have a legislative fallback date. So the act that sets the basic parameter for summonsing and holding people in contempt has a fallback which says, 'the House of Common's privileges are incorporated into this set of privileges' and so it enlarges rather than restricts.

In *Stockdale v Hansard*, which is a nineteenth century case, the UK courts confirmed that the House of Commons had the power to inquire into the executive and the executive acts, and it is an incredibly broad power. My interpretation, particularly of *Stockdale v Hansard*, is that it allows either House or its committees to ask about any documents, including documents that are ostensibly cabinet-in-confidence, but that's another matter we can discuss next week. Certainly, you incorporate all those powers into your Constitution by virtue of the Parliamentary Privilege Act or your Constitution, so the Commonwealth does both. The Commonwealth has a fallback date in its Parliamentary Privileges Act and then in sections 48 and 49 of the Commonwealth Constitution,

which do the same thing. Tasmania has no fallback date - none at all - not in our Constitution, not in our Acts Interpretation Act and not in our Parliamentary Privilege Act.

I've just given you the example of the remaining jurisdiction, the Commonwealth. Section 49 of the Commonwealth of Australia Constitution Act says that the powers, privileges and immunities shall be those of the Commons House of Parliament in the United Kingdom, and of its members and committees at the time of Federation, which was 1901 - so you get all those powers and that thousand years of history.

This is what we have in section 12 -

> Nothing in this Act contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect any power or privilege possessed by either House of Parliament …

That is, the colonial Houses at 1858 -

> … before the passing of this Act …

There are two things: first, it locks our privileges to Commonwealth privileges belonging to a colonial House; and second, it says 'before', so this act, by implication, amends what happens after. It is really problematic wording.

We are distinguished from everyone else based on that provision, and the only place we can look then is reasonable necessity. This was *Egan v Willis* and *Egan v Chadwick*, and that is because New South Wales does not have a privileges act. It has never legislated; even in colonial times, it decided not to legislate. That left the question up in the air. I have gone through those cases.

The New South Wales Supreme Court and the High Court of Australia had to work out what the Legislative Council could do. The privileges that it determined to be reasonably necessary were related to its core constitutional functions. Those constitutional functions were to inquire, but that did not extend to punitive - that is, contempt - so you don't have the power to punish in New South Wales. The coercive power only extends to those who fall within the immediate jurisdiction of the Council. A member sitting in the Chamber was able to be removed, but only to the footpath. You had that ridiculous thing where it cost $380 000 to win $1 in trespass, so once you arrive at the footpath and the Usher of the Black Rod is holding onto the arm of the member, that is a trespass. That is as far as it extends.

Whereas if you had the Parliamentary Privilege Act in Tasmania apply to the Crown, you could order members to attend. You could hold their arm across Tasmania, and possibly beyond, depending on whether you assume it has extraterritorial jurisdiction.

That's what happened in New South Wales, but this is what I mean about reading these things in some depth. Actually, the *Egan v Chadwick* case is great because in the second matter before the Full Court, they go through the steps.

Step number 1 is to look at section 5 of the Constitution Act of New South Wales which has its express legislative power, and they say we can work off that and start the premise with that. We have a Chamber, which is part of the parliament that is given this express power and you can't legislate without that. We can derive a whole lot of common law history from that.

The second place that we can derive it from is this evolved Chamber. We haven't limited this Chamber; it has evolved over time. It is not sitting around in 1850, it's a Chamber in 1997 so it's evolved and we look at what we can apply from the role and functions of that Chamber now. Did I leave you the quote? Here we go, and this is from the High Court -

> What is 'reasonably necessary' at any time for the 'proper exercise' of the 'functions' of the Legislative Council [of New South Wales] is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.

They are free to do that because they don't have privileges legislation, but the High Court says this -

> Such a position may be varied or abrogated by legislation.

But in New South Wales there has been no legislation. In Tasmania there has been and we have section 12, which says this does not amend anything before this date, implying that it sets it after that date.

That is where we get to: Tasmania confers no express power to legislate on its parliament in its Constitution Act. Why? I don't know, that is just historical. It has modified its privileges by legislation. It implicitly time-locks the privileges to the colonial Houses at or before 1858, so this creates a significant degree of uncertainty about how far the doctrine of reasonable necessity would extend in Tasmania.

These are concluding notes. We have a significant amount of legal uncertainty, I really think that. If someone came and briefed me from the ministry, I would say there is a matter that can be raised. By having legislation, the courts can inquire and you want to avoid that situation. The reason New South Wales has never legislated is that they don't want the privilege issues, and certainly the scope of the privilege issues, to be aired in the court, which is why *Egan v Chadwick* and *Egan v Willis* were such anomalies.

The other states that leave it only to their constitution acts have repealed their imperial acts. South Australia and Victoria intentionally did it so they could avoid the courts litigating on matters of privilege. It should be left to the Houses themselves to resolve between the Houses and the executive.

I think there is significant uncertainty and it extends as far as the public service. I don't think that a court is going to accept that, but I certainly think the matter could get up in a court and be agitated. A recalcitrant member of the executive could press this matter under the privileges legislation and say that the House and its committees lack this power, and then have the matter aired. I think, at the end, it might embolden refusals and if pressed would have to be resolved in the court. This would at least delay a committee, if not undermine its constitutional role.

As I said, and this is what I started with, we sit at the bottom compared to all the other states. We don't have any of those three steps and that is in the document which I will give to you so we can talk about that later.

The ways we can resolve this are to place a bill before both Houses, asking to include the Crown in the Parliamentary Privilege Act, as the most recent privileges legislation in New Zealand did and that resolved the issue easily. I don't know what the view of the Government would be on that. Certainly, you would expect that, as part of representative and responsible government, the Government is aware that it is subject to parliamentary oversight and it is such a historical position. I don't think a court would find that that power didn't exist, but it may read it down significantly. Remember in New South Wales, the privileges of the Houses are much narrower than they are, say, at the Commonwealth level, because it had to be implied by a doctrine of reasonable necessity. Even worse though, because of the existence of our Parliamentary Privilege Act, the courts here may read the powers down even further, so we need to be careful about that.

I don't know why we don't have a legislative fallback provision. We are the only state not to do that, apart from New South Wales, of course, but it doesn't have any legislation whatsoever. It would be very easy to do, probably more politically palatable because it reflects what happens in all other jurisdictions other than New South Wales. I would love to see the Constitution Act amended, but that is my bugbear in life, to include references to privileges of both Houses. Certainly, to be the only state not to have express power to legislate is a little bit laughable and does bring us into some - well, people question our Constitution.

The other option, of course, is to repeal the Parliamentary Privilege Act altogether and go to New South Wales' position. Those are the three options I can foresee here.

I am sorry for giving you a constitutional law lecture.

Mr DEAN - If that was repealed, what would we need to do?

Dr GOGARTY - We would go to New South Wales' position, so it would be reasonable necessity. You could repeal the Parliamentary Privilege Act and then you would certainly need to provide a fallback provision in your Constitution. The latest one I am aware of is Western Australia's, which I think is from 1997. That is the date they give. They incorporate post-Federation privileges from the House of Commons, which is a lot of privileges. It is a very powerful position to be in. It allows you to draw on 1000 years of history to determine what powers and privileges you have.

Mr WILLIE - What you are saying is that people who say the Legislative Council is one of the most powerful upper Houses in the Westminster system anywhere in the world are potentially wrong if that is tested in a court?

Dr GOGARTY - I won't say that. I am very proud of the Legislative Council. I think it has an amazing history of holding the executive to account. My concern is -

Ms WEBB - There is no legal basis for it to do it.

Dr GOGARTY - No, I think the court would find that there is an inquisitorial power. I think the easiest resolution for this is for a court to say the Parliamentary Privilege Act does not apply to the Crown at all and we revert to 'reasonable necessity'. Where we are uncertain and we were debating between the three of us at the moment is what the existence of the Privilege Act in our jurisdiction, unlike New South Wales, means for reasonable necessity, vis-a-vis this Chamber and the Crown, whether it is narrower than New South Wales or the same.

There is no question that we exist in a system of representative and responsible government. Inherent in that constitutional function is your power to inquire for the purposes of the legislation. Do note though, that in terms of reasonable necessity. Justice Kirby in the High Court said that where we have reasonable necessity, cabinet-in-confidence and possibly legal professional privilege may override implication where it doesn't in other jurisdictions. Again, we are in that weaker position.

I am not being obsequious; I think this is a very powerful Chamber. It operates on a lot of good faith from the Government but I think that uncertainty should be resolved in favour of clarification rather than obfuscation. It would at least set the parameters for negotiating compromises between the Government on documents. If you have an open end, it makes it much harder.

CHAIR - I will ask you to provide a hard copy to the secretary so we can include it in the *Hansard*. When you are referring to a slide it is hard for Hansard.

I would like to ask a couple of questions. We will have another opportunity to ask more but I want to focus on this aspect. Our terms of reference go to dispute resolution. This is slightly outside of that but relevant in some respects.

When we look at the case of reasonable necessity, isn't it a fact that the parliament and a responsible government have the responsibility to do the best for the people of the jurisdiction they represent? To do that, it is implied that you make laws, even though it is not written in law, as such. In order to make laws and to hold the government of the day to account, you will need to access documents and information that would be held by the government or the executive to facilitate that process. I hear what you are saying about that but surely, on that basis alone, we should have those powers that exist in parliaments in the Westminster system?

Dr GOGARTY - Privileges in the Westminster system derive from both the common law and convention. In both cases those can be overridden by an act of both Houses of parliament. There are numerous occasions where parliaments have, by legislation or by motion, lifted a privilege. The case in New South Wales of the Network of Alcohol and other Drugs Agencies where accusations were made about child sex offences in parliament and an inquiry had to be held. The member claimed privilege and the House passed a motion to lift the privilege from those statements so they could be admitted into an inquiry.

In other situations privileges have been modified. At one point in history, the members here would have had a privilege against arrest. That has modified in most jurisdictions by legislation. If you have legislation, including the Privileges Act itself, which overrides any of those common law or conventional privileges, it takes precedence. The only limitation to that would be if the legislation itself is contrary to a constitutional principle which you talk about.

The degree to which a parliament may modify or abrogate its deeper conventional privileges is uncertain as it is unresolved. *Egan v Willis* resolved it to a certain extent but that was based on the particular circumstances of New South Wales and a lack of legislation. We have legislation here. Just as a hypothetical question: could there be an act of parliament in Tasmania removing the power to call on documents whatsoever from both Houses? From the merely legal position that the act would override the historic implication. The only thing to stop that would be an argument to say that representative and responsible government demands by constitutional mandate that those powers exist. That would have to be litigated probably in the High Court. This is where the uncertainty comes from.

CHAIR - Assuming a piece of legislation got through like that.

Dr GOGARTY - Yes, of course. This is the problem. We have this bit of legislation that has oozed its way through history. We started writing pages 3 to 5 and it was only when I went back and looked at the Acts Interpretation Act that I thought, 'Just a second, this doesn't bind the Crown'. I then tried to look to historic case law, which we don't have, to say that it does bind the Crown.

CHAIR - Tasmanian historic case law?

Dr GOGARTY - Yes. And then to look to the history of the act. This is something which just popped out of the ether. We did a bit more digging to back up what was stated here. We started by saying that to resolve these disputes, you need to know what your powers and privileges are. If you read the Privileges Act as binding the Crown, it's a complete power. That would have been a very good position to be in, but once we started digging it turned out to be arguably the opposite. Our argument is that it shouldn't be arguable. If you have legislation, the legislation should be clear on those functions and those powers and those duties that you describe.

CHAIR - *Odgers' Australian Senate Practice*, which I am sure you have probably read. I haven't read all of it.

Dr GOGARTY - Yes, every evening I sit down with a glass of wine -

CHAIR - I am sure you do.

On page 644, it talks about the parliament and the Senate holding a position that is supreme and able to call for the production of documents and information from the executive. It acknowledges the executive claim that some material should not be released but it doesn't resolve the position or concede anything other than the claim of executive immunity as just that - claims of established prerogatives. Isn't this power implied, regardless?

Dr GOGARTY - Section 49 of the Commonwealth of Australia Constitution Act incorporates all the House of Commons privileges to the Senate, expressly. The Parliamentary Privileges Act 1987, section 6, also provides a fallback to the House of Commons but also explains that the privileges set out in the Parliamentary Privileges Act expand upon those privileges and doesn't restrict them. Senator Odgers' *Practice* refers to the Senate in that constitutional arrangement, not Tasmania and other constitutional arrangements. There are certain conventions which of course apply across all Westminster systems. The big question is: what do our particular circumstances speak to and how does existing legislation that exists here but doesn't exist in the Senate of the Commonwealth affect our position?

CHAIR - What can we rely on if we can't rely on documents like *Odgers' Australian Senate Practice* and other High Court decisions that address many of the situations we face in Tasmania?

Dr GOGARTY - I think most of those positions are generalisable, but you must remember that we are five different jurisdictions with different constitutional frameworks under the Australian Constitution. New Zealand is another jurisdiction altogether. You look to what is generalisable but you also have to remember that there are exceptions to that rule because Tasmania is certainly not the Commonwealth any more than it's Western Australia or it's South Australia. You need to look primarily to your own constitution and to your own case law. To the extent that House practice

and the history of the privileges within this state are indicative, you can rely on those as well. There is no manual for privileges; privileges are nebulous and they change over time. There are some which fall into desuetude, such as the privilege against arrest. In most jurisdictions, historically both Houses have the power to expel members, and that was found to be contrary to representative government at the very least and has been read down. There are generalisable rules, but there are also rules specific to each jurisdiction.

The problem with being in such a small jurisdiction as Tasmania is that people don't like manuals for Tasmania. I say that but I'll probably find out the Clerk has, so I apologise.

This is one of those situations where we expected to apply just the general rule. We started from that proposition and then, once you actually do the digging for Tasmania, you end up with a problem.

Sometimes these things crop up after 80 or 100 years. At the moment, the tribunals in Tasmania have a significant problem because they cannot hear matters between residents of different states. There have been warning bells for a long time about this, but it wasn't until someone brought it up in New South Wales that everything just fell apart. We haven't resolved that here. It was unexpected. The tribunals operated on the premise that they had the powers that were given to them and in fact they didn't.

In New South Wales, in the mid-1990s, the New South Wales Parliament passed a law requiring a sex offender be kept in jail for 80 years. The state parliaments were allowed to do that and all of a sudden someone found a constitutional principle that applied to the states and that we didn't know existed before, and it blew up.

General rules tend to be broken in specific circumstances. My only concern here is that this is a particular problem for Tasmania which is an exception to the general rules.

CHAIR - A couple of quick questions. We are a bit over time.

Mr DEAN - This inquiry is about our having the right to demand documents and how we should go about it. Are you saying, Brendan, that in progressing with this, we would need to get this right in the first place? It has never been used as a reason or defence or an argument as to why they should not produce documents from the Crown and the executive. Is that what you are saying?

Dr GOGARTY - I agree, that's exactly right. I think this committee can continue on assuming that the Executive will behave like that. This provided an opportunity to raise the issue and certainly you talk about the right to demand documents. I would say there is a very large question about the legal right to do it.

The convention would dictate that you do, and certainly the behaviour of the executive historically has not been to push back. Of course, we have 58 cases of the executive pushing back but I think you can, in most cases, rely on good faith.

If you are to look at the larger question though of clarifying the position of the Legislative Council and its committees, the basis for that clarification would be to set in legislation what the right is, because at the very basis of the question is an uncertainty.

We can skip over that; historically we have skipped over that and moved directly to the question of resolution.

Mr DEAN - Thank you.

CHAIR - Just one quick question, Brendan. You talk about not binding the Crown. There are differing views about what the Crown is and it is not defined, as I think you mentioned and other witnesses have mentioned too. In information I have read, Anne Twomey, who is a bit of an expert in this field as well, talks about how it can refer to a number of different people and bodies. Does that make any difference?

Dr GOGARTY - The High Court in, I think, 1995 in a case called *Bropho v Western Australia* gave three examples of what the Crown was; that's possibly what Professor Twomey was referring to. I try to give the outer limits of those examples, one being the Sovereign and her ministers, or, in respect of Tasmania, the Governor and her ministers acting under executive power. The widest example, which would be a very unfortunate one, is the entirety of the executive branch, including the public service and its agents. All that does is compound the uncertainty. This committee was established to ask about resolutions of disputes between ministers and the Council and its committees, but even on the narrowest position taken by the courts, that would be included in the definition of the Crown.

CHAIR - Thanks, Brendan. We will speak to you at a later time with your other colleagues and focus more on the rest of your submission, which is more about the process that we might implement to resolve deadlocks in the process.

Thank you for your time. If we have any other questions, we can ask them next time we hear from you or by letter.

Dr GOGARTY - Thank you for bearing with me through that.

THE WITNESS WITHDREW.

Mr ROD WHITEHEAD, AUDITOR-GENERAL, TASMANIAN AUDIT OFFICE, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Welcome, Rod. Thank you for appearing before the committee in your capacity as Auditor-General. By way of explanation, I am sure that you are aware that everything you say today in your evidence before us is recorded on *Hansard* and will form part of our public report, which will be published on the website at a later time. You are covered by parliamentary privilege during these proceedings of the committee, but not so when you leave, and if there is anything you wish to mention in camera, you could ask the committee to consider that and we will then do so.

We did read your submission and note that it is probably narrower in its focus than the last submission we heard, but I invite you to make further comment to your submission and then we will have some questions for you.

Mr WHITEHEAD - I might just start by reading a statement. I have noted with interest past parliamentary inquiries calling for the production of documents from ministers of the government and instances where documents have not been produced on the grounds that they fall within a class of documents subject to public interest immunity.

In the conduct of a recent auditor examination, I requested certain documents to be provided to me that had been provided to Cabinet and I was denied access to those documents on the grounds that they were subject to public interest immunity as they related to the deliberations of Cabinet.

This gave me cause to consider whether the information gathering powers under the Audit Act 2008 could empower me to demand the production of documents to which a claim of public interest immunity was made. From the advice I received, it would appear that the powers under my act do not provide me with coercive powers to demand the production of documents subject to public interest immunity.

During the course of my consideration of this matter, I became aware of information which may have been relevant to the matter being considered by this inquiry, and this formed the basis of my submission to the inquiry.

Whilst I acknowledge that the powers of parliament to order the production of documents are different and more extensive than the powers provided under my act, I note with interest this inquiry's consideration of options to resolve disputes that arise between the parliament and its committees, and the executive government.

CHAIR - Thank you. It is interesting, Rod, and I think it was Mr Sealy, when he was here earlier, who talked about how there are other jurisdictions where other bodies such as yours can request and get cabinet documents. Can you explain how that works from your perspective in other jurisdictions?

Mr WHITEHEAD - In the case of the other jurisdictions, it is usually included within their act for the auditors-general; it talks specifically about auditors-general and not about other investigative bodies. There are a number of other jurisdictions where the auditors-general do have specific powers under their act to obtain access to cabinet documents and decisions of cabinet.

CHAIR - From talking with other auditors-general, has that been smooth in its operation or have they experienced pushback at times, even in spite of that power?

Mr WHITEHEAD - Where that power is included within their respective acts, there has generally been no dispute in terms of having access to that particular power. I have, on occasions, discussed the matter with people from the other jurisdictions and people within their audit offices. None of them has expressed any concern that has been raised in regard to the power under their act to obtain those particular documents. I think, notwithstanding the fact that there's a power to obtain access to cabinet documents, usually the acts also have an additional consideration incorporated within the act for the auditors-general to consider whether disclosure is against the public interest, so as to make sure they are not disclosing something that should be disclosed to the general public.

CHAIR - That is up to the auditors-general to determine?

Mr WHITEHEAD - In those particular cases, it is up to the auditors-general to consider.

CHAIR - Is that reviewable by anybody?

Mr WHITEHEAD - I don't believe it is. I think it is a matter for the auditors-general to put their minds to.

CHAIR - You may have looked at some of the submissions to the committee. There's a view that this is a political matter, not a legal matter, in terms of parliament going about its business, being able to hold the government of the day to account, to scrutinise legislation and undertake those roles we are here for. To try to legislate something would involve the courts, and even to test in the courts would not necessarily be the right approach. I don't know if you want to comment on that because parliament is different from your office, obviously.

Mr WHITEHEAD - Correct.

CHAIR - We looked at New South Wales and Victoria, which have put measures in place in their standing orders rather than trying to put anything in legislation. Do you have a view about any of that?

Mr WHITEHEAD - I have looked at some of the other submissions made to the inquiry and noted where some have outlined situations in which the court may arbitrate on access to documents that have been subject to public interest immunity. I believe that is more in the context of where there is a legal challenge around the right of access, such as in civil matters. I think most of the submissions have put the case forward that, in regard to the parliament's access to those particular documents, it should really be a matter for the parliament to decide and not necessarily one for the courts to become involved with. That raises the question around how the parliament best resolves those deadlocks between the parliament and, for example, ministers where documents haven't been produced. Most of the documentation I've read on this particular matter seems to imply that it should be a matter for the parliament to resolve and not the courts.

Mr WILLIE - Would the process you outlined be a useful thing for you in fulfilling your functions if there were a third party that could adjudicate?

Mr WHITEHEAD - It is interesting because I noted that with regard to the standing orders that the Australian Senate uses and that the New South Wales Parliament uses, I think New South Wales parliament in their particular case use a retired member of the judiciary. I think in the case of the Australian Senate that there have been occasions where the Auditor-General was asked to

come in and adjudicate on documents subject to public interest immunity. I find it interesting that the Auditor-General has arbitrated in those particular instances. If you were to suggest that I had that particular ability here, I'd probably be prevented at the outset by virtue of the fact that my act doesn't give me access to those documents unless there were to be a change to my particular legislation.

Mr WILLIE - Do you have a particular view on the Auditor-General acting as that third party in the situations you described?

Mr WHITEHEAD - It's interesting. In fact, in regard to the advice I received when I was looking at this matter under my act and asking the question as to whether I have the power to obtain access to cabinet-in-confidence information and information subject to public interest immunity, the comment I received back was that if I had such a power but then had to make a decision about whether I disclosed that information in a report, I would be becoming an arbitrator and making similar decisions that a court might make around whether that information should be disclosed. I think the advice went so far as to suggest that there is no presumption within my act to give me that particular power to make that decision.

CHAIR - In the jurisdictions where the Auditor-General has been used as the arbiter, I am presuming from what you have said that they would have that power within their act?

Mr WHITEHEAD - Correct. That requirement for me to consider whether something should not be disclosed because it's in the public interest not to disclose it, that power is within my act as well. It says I must consider that, but some might suggest that power is irrelevant because I might not be provided with that information in the first place, although it should be noted that while I can ask for information, I just can't demand the information. I can still ask and it might be provided voluntarily, but I can't demand that information to be provided to me.

CHAIR - Whilst it's not subject to this committee's inquiries, do you think that's important in your role?

Mr WHITEHEAD - It can provide a limitation to my work. Certainly, that's been a point raised by other auditors-general in other jurisdictions that don't have our access to cabinet-in-confidence information or information subject to public interest immunity. If that information goes to the very subject matter that they're investigating or that they're reporting on, it may actually limit their ability to form an opinion on a particular subject, in which case they would probably have to qualify their opinion by saying, for example, this is my view but my view is subject to the fact that I might not have received all the relevant information.

CHAIR - This is a few steps down the path. If your act, the Audit Act, was amended to enable that power, do you think it would be appropriate for the Auditor-General to fulfil that role, particularly where it was a matter of financial information being sought?

Mr WHITEHEAD - It would probably come down to the nature of the information being sought and provided. Certainly, most people would view matters of a financial nature to be within the realm of the Auditor-General. Matters outside a financial nature, in making decisions around whether it should be in the public interest to disclose or not, might not necessarily be matters for the Auditor-General to consider.

CHAIR - If it were a financial matter, do you feel it would be in the Auditor-General's capacity and would be an appropriate role? The committee is looking at putting in place a mechanism to deal with these deadlocks we have found ourselves in in recent times. In New South Wales and Victoria they can appoint an arbiter - a retired member of the judiciary is one suggestion, a retired auditor-general may be another. I am not sure how they are bound but in terms of releasing the information themselves or even a practicing auditor-general and not necessarily from the same state. It might be that in Tasmania you might ask a Victorian auditor-general to have a look at it rather than the Tasmanian Auditor-General, for example. Do you think that would be an appropriate role or is it better to have a member of the judiciary looking at it?

Mr WHITEHEAD - In most cases, and again in the case of New South Wales they have elected to use a former member of the judiciary to avoid that conflict with having someone connected with the courts making that particular decision. In terms of the ability of the Auditor-General to form a view around whether something should be disclosed within the public interest, that would very much depend on the nature of the facts being considered and the decision that had been contemplated at the time. Again, there might be an inference that matters of a financial nature might fall within the realm of an auditor-general to form a view on that but that might not necessarily always be the case.

Mr DEAN - Mr Whitehead, your ability to access cabinet documents is not provided for within your act. Does it specifically say the term 'cabinet documents'?

Mr WHITEHEAD - No.

Mr DEAN - What does it say?

Mr WHITEHEAD - Within my act it says that I have a broad power to demand people to produce documents and other records for me. I would make that request in writing and it says that if someone fails to comply with that direction without having a reasonable excuse, they can be guilty of an offence. The fact that the act contemplates that there might be a circumstance where there is a reasonable excuse does contemplate the fact that there will be situations where they don't have to or it's not appropriate for them to provide that information. Certainly, documents that might be subject to public interest immunity would be an example where there would be a reasonable excuse not to have to provide documents.

Mr DEAN - A document was said to be a cabinet document and there were questions about whether it was a cabinet document and that created issues. In the case here where you were stopped from receiving that information and, in your view, it was clearly a cabinet document or information you were seeking.

Mr WHITEHEAD - There were questions raised around what are documents that are subject to that public interest immunity. From the inquiries we have made, there is no specific definition around what documents fall within that class of public interest immunity and what ones fall outside that. It is a matter to be considered on each particular case. There is a view, and even within some of the submissions, that the claim of public interest immunity is widely used and, in some cases, it is probably not relevant to some of the documents they are claiming it covers.

Ms WEBB - I am interested in the other jurisdictions that allow their auditors-general to compel cabinet documents. Can you tell me which other jurisdictions allow that?

Mr WHITEHEAD - The two specifically that I know about are the Australian National Audit Office and the Victorian Auditor-General's Office. Both those audit offices have the ability to have access to cabinet documents.

Ms WEBB - One thing that has been asserted to us at different times in times past when there was a refusal to provide a document to a committee is that the nature of advice provided or information given might be distorted and constrained if it is known that information or advice might become public. I wonder, in jurisdictions where the auditor-general can have full access to cabinet documents, whether there could be an argument made that there might be a similar constraint imposed through that power being there?

Would you have a view on the degree to which advice sought and provided, or information provided to the government, to cabinet or to a minister might be constrained by the ability for it to be called either by an auditor-general or by a committee of the upper House?

Mr WHITEHEAD - The concept of collective responsibility in regard to the way in which cabinet makes decisions, I think it is a well-accepted principle - even by the courts - that there are circumstances where cabinet decisions should not be disclosed to the general public. The courts have also acknowledged that it is not an absolute power either and there may be circumstances in which a disclosure might be relevant. The question is, if you have a broad range of people having access to those cabinet documents then you need to consider the other restrictive powers that should be put in place to make sure that those people are exercising due judgment about what they might disclose in the public domain.

Ms WEBB - I guess what I am thinking about is not so much what people might do with the information they gained if they had access, it is more to do with the nature of the advice that might be provided. I am not talking about cabinet deliberations; I am talking about a report that was prepared with advice for cabinet or for a minister or advice from an external consultant. The fact that it has been asserted that the access to that by committees or an auditor-general might put constraints on the nature of that advice provided or the information given. That is a negative thing, is the implication. Do you think that that is a justifiable position to be asserted?

Mr WHITEHEAD - No, I do not think so, necessarily. In the context by which auditors-general have been given access to those cabinet-in-confidence documents, it is not always just to examine the decision of the government. Quite often the access is attained for the purposes of understanding what information was provided to the cabinet to make that decision and whether there was actually rigour around the information provided to enable the decision to be made. In some regards, they are not necessarily looking at the decision of government because that is a policy decision but they are probably more interested around the information provided to enable that decision to be made.

CHAIR - Which is arguably not revealing the deliberations of cabinet.

Mr WHITEHEAD - This is the question that comes back to the scope of what documents are subject to the public interest immunity claim. There is a view that there is a class of working documents that may potentially not be subject to the claim. Where someone asserts that they are, the only way, for example, that I could challenge that claim is potentially through the court.

CHAIR - Or if your act were amended to enable you access to those documents to make a determination yourself?

Mr WHITEHEAD - That is correct.

Mr DEAN - If it had been good news, you would soon have them.

Mr WHITEHEAD - We cannot always make decisions on what we haven't got.

CHAIR - Rod, under your current act you have the power not to report matters anyway, don't you?

Mr WHITEHEAD - That is right. In fact, where there is information that I decide should not be disclosed because it is in the public interest not to disclose, I can actually report that to the Public Accounts Committee and the Treasurer and inform them of information that I believe is not appropriate to disclose.

CHAIR - Let's just take that down that little rabbit hole for a moment. Say your act was amended to enable you to access cabinet documents and in the conducting of audit you prepared a report that it was not in the public interest to release, but you are able to provide that to the Public Accounts Committee. Wouldn't that then, in a circular way, be providing that information to a parliamentary committee that may divulge some of the information that caused you to form your opinion?

Mr WHITEHEAD - That is right, but then that would be a matter for that particular committee to consider as to what it does with that information.

CHAIR - An interesting thought.

Mr DEAN - And if you provided that in confidence and it's protected in any event.

CHAIR - We would expect it to be provided in confidence, but I am just saying it could work that way.

Mr WHITEHEAD - Yes, and it would be information that would have to be considered in the context of the subject matter of the audit. I would imagine that power would have to be used rather sparingly, and even in current situations, there have only been rare circumstances where we have contemplated the need to go and look at, or request access to, cabinet information.

Mr DEAN - In your submission, Rod, you raise five dot point areas of significance and then you go on and say that, 'reference to these cases should not be interpreted as legal advice'. Have you sought legal advice on that? Can you do so?

Mr WHITEHEAD - No, I don't. The reason I highlighted those particular dot points was because I suspected they may have been of relevance to the subject matter of the inquiry. I was really just highlighting that those particular points were covered within the information I included the link to really just to draw that to your attention.

The qualification around the fact that my references to those points should not be considered to be legal advice was because I am not qualified to provide legal advice. Again, it was really information I came across in the course of my examination of my power around access to demand

people to provide documents and I thought, again, that this was relevant to the subject matter of the inquiry.

Mr DEAN - Very significant points, all five of them.

Ms WEBB - I am interested to hear a bit more. You mentioned that it has only been rarely that you have requested what could be construed as cabinet documents and within that somewhat amorphous definition, I am interested in what plays out in that circumstance. You may be able to refer to the times it has happened, or perhaps just hypothetically if that is easier, if you, in the course of one of your investigations, felt you needed to access documents that could be potentially construed as cabinet documents. You have requested them, they are either supplied to you or not; potentially, if there is a refusal to supply them to you, is there any requirement you are provided with an explanation as to why that refusal might be there?

Mr WHITEHEAD - I do not think there is a requirement for them to provide other than perhaps to say that because they believe it is subject to public interest immunity or because the documents fall within that particular class.

Ms WEBB - As it stands at the moment, you have no recourse then to test that in any way?

Mr WHITEHEAD - I could potentially challenge that in a court of law, I believe, because that power to request information, if the claim is that it is subject to public interest immunity and I believe that the documents are not, I could actually ask or approach a court to make a decision on that particular point.

Ms WEBB - That would be a pretty extraordinary action to take, I imagine.

Mr WHITEHEAD - It would have to be information I considered to be crucial to the conduct of the audit for me to go to that extent.

CHAIR - Has that been done in any jurisdiction where an auditor-general has gone to the court for a decision?

Mr WHITEHEAD - I am not aware of any particular cases so I can't specifically answer the question.

Ms WEBB - Just to be clear, are there instances in which you have requested documents and they have been refused on that basis?

Mr WHITEHEAD - There's only been the one instance during my tenure as Auditor-General to date where I've requested documentation and that request has been denied.

Mr WILLIE - There wasn't even an offer for you to see that document but not use it to form part of your report?

Mr WHITEHEAD - No, but I should make the point at this stage that the document I requested access to had been in the public domain in an abbreviated or an abridged version. I sought to seek reference to the entire document. So, in that particular case, I felt that I could place reliance on that abridged version of the document and that was sufficient for the purposes of my audit.

Ms WEBB - That document would have been placed into that grab bag of cabinet documents as a definition potentially?

Mr WHITEHEAD - Correct.

CHAIR - Thanks, Rob that's been really helpful from that perspective as well. Do you want to make any closing comments?

Mr WHITEHEAD - Perhaps just one other comment, Chair, I note that one of the objectives of the inquiry is to look at potential solutions. Again I noted that a number of previous submissions identified a number of solutions. I also noted, in fact I think it was probably the speaker immediately prior to me, pointing out whether or not the Parliamentary Privilege Act actually extends to the Crown or not. I thought that was a rather interesting observation to make in regard to their submission. Again, I think there's been various references to some of the other Legislative Council standing orders and the Australian Senate Standing Orders and, as we have touched on, the use of arbitrators to make decisions around whether documents are subject to public interest immunity or not.

CHAIR - If you don't wish to comment from your position, that's fine, but do you think it would be a reasonable step for the Legislative Council to put in place a process through our Standing Orders to do that?

Mr WHITEHEAD - I think it's a matter for the parliament to decide how it deals with situations where they've requested documentation and it hasn't been provided. Again, I think it's a matter best resolved by the parliament and one that doesn't necessarily need the courts to come in and adjudicate.

CHAIR - Thank you very much.

THE WITNESS WITHDREW.