THE LEGISLATIVE COUNCIL SELECT COMMITTEE INQUIRY ON PRODUCTION OF DOCUMENTS MET IN THE PRESTON STANLEY ROOM, PARLIAMENT HOUSE, SYDNEY ON TUESDAY 24 SEPTEMBER 2019

HON JOHN HANNAFORD AM, FORMER LEADER OF THE OPPOSITION, LEGISLATIVE COUNCIL PARLIAMENT OF NEW SOUTH WALES, WAS CALLED AND EXAMINED.

CHAIR (Ms Forrest) - [Inaudible] experience of establishing and dealing with a resolution process and disputes around the access to papers and documents.

Our terms of reference are pretty narrow. They are looking at whether there should be or could be a model to resolve disputes, and if there is, what sort of model would be most effective. Our research to date has shown that New South Wales has such a model; Victoria has as well. Obviously other parliaments have looked at it [inaudible] at this stage in Australia.

It will be interesting to hear your thoughts on your experience in the New South Wales parliament utilising that model and if you think it is a good model or if it needs to change, that sort of thing.

If you would like to make some opening comments, the members will probably have questions for you.

Mr HANNAFORD - Thank you, Chair. Keep in mind I have been pleasurably out of this world for a number of years -

CHAIR - How many years now?

Mr HANNAFORD - Nineteen years. So you will have to rely upon the current [?inaudible] members of parliament [inaudible] to give you more up-to-date information about how things operate. I can give you some background up until I left in 2000 and then some hindsight reflections on the adequacy of the process you are facing.

Just keep in mind, the power the Legislative Council has to provide the production of documents has been identified by the courts as a common law power, and that is important. But because that power can be varied by the parliament by legislation, most likely through a privileges act - you have a privileges act, and I am not familiar with the content of it - but I have absolutely no doubt that the time will come when the executive government will seek to use its influence to achieve a legislative reform that would control, in some way, the Commonwealth power. That will arise, in my view, when there is evidence that power has been abused.

I will comment on that in a few moments because it is the greatest danger I think the parliament faces in relation to its powers.

Putting that power into some background: the Greiner government came into office in 1988 with a commitment to achieving an accountable Legislative Council providing oversight to the government. Shortly after coming into power, I, with the Clerk, was responsible for drafting a standing order in relation to the establishment of policy committees. We couldn't get what we were wanting because of pushback from the administration in cabinet against what they would have

regarded as usurping of their role in driving policy, keeping in mind bureaucrats have often said to me, 'You're only there for the short term, we are there forever'.

Following that, then there was the Legislative Council standing committees on budget, and budget oversight committees. Neither of them actually worked as originally designed, but at least they were an important start.

CHAIR - On the point of the policy committees, can you come back to that later and talk about how they actually worked - what the function of them is?

Mr HANNAFORD - I am happy to come back to comment on them.

CHAIR - Great, thanks.

Mr HANNAFORD - Keeping in mind: what was the philosophical structure? We took the view that parliament exercises the democratic process - the executive is there, established under a process, by the parties or otherwise, to exercise the executive role of the parliament, and the administration is there to support the executive.

There is no doubt in my mind that when there is a strong parliamentary majority, parliament is almost a secondary process, and the executive takes the view that the executive runs the government. The parliament is there to administer the wishes of the executive. A number of us took a different view as to the role of the parliament in a parliamentary congress. We took the view that the government is by the parliament, through the executive government, with the executive and administration being responsible to the government. That was the underpinning philosophy.

The Greiner and Fahey governments then went into minority government and during the period of that minority government, the opposition, with the support of independents, made orders in the lower House for the production of documents. I was in cabinet at that time. There was a high level of concern at the total expense that had been incurred in the production of documents at the time because of the myriad agencies that had to be brought together. A truckload of documents had to be delivered.

The call for documents arose out of political pressure. The Carr government then came into power. I was at that stage leader of the opposition in the Legislative Council.

The coalition at that time, again for political reasons, demanded documents be produced to the parliament. That gave grounds for the drafting of the first of the standing orders. That standing order was a very blunt instrument, and it was an instrument that was used to try to usurp the authority of the parliament over executive government and over the administration. The executive government was very strong on taking the view that the executive controlled the process of democracy. A different view was being pushed through the exercise of control of all of the [inaudible] So, it was a blunt instrument.

Those orders were subsequently amended to provide for a method of dealing with cabinet documents and public interest immunity claims, which are basically underpinning your terms of reference, and I will come to that in a few moments' time.

The purpose of the power was to secure accountability. Wherever you have a power, the question becomes the use of that power - responsible, transparently and accountable - and whether

or not the use of the power can be abused. Do I have a suspicion that there may have been an abuse of the power? Yes, I do have, but I don't have any forensic material which would sustain that. My recollection is that on a few occasions there was a successful call for papers and my attention had been drawn to the fact that there had been none, or virtually none, parliamentary examination of those papers.

If the call for papers is in fact part of a political [inaudible] then potentially you have the avenue for abuse of power. The papers are being called for by examination by members of the parliament. If they are not being examined or not being appropriately examined, there are grounds for allegations of abuse. Material that has been provided to you by the parliaments has indicated that power has been used over 300 times. I find that quite extraordinary.

There have been over 38 claims for confidentiality of what is produced [inaudible] Because of the process, at least that means that on 38 occasions out of 3300, the papers were examined.

To the best of my knowledge there is no information available as to the number of times papers that have been produced have been examined. The Clerk has been advised, under the standing order, to record who seeks access to the papers. If the access to the papers has been periphery, there has been no real examination of the papers. I don't know what information may be available as to the extent to which papers are in fact being accessed and examined.

If I were going to be looking for a change to the standing orders, I would be wanting a more forensic analysis of what has in fact occurred to date. As I said, I suspect that there may have been an abuse of power for political gamesmanship. Keeping in mind that under the rules that are here, the papers are made available to public, made available to the media, and it can be used to sustain the pressure on a government over a particular issue. I would regard that as an abuse of parliamentary privilege.

If the power is going to be abused, eventually it will be called to be curtailed or be removed. You have seen from some submissions referred to by the Clerk, and your own experience from your department of Premier and Cabinet, that there has been a pushback against the use of the power.

If you look at the report on the 2009 Mount Penny return to order, which might have been drawn to your attention here in New South Wales, there is an extensive reference to a pushback from our Premier and Cabinet against the use of the powers. I haven't seen the actual letter from Premier and Cabinet because it's not [inaudible] document but it highlights that there is a grave concern within the administration that there may be an abuse of power. My experience has been that when Premier and Cabinet has a pushback, then eventually Premier and Cabinet will get their way and there will be an attempt at legislative framework, which will undermine what I referred to initially as [inaudible] come more apparent.

Subject to what might be a forensic analysis of the experience in New South Wales, do I believe that the current system is adequate? No, I don't. The orders that were originally drafted were, as I said, a blunt instrument. They were not created under any structure of governance around the call for those documents

Your terms of reference call, as I interpret them, for the creation of a structure of governance around a call for documents. Any structure of government must understand that a call for documents generates a very substantial cost. It is my experience that members of parliament don't address their mind at all to that particular cost.

CHAIR - Financial cost or other cost?

Mr HANNAFORD - Financial cost. There could be other costs as well but significantly the financial cost. I would suspect that with over 300 calls, the state in Tassie spends millions of dollars of expenditure in responding to those calls.

Do I suspect that Premier and Cabinet has some handle on those costs? Yes, I suspect so, because I can remember in my day, it averting to the cost of some of the production.

There should be a transparent responsibility within the Legislative Council for exercising the power so that the members who initiate a call for documents should in fact be accountable for that. It is not sufficient to say that the executive must be accountable to parliament or that the administration should be accountable to parliament, but the members of parliament who exercise the power should also be responsible and accountable for the exercise of that power.

Where does that lead you? When a call for papers is made, there should be a purpose for that call. Under the structure in New South Wales, that purpose is not [inaudible]. They should be able to be identified. If you are looking at the purpose for a call, are you concerned about the policy for which the documents were created, and is that policy adequate or appropriate? If you are making a call, is your concern about an executive failure in the administration of that policy? Are you concerned about an administrative failure about the implementation of that policy? Or are you concerned about improper behaviour in the exercise of the powers which give rise to the creation of the documents you are calling for. That purpose, in a framework of governance, ought to be understood upfront.

It is important if it is identified within the resolution that has called for the production of the documents because it will also give some discipline to the debate around whether that call should be supported by the parliament.

They should also report to the parliament on the outcome of the call for papers. In New South Wales, 300 calls, with what consequence? On 38 occasions there has been an analysis of cabinet confidentially or of public immunity. I don't know of any, but perhaps the Clerk will be able to provide some understanding. But if you don't have an outcome, it gives rise to the reason for the administration to be concerned that there has been an abuse of power and that the power has only been used as a witch-hunt of some form. That leads to an allegation of an abuse of power by the parliament, which ought to be curtailed in some way.

Currently, access is given to all MPs to these documents, without any structure of accountability. An individual member could look at the documents. An individual member could bring their own prejudices to bear in an analysis of those documents and provide some report to the parliament. There is no structure for a report to parliament about what has been observed.

You might want to consider whether the more appropriate approach should be that there should be a committee of at least three persons, including the person who initiates the call, to look at what is within the documents with a view to providing a report back to the parliament on the reasons for which the call was made. That should include an advice to the parliament, that as a result of this investigation, a cost has been incurred in pursuing the call.

My view is that if you provide a structure around that call with a structure for the parliament to understand the benefits of the call, that might minimise a political call for papers and minimise an allegation of abuse of the process.

The greatest concern we have noted in relation to the call for papers is the issue of cabinet papers. There is always a reference to Spiegelman's description of a cabinet process. I would have to say that the Spiegelman description of a cabinet process bears no reality to process of creation of cabinet documents in New South Wales. He refers to discussions within, I understand, within federal Cabinet. Where Spiegelman had some experience as a head of department and as an adviser to a prime minister, he would understand that cabinet minutes recorded the discussion in detail of the various Cabinet members. In New South Wales, to the best of my knowledge, no such minute is ever kept.

I was in cabinet for a number of years. I never saw detailed minutes of the discussions of the members of Cabinet. I think that had they thought there was such a note, they would have been a little bit perturbed about it.

CHAIR - So you did record the outcome of the discussions?

Mr HANNAFORD - Record the outcome. To the extent of my knowledge, of there being a cabinet document, there is the original cabinet paper. Then there is the commentary of all the relevant agencies that may be impacted by the original cabinet paper and the cabinet decision either rejecting the original proposal or agreeing to it or agreeing to it with amendment. To that extent at a state level, the Spiegelman comments on cabinet confidentiality are irrelevant. For them to be continued to be drawn upon is, at best, aberrant behaviour.

I have never seen a detailed explanation of the New South Wales cabinet processes.

CHAIR - Would they potentially vary from government to government?

Mr HANNAFORD - Absolutely. Therefore, within the power of the parliament to call upon a cabinet process, you will need to understand the process. It needs to be articulated as does the point at which you draw the line.

In terms of the New South Wales process, where would have I drawn the line? It is my view that because a cabinet paper is initiated by a minister and an agency, it goes to the cabinet office. It may or may not get no further and it gets peremptorily rejected or sent back for consideration.

At the moment the cabinet office starts working on that paper and starts calling for submissions from the various agencies, the final submission to the cabinet office forms part of the papers that go to cabinet. For me, cabinet papers are the papers that go to cabinet for consideration. Reports that are prepared in preparation for the submission are not part of the cabinet papers unless they have been included in the cabinet papers.

In my day, have I seen reports created as cabinet papers for the purposes of minimising access to them? Yes, I have and it is inappropriate.

CHAIR - So how do you prevent that in the system? Look at what happened in Queensland in Bjelke-Petersen's time where whole trolley-loads of documents were wheeled through the room.

Mr HANNAFORD - That is where you then you have arbitral process, which is what the second tranche of call for papers created so that if there has been an attempt to abuse the process, that is able to be identified. You might claim confidentiality, but confidentiality should not totally close the opportunity for an examination independently and confidentially of whether the process is being abused.

We created an arbitral process in New South Wales. I believe that if you created a clear guideline as to what is to be cabinet papers in the form I have outlined, is it my experience that the bureaucracy will observe the process to the best of their ability? Yes. I do not think the bureaucracy deliberately seeks to subvert the parliamentary process, so if you have clear rules as to what is to be regarded as cabinet documents, the bureaucracy will report to the parliament in accordance with those rules.

Mr DEAN - Are any documents coming out of the cabinet discussion identified in any way as cabinet in-confidence?

Mr HANNAFORD - I think it would be dependent upon the particular jurisdiction. I don't recall seeing a stamp on the document saying cabinet-in-confidence.

Mr DEAN - We know a lot of conversation within cabinet is released - all the good reports - so we get that difference.

Mr HANNAFORD - That is the art of politics. A document that is created stands on its own. If it is a document created for purposes of the cabinet discussion, it therefore forms part of papers presented to the cabinet, and I would regard that as something that needs to be protected. Why? Because I have seen agencies provide very full, very frank assessments of some of the proposals put up by various ministers for policy reform. Any attempt to impede that very full and frank assessment being given to the cabinet is a step which I would regard fraught with danger.

The bureaucracy may well commission independent reports, which are given to the bureaucracy, for assisting the bureaucracy in making a full and frank advice to the cabinet. I do not regard such documents as appropriately being cabinet documents.

It is the advice of the agencies to the cabinet which are advisories that ought to be preserved in the interest in sustaining an accountable democracy.

If you have a clear process, it would be less likely that you will need to have an arbitral process being triggered. You may have an arbitral process in order to ensure accountability, because there must always be accountability in order to minimise allegations of abuse, keeping in mind that within the political environment where there is a vacuum, the vacuum will be filled with disinformation. If you don't have an ability to assess whether the documents have been properly created, eventually that vacuum will be filled.

The same comment applies in relation to public interest immunity claims, but with a higher level of difficulty in dealing with those. At a federal level, where you are dealing with defence and intelligence, PII is much more easily administered. At a state level, the only level of real concern, whether we justify claims for PII, is in the field of the administration of justice.

Under the NSW regime, claims for access to documents and the area of administration of government are requests made to the Governor. The Governor has never granted any such request.

That might be regarded as appropriate, and I make no comment on that. But where claims for PII have been made within the NSW context, or seem to have been made - and, again, I would want to look at those 300 claims to be able to be confident in my assertion of concern - they are claims around commercial-in-confidence. I have a lot of difficulties with claims for commercial-in-confidence because I think there are claims made in order to minimise transparency of accountability by the bureaucracy. I don't know that necessarily the ministers even understand the issues of public interest immunity that are being raised in those particular spaces.

Those who have been engaged in the arbitral process in NSW where PII has been claimed have created a couple of different approaches to handling those claims, one being that the claimant needs to justify it to the arbitrator with a return for comment. That becomes necessary where you have a call for documents that has been triggered by an individual and nobody has any responsibility for looking at the documents and reporting to the parliament on them. If you put a committee around the analysis of the documents with a responsibility to report, the interface would be between the arbitrator and that particular committee, and that would trigger whether there is a justifiable PII claim.

CHAIR - Who do you think should sit on that committee? In some cases, you might have a committee requesting a document or maybe a member in the House requesting a document. Who should constitute such a committee?

Mr HANNAFORD - That should be forming part of the order so that when an order is made for the production of the documents, the order shall require that the documents be brought back, under my proposal, to a panel of the person initiating the call plus at least two other members. If it is a committee, I will talk about that separately. My concern at the moment, without an understanding of how use has been made of the process over 300 times, I will be looking at some governance around the process, which is not there at the moment.

CHAIR - There are two different things here. There is one in the House asking for a document and often, as you have seen in NSW, it is related to a piece of legislation that is before the House. The experience we have had more in our parliament is when committees have sought a document. You have a properly constituted committee; the committee has sought a document. I would have thought that committee would have the accountability framework there to assess the validity of the claim and then to report to the parliament as that committee. You wouldn't need to establish a separate committee; you are not suggesting that?

Mr HANNAFORD - Absolutely not, no. Once you have a committee, that committee has a responsibility. There has been a purpose in the establishment of the committee. That purpose is usually clearly identified within the establishment of the committee, and the committee responds to the parliament, reporting on the purpose for its creation.

CHAIR - You are talking about more a call in the House for a paper or a document?

Mr HANNAFORD - A call in the House for papers is where I suspect there is the potential for abuse. If I can deal with the call by committees, I have no problem at all in a committee taking responsibility for a call and dealing with the arbitrator in relation to the handling of claims for cabinet in confidence or PII. That, for me, is not necessarily a problem. I have a problem when it comes to enforcement, where there is conflict. That can occur from a claim made by the committee or a claim by a call on the House.

A number of presentations raised the concept of contempt of the parliament being the trigger for ensuring enforcement. I regard contempt as an undesirable process. Properly administered, contempt results inevitably in incarceration. That raises a whole different level of accountability and whether the parliament is even appropriately empowered to deal with that, notwithstanding at least one incident federally. My personal view is that suspension of a responsible minister until compliance with the call is the most desirable tool. We have experienced that in New South Wales. It did get, potentially, to a concern, which some of us talked about, of possibly having to suspend one than more minister to be able to secure compliance with the call for papers. It may well be that because of the discussion about the need to suspend another minister because the initial minister was already out of the House, that might have resulted in a move towards compliance.

What is the power of the parliament? Ultimately, it is suspension. What is the least desirable? Ultimate power of the parliament is the suspension of the business of government until there is compliance with the call. They are the ultimate tools. That comes back to the issue of the role of a committee and a committee calling for documents. Should it in fact be a committee that exercises the power of the parliament in a call for documents, or should it be the committee requesting the parliament to call for the production of documents, leaving it for the parliament to exercise the power to enforce compliance?

I have a mixed view on that. The efficient view would be to say that we will leave the committees with the power to call for the documents, then for the committee to refer the matter to the parliament, and for the parliament to decide on the enforcement of the call.

CHAIR - The relevant House of parliament?

Mr HANNAFORD - Yes, the relevant House. Invariably - to face the political realities - it will be where a government doesn't hold the majority. In the New South Wales environment, I don't suspect any government ever again will have control of the upper House unless there is a massive swing to a government. Even then, I suspect it will never occur.

CHAIR - In Tasmania it never has.

Mr HANNAFORD - In Tasmania?

CHAIR - In our long history, we have never been controlled by a party.

Mr HANNAFORD - That is all the more reason, from my comment, that a framework of governance around the process is going to be important. If you do not have a framework of governance around the process, I suspect you will find there will be an abuse of the process. When you have an abusive power, there will eventually be a call of the curtailment of the power.

CHAIR - Do the two aspects here warrant the same treatment? Can the calling for papers in the House related to a piece of legislation before the House or another matter that may not be, and then the process of the power to call for papers and a process to deal with that within a properly constituted committee of the parliament operate under the same standing orders or do you need standing orders reflecting the differences?

Mr HANNAFORD - They can operate under the same standing orders, but the question that comes back is, if you call for papers in connection with legislation, what is the purpose for the call? Is the purpose capable of being identified or is just a witch-hunt as part of a game play over the

powers and different views of the legislation? If you cannot articulate the purpose for which you are making a call and you cannot understand the outcome you are wanting to achieve by a call, I would have to ask why are you making the call, other than for political gamesmanship. Political gamesmanship is always reciprocated. When reciprocated, it will eventually lead to an allegation of abuse of power. That is why creating a governance framework around the use of the power will minimise allegations of an abuse of power. It will never eliminate it, but you might minimise it.

Then it comes to the next question of access to the documents. Under our framework in New South Wales, a call for papers leads to those papers being publicly available. You will have seen from comments initiated primarily out of the department of Premier and Cabinet that the government has created a government information process. In New South Wales it is the Government Information (Public Access) Act 2009. The GIPA Act should be the framework under which the public has access to the papers of government. There is a framework within that legislation that governs public access.

If the call for papers is, in fact, a call being made to overcome the restrictions of GIPAA, or whatever is the respective legislative framework, again this will give rise to allegations of an abuse of process. The parliament has created a process for public access to documents held by the administration. The parliament is seeking access to additional material in order to exercise its oversight of the executive and the administration. I have a concern - which I have seen expressed in some of the papers by the clerk of the parliament - that once the documents come into the control of the parliament, documents should be available to the public.

That, in my mind, triggers an appropriate allegation the parliament is being used to usurp the structure created by the parliament to provide public access and that could lead to an allegation that you are not properly trying to exercise oversight of the administration of government or the exercise of power by the executive.

The next issue that arises from this is: once there has been a call for papers, who do the papers belong to? It is my understanding and I might be wrong, but certainly it was my understanding at the time I was here, that once the papers are produced to the parliament, the parliament holds these papers. Why? The papers are the papers of the agency. There is an archives legislative framework for the preservation of those papers.

Why should the powers of the parliament become a repository for, at the moment, 300 calls for the production of papers? Once papers are produced there is a report to parliament in respect of the papers produced and the parliament has moved on. Then, perhaps, the papers ought to be appropriately returned to the agency that receives them, because it has the legislative responsibility to preserve those papers. That would complete the process of government, the whole process of governance over the documents.

There is a framework for the receipt, handling and reporting of the documents. There is a framework for assessing claims for the protection of documents and then a framework for dealing with the documents once the process has been completed.

Am I happy with the blunt instrument we have in New South Wales? Obviously not, but it would take a seismic move for the parliament now to review that particular process, because it has given a lot of power to the parliament and to individual members who might wish to seek an agenda and be supported in order to put pressure on the government of the day in dealing with these particular issues. As I said, I would only want to pursue the type of reforms I have outlined had I a

better understanding of whether, with the 300 calls made, there been any abuse of the process. If there had been any abuse, that would be used by me, if I were in a position of influence, to trigger a review and creation of a better system of governance around the process.

CHAIR - In the absence of such a review, do you think embedding in the process a greater accountability framework would be at least a good idea in the first instance? The 300-plus documents is a lot and we have not had anywhere near that sort of number of challenges in our parliament . Mind you, who knows what kind of doors could open? I have read some of the reports of the arbiter appointed on occasions to deal with this, so do you think in the absence of a forensic examination a measure can be put in place to actually address some of these issues?

Mr HANNAFORD - Starting over again with the benefit of experience, I would put in place a better framework of governance than initially was undertaken. Keeping in mind the framework originally created was a blunt instrument to try to deal with an obturate executive at the time. It was not dealt within any understanding of the need for creating a formal governance framework. I do not think at that time there was ever any expectation the government would be obturate. Keeping in mind that we were in government when the power was first used in the lower House and there was immediate compliance. Change of government and a different element of obduracy, which then basically led to the conflict between the powers of parliament and the role of the executive. So, a blunt instrument was created without any consideration of the creation of a governance framework that would lead to a responsible level of accountability of the House or the members of the House. I do not think at that time, had it ever been suggested to me - over the course of a decade - that the power would be used on over 300 occasions; it would never have entered my mind.

CHAIR - It is interesting the obdurate government would have been the one in opposition when the standing order was brought in.

Mr HANNAFORD - Yes, that it right.

CHAIR - When you turn it round, you would maybe say welcome.

Mr HANNAFORD - It highlights in my mind that we often do not think about frameworks of governance around the exercise of powers. We actually never think powers will eventually be abused. There is a very interesting book around the English parliament about the use and abuse of power and the stronger the executive, the more likely it is there will be a temptation to abuse a power.

CHAIR - Are we happy to take other questions now?

Mr WILLIE - I have seen some commentary around the arbitration process and the claim of privilege and arbitrators in weighing up public interest against that privilege. You said there should be two arbitrators. Have you some commentary on that?

Mr HANNAFORD - They are distinct processes, in my view, but sometimes, within the written material, they get conflated. You have claims for cabinet-in-confidence and, it is my view that it is possible to create a formal framework around the identification of documents that should be treated as cabinet-in-confidence. That could be part of your government's framework.

There has been a claim for public interest immunity. I have to say, I have not addressed my mind to it because I am out of this world these days, but it would again be possible to create a

framework for the consideration of public interest immunity and what ought to be the relevant heads of consideration because there has been enough guidance from the courts over claims by government of public interest immunity, which would assist the creation of that government's framework.

The variety of circumstances in which there might be a personally identifiable information claim are really quite broad. I think it is more difficult to create a guidance framework around dealing with PII. That is why, when I looked at the limited reports I had of PII considerations by the arbitrators, I felt that leave it to their comments to provide the guidance, but where one of the arbitrators had determined they would put in place a consultative process, I felt that perhaps that might be a fairer process for dealing with the PII. I noted on a couple of occasions that once the arbitral process was triggered with a consultative process, the PII claims were withdrawn.

CHAIR - There was a bit of give and take at that point and some negotiation and agreement on what would meet the need of the members seeking the information.

Mr HANNAFORD - Again, my experience is that once you have a committee looking at these matters, members of the committee do, in fact, exercise their role quite responsibly, and usually outside of the pressures of the political framework. They accept individual accountability for decisions they make as members of the committee.

When you start seeing dissenting reports, you can usually form the view that a level of political influence has been brought to bear. If you have a joint response, that is usually a fairly fair indication of an exercise of an appropriately accountable exercise of power.

I would leave the PII a little to the side but I would consider, in terms of the options, the creation of a framework that would require the arbitrator to put in place a consultative mechanism so that there is a better understanding of why the PII has been raised. Is the PII essential? Again, from my experience, both working within state and federal agencies, PII claims are often kneejerk claims which, when examined more closely, are not pursued.

Mr WILLIE - We find that with our Right to Information Act; there is a resistance in making decisions.

CHAIR - Are you talking about with the parliament?

Mr WILLIE - I am talking about the Right to Information Act and the claim of public interest, which is different to what we are talking about, but there is an inherent resistance to release information.

Mr HANNAFORD - Keep in mind the bureaucracy takes the view that ministers are only there for a short time. The bureaucracy has as much interest in sustaining the secrecy of its processes from the executive government as often the executive government has in maintaining the secrecy of its processes from the parliament and the public. Putting in place accountable measures in the reviewing of these things is an important part of the governance process.

CHAIR - Before I go to you, Ivan, if I can just clarify this point. It appears to me that the standing orders do not prescribe a consultative approach for the arbiter to take, but obviously it has been a process undertaken by the arbiter here. Do you think it would better to have that included

in the standing orders, though standing orders do not bind an arbiter, they bind the operation of the parliament? Is it just like a - to use a terrible term - a gentlemen's agreement, or what?

Mr HANNAFORD - The standing orders would prescribe a process for the arbitrator in exercising their power.

CHAIR - So it could be included in that?

Mr HANNAFORD - It could be included the standing order. Yes.

CHAIR - Okay.

Mr HANNAFORD - Or in a sessional order. As we started out here in New South Wales, it was a sessional order. Once it had bedded itself down, it then became a standing order.

Ms WEBB - Just to clarify, the description of what you are engaging the arbiter to do could include the possibility of that approach?

Mr HANNAFORD - Again, if you were to acquire as part of your sessional order or standing order, the person initiating the call has to identify the purpose of the call, and an understanding of the outcome. That also provides guidance for the arbiter in the examination of the documents and the purpose for which they are being delivered. You might have a large number of documents. A PII relates to a stream of consideration of the agency, but the consideration of the parliament for the call was a different stream. If you understood why you are making the call, as distinct from a fishing expedition, that becomes guidance for those who are examining the documents, but also for those who have to report on a claim for PII or cabinet confidentiality.

Ms WEBB - Presumably, that would be particularly important. It is not just a matter of whether there a valid claim for PII. It is competing claims for PII because, as you say, the claim for PII might be different to the intent for which documents were being sought. If that is clearly articulated, that allows you to adjudicate that competing claim - is what you are saying?

Mr HANNAFORD - That is correct.

The other reason I believe it is desirable in the standing orders or the sessional orders guiding the call for papers, the need to identify the purpose, is that all of our agencies now have myriad mechanisms for oversight of the executive and the bureaucracy. You have the auditor-general and the ombudsman; you might have corruption commissions.

If you have a call for papers, and the purpose is identified within the debate, you might well form a view that the more appropriate organisation to examine the documents and report to parliament is the auditor-general, or the ombudsman, the corruption commission, or even, as in a Mount Penny-type situation, that it might be more appropriate for a commission of inquiry.

The exercise of power by the parliament would only necessarily be triggered where there is not an otherwise appropriate mechanism for a review of the exercise of power by the bureaucracy or the executive. In some states, a commission of inquiry can be triggered by a request from the parliament to investigate. Or the ombudsman may be required to report by a triggered report request from the parliament. Or the auditor-general may well do so.

CHAIR - Our Auditor-General doesn't have the power within the act to compel cabinet documents, which makes it difficult on that front. The Victorian Audit Office and the National Audit Office do. I am not sure about the New South Wales Audit Office.

Mr HANNAFORD - My recollection is that there is not a power but the auditor-general has a power to trigger a special inquiry. My recollection is that it has done so where there has been a request from a parliament for analysis that were taken. Again, keeping in mind the system of governance. If the parliament starts calling for documents because there is not an otherwise appropriate mechanism for investigation, that may well lead to government formulating a view that there ought to be a more appropriate trigger for review to amend some of this legislation.

A call for papers and a parliamentary inquiry is a very blunt instrument. Do we believe that parliamentarians with all their skill and intellectual ability are always the best people to be undertaking a forensic examination of certain matters? I doubt it. If the parliamentary committees were in fact serviced as they are in the United States Senate or Congress, with an administrative panel, a counsel assisting and researchers, where the staff of the committee really drive a forensic examination, then, yes, that might well be an appropriate forum for some of these investigations. But because we don't have in place - what I will come back to - an appropriate level of governance, we don't have triggers which would allow us to form a view in the debate as to whether there is a better agency that could conduct the examination and report to the parliament on the matter rather than having to have the parliament trigger its own investigation.

Mr DEAN - I make the comment that the situation in Tasmania hasn't arisen that often. I think in the last three or four years we have had about three or four occasions where documents have been requested and have been refused. One of the situations that has brought this inquiry into being was a joint House committee requiring the government to produce a document. That document was produced but heavily redacted at the end. That document - and this is a question - what is cabinet discussion? That document was a document between two ministers. It was a letter between two ministers. It was claimed that the conversation included in that letter was a conversation coming out of the cabinet discussion, and therefore it was cabinet-in-confidence - an interesting position. Would you like to comment on that? How would you see that?

Mr HANNAFORD - I would have a very firm view that it is not a cabinet document. It hasn't been produced for the purposes of discussion within cabinet and was not part of the material that was collated by the cabinet and brought to the attention of the cabinet in a meeting to formulate a decision on the directions of policy. The document, in those circumstances, should be produced. If there was something in that document that might generate a claim for public interest immunity, then you would need to have a process by which that could be impartially adjudicated upon. A claim made at large is a claim that leads to allegations of an abuse of the claim. If you have an abuse, you'll call for reform.

If you don't have a process for resolving that, it will lead to confrontation. Within the New South Wales environment, what would that most likely have led to? A call for the suspension of the minister in the upper House, that being the responsible minister who is representing the minister in the lower House - for him to be removed from the parliament until such time as the documents required by the parliament are produced. As I said, the ultimate sanction that the parliament has is to suspend the business of government until such time as the call by the House is responded to. That is the reason, in the second iteration, we created the arbitral process. There needed to be a gatekeeper to try to minimise the level of potential confrontation that could exist between the parliament and the executive, or between the parliament and the administration.

Mr DEAN - In this instance, there were a lot of suggestions being put forward as to how the matter could be resolved: bringing in an independent judge, a retired one perhaps, to look at the document and make comment on it. It just went on and on. At the end of the day the document wasn't produced unredacted. It was a very important document.

CHAIR - They had to rely on the goodwill of the Government to accept the suggestions of the committee, which the Government wasn't going to do.

Mr HANNAFORD - Essentially, that is what your terms of reference are: to look at what is to be a governance framework. That is why I grounded my comments to you on what I perceive as a better governance framework rather than the blunt instrument which has operated here in New South Wales.

CHAIR - On that point, if I might, a couple of questions. You talked about developing clear guidelines around what a cabinet document is. I agree that bureaucracy doesn't intend to subvert. They are doing their job, but generally we don't ask the bureaucracy for these documents, we would ask the relevant minister in a committee setting.

In the Legislative Council, the Leader of Government Business is the representative of all ministers in our House and we would be asking the Leader to produce the documents in our House.

You said there were guidelines and your Government Information (Public Access) Act provides the basis for that. Who does that actually bind? Does the act bind the bureaucracy or does it bind members, or who does it bind?

Mr HANNAFORD - The GIPA Act is the guidelines for the bureaucracy in making available to the public information which is requested by the public. If a member of parliament wanted access to the bureaucracy's documents and used the GIPA Act to trigger that, GIPAA applies.

The GIPA Act is a framework for the operation of the administration. The parliament sets its own framework for the access which the parliament wants to the material required by the parliament for it to exercise its role in ensuring accountability and a responsible administration of government.

CHAIR - Have you some standing orders or sessional orders, however they are framed, to start with, that clearly define a governance and accountability framework in seeking documents, particularly from a minister as opposed to from the bureaucracy, to give some clarity around the process? You can include things like consultative approach with the arbiter where it is deemed appropriate, so that there is a clear framework that governments - of whatever colour - can't ignore. Wouldn't that be better than just having some sort of notional governance framework that might achieve something?

Mr HANNAFORD - My advocacy would be that you have within your governance framework a clear statement as to what the House would regard as a cabinet document.

That might lead to confrontation with the executive government over that particular item, but at least it is a clear starting point as far as the Chamber is concerned as to what it would regard as a cabinet document. A view as to what is a cabinet document tends to vary depending upon the nature of the cabinet at the time, but at least it opens up the start of a discussion with the executive government.

If you have discipline around your definition of what is a cabinet document, it is more likely than not that the cabinet would accept that.

CHAIR - A definition around what is a cabinet document in legislation?

Mr HANNAFORD - No, within your sessional orders.

CHAIR - Within the sessional orders.

Mr HANNAFORD - As I said, I have a lot of difficulty of accepting the [? 9.58.34]approach. I guess it certainly doesn't reflect what would be a cabinet paper here in New South Wales. I would have perhaps a little bit more difficulty with the broad approach that might be referred to as the Priestley [? 9.58.47]approach.

CHAIR - I sat on this committee that Ivan was referring to as well, and we actually sought some legal advice from the former solicitor-general of Tasmania, who went to great lengths to define, as he saw it, what a cabinet document is, in terms of revealing the decisions of cabinet as opposed to the deliberations and the documents that inform. When you read the various cases, there are differing views - you referred to Priestley -

Mr HANNAFORD - If a cabinet document is to be just a decision, that is three lines.

CHAIR - They often are released by the government.

Mr HANNAFORD - And they are released. You have to go back to, basically, Politics 101: why was the cabinet in confidence ruling first initiated and is it still relevant today? I believe it is. That is, it was developed so there could be full, frank and unimpeded advice being given to the executive government to assist the government to make the best possible decisions about policy.

If you are going to create a framework that says the advice of every government agency going to cabinet is going to be available to the public. Then, in my view, with all the best will in the world, you are going to impede the full and frank provision of advice to the executive government to assist the executive government in making the best possible decision on policy matters.

If it were up to me to set a definition, I would be looking at what is the material that I, as the minister, received at the cabinet table to assist me in making a decision on the proposals that were brought before cabinet. That invariably consisted in the New South Wales context in the initiating minute, then all of the correspondence from each of the other agencies, which was gathered together by the cabinet office and made available to cabinet members to assist them in reaching their deliberations. That is the cabinet material because cabinet does not have anything else.

What the cabinet office might want to do is to then extend that to all of the material that all of the agencies had in forming a view as to what ought to go into the piece of material that goes to cabinet in order to close down access to information. That, in my view, is sailing the ship too far across the sea. If you look at, I think it was Sealy's comment report, I think, and saw the Priestley document, you just open up the seas. In my view, that is going to impede full and frank delivery of advice to the executive government.

CHAIR - We are just about out of time.

Mr DEAN - I just wanted to quickly raise one issue. You raised the issue about a committee being able to exercise the power of the parliament in identifying and sorting out these issues. Could you just explain that a little further? Are you suggesting that the best option is that it should go back to parliament?

Mr HANNAFORD - I do have a concern about the committees themselves exercising the power to require the production of documents. Invariably, they are the production of documents of the administration. The exercise of the power should be exercised responsibly by the Chamber within its framework.

Mr DEAN - Hence that raises an issue when you are dealing with joint House committees where the members are half upper House and half lower House. That is what the situation is here.

Mr HANNAFORD - Again, that then gives rise to the question of whether you have an appropriate framework of governance around the operation of those committees and the exercise of power by those committees. If you do not have at least a framework, you are going to have this question of conflict. The question of conflict will be politically driven because we live within a political environment.

The creation of an appropriate and accountable framework for the operation of whether it is a joint committee or whether it is a committee of one of the Houses is, in my view, the first essential step, which is what your terms of reference have triggered. If you are going to put in place the governance framework then you must have a clear understanding of how each of the steps are going to operate. We do not have that, in my view, within the New South Wales framework because of the political exigencies that existed, which resulted in the creation of the sessional order. What I would say, if you were starting over again, you would think in a little bit more detail about it.

CHAIR - Thank you very much for your time. We appreciate your experience in explaining the history of it and having us see some of the potential challenges, but also the opportunities. Thank you.

THE WITNESS WITHDREW.

Mr DAVID BLUNT, CLERK OF THE PARLIAMENTS, LEGISLATIVE COUNCIL PARLIAMENT OF NEW SOUTH WALES WAS CALLED AND EXAMINED.

CHAIR - Thank you for joining us. We thank you for appearing before the committee. It is being record by Hansard and will be published as part of our hearings on our committee web site at a later stage.

We invite you to make some opening comments and speak to your submission. We appreciate the submission and the experience you bring to this. Our terms of reference are quite narrow. As you can see, we have had a few incidents in Tasmania recently where requests for documents have created a deadlock, with a standoff, and the purpose is to look at what an appropriate mechanism may be and what it should be, if there is to be one, to assist.

Mr BLUNT - Thank you for the opportunity to appear before you and to assist you today. It is much appreciated in the company in which I am with such eminent witnesses you are hearing from today, the honourable John Hannaford, former cabinet minister and former leader of the opposition, the honourable Keith Mason, the honourable Michael Egan this afternoon and one of my predecessors, Mr John Evans. It is great to be in their illustrious company.

I would like to make two opening comments. The first one replicates a comment that I made to the Senate Legal and Constitutional Affairs References Committee when I appeared before them when they were dealing with similar questions a number of years ago, and that is this: I am very happy to assist you by explaining the way these matters are dealt with in the NSW Legislative Council and how it works for this House here. It is not for me to try and tell you what to do or recommend to you what to do in your own context. Every House of Parliament is different. Every House of Parliament has a different culture and history and set of procedures. Whilst I am happy to assist in explaining how it works here, I wouldn't suggest what you should do in Tasmania.

CHAIR - The purpose of hearing from you, aside from what you provided in your submission already, is to understand more about how it was introduced, the process of making standing orders in your House, and in some respects your role because I assume in some of the arbiters - we will talk to the arbiter later - in the arbiter's assessment of various claims, you did have a role to play in that. I would be interested to hear more about that role.

Mr BLUNT - I would be happy to answer any questions in that regard that you have. The other thing I say by way of opening is to draw attention to a couple of additional resources. With my submission I provided a copy of the submission I made to the Senate Committee some years ago. It goes into the power of the NSW Legislative Council, the Egan decisions, the procedure for ordering the production of state papers in NSW, the sorts of claims, the privilege that are frequently made, particularly in the area of public interest, community, and the role of the independent legal arbiter, the way in which the arbiter does his or her work and then the ultimate decision-making role of the House after the arbiter's reports.

In my primary submission to you, I took all that material as read and I dealt with two new issues that arose in a new way in 2018, one of which was the question of access to cabinet information, orders for the production of documents that the executive classified as cabinet information. Second, orders for the production of documents by committees. In both those areas, there was quite a lot of activity last year and there are a number of attachments.

There are two other resources I would draw to your attention. We are involved with an oral history program in the New South Wales Legislative Council and after each series of interviews, an historian pulls together the relevant themes. A publication came out last year to mark the twentieth anniversary of the Egan decisions which told the story from the perspective of key players involved. People like Mr Hannaford, Mr Egan and so on, I would be more than happy to make that little publication available to you. I commend it to you.

Third, there is a report of the New South Wales Legislative Council Privileges Committee dating from October 2013 which you might find of interest. Following the change of government in 2011 when the Independent Commission Against Corruption was conducting an inquiry here, it became evident the ICAC had access to a certain amount of information and documentation not made available in a return to an order for papers by the House. It looked like the House had not received the full disclosure in a return to order.

The privileges committee investigated the matter to see exactly what had happened. During the course of its inquiry, the committee received submissions from the Department of Premier and Cabinet which recommended a number of changes to the order for papers system, changes to standing order 52 and so on. The way in which those submissions were presented and the determination of the privileges committee in relation to those matters may well be of interest to you, because some of those go to some of the issues you are grappling with.

CHAIR - This was in 2013?

Mr BLUNT - The 2013 report, yes. Again, I am more than happy to make those available to your secretary. I am happy to answer your questions.

CHAIR - Were you the Clerk when the first iteration of the sessional orders of the time were put into place?

Mr BLUNT - No, I was an officer of the House, but my predecessor who you will be speaking to this afternoon, John Evans, was the Clerk at the time with his deputy, Lyn Lovelock, who was my immediate predecessor. Together, John and Lyn were involved in the drafting of the initial orders for production, then the sessional orders and alternately what became standing order 52.

CHAIR - Since you have been Clerk, Mr Hannaford said since inception there had been 330-odd papers or documents sought or calls for documents - which I assume one call can be hundreds of documents - we are not talking 300 pieces of paper. I understand from reading some of the arbiters' comments and reports back, the Clerk has played a role in the consultative process of this. Can you talk about this and how it has worked?

Mr BLUNT - Where a member wishes to initiate an order for the production of documents, they do so by way of giving you a notice of motion in the House, which then sits on the notice paper overnight and is moved the next sitting day, either by a formal business or with debate. More likely, it will sit on the notice paper for some days, maybe a couple of weeks and during that time there will be some negotiation around its terms. The first involvement my staff and I have with the matter is when a member approaches us with a draft notice of motion and wants it put into the appropriate form. My staff and I will play some role, at that stage, in terms of trying to assist the member to have the motion drafted in a way that will capture the documents they are after without causing the resources of the public service to be unnecessarily diverted from their core work and ensure the motion is not drafted so widely as to collect a truckload of documents, when all they are after is one

or two specific documents. We do have that role up-front, trying to assist members with the drafting of their notices.

Once an order has been agreed to by the House, after that process of negotiation going on behind the scenes and potentially with amendments moved on the floor of the House, once a motion has been agreed, it becomes an order of the House. I am obliged, under standing order 52 to communicate the terms of that order to the secretary of the Premier's Department.

The Premier's Department, known now as the Department of Premier and Cabinet, coordinates the collection of the relevant documents from ministers and agencies and required to return them to me.

If the House is sitting when they are received, I will immediately inform the House of their receipt. If the House is not sitting, I will communicate to all the members of the House within an hour or so what has been received, that is, the volume of material, how many boxes of documents are immediately public, how many boxes that are subject to a claim of privilege and we go from there.

Members and their staff, the media and other stakeholders can immediately begin to inspect the documents not subject to a claim of privilege. The documents subject to a claim of privilege are available for inspection by members of the Legislative Council only.

CHAIR - All members?

Mr BLUNT - All 42 members of the Legislative Council, not only the member who moved the motion.

The next stage I would be involved in is if a member, having inspected documents subject to a claim of privilege, believes a claim of privilege has been drawn too widely and is not perhaps, justifiable.

If they feel there is an overriding public interest in the material - subject to a claim of privilege - being able to be put into the public domain so they can use the material in debate in the House and otherwise consult more broadly about this, the mechanism under standing order 52 is they can lodge a dispute in relation to the claim of privilege. They do this by writing to me as Clerk.

I may have some involvement with the member if they are seeking advice about the framing of their letter of dispute.

CHAIR - So you do assist with this because it is a letter to you?

Mr BLUNT - Yes, it is a letter to me. It may be simply providing them with some precedence of previous letters of dispute. They may want to know where they can have access to a previous report of an arbiter, so they can understand the arbiter's thinking around something like public interest, immunity or legal professional privilege.

It may go a little beyond that, but it is assisting them to interpret what is in an index to a set of privileged documents or assisting them to understand what is in the claim of privilege lodged with the privileged documents.

If they lodge a letter of dispute concerning the claim of privilege, I then take this to the president. There has never been an instant where a president has not authorised the appointment of an independent legal arbiter.

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CHAIR - Who pays for the legal arbiter?

Mr BLUNT - It comes out of our budget, the Department of the Legislative Council. How much that costs depends upon the bill from the arbiter. I do not want to give the arbiter any ideas here unnecessarily, but in view of the considerable experience of the current arbiter and previous arbiters and the quality of the work they do for the Legislative Council, I suspect we get a fairly heavy discount on what would otherwise be their standard hourly rate.

CHAIR - Do you have to budget for that? Or is this like a request for additional funding where unexpected expenses arise? Do you budget a certain amount for this legal advice?

Mr BLUNT - Yes, we do. We have never found ourselves in the position of having to go to Treasury for supplementation to cover the cost of legal fees to arbiters or other legal fees. I suspect a supplementation request to Treasury for such a matter might not get a very positive response in any case, given that the role of the arbiter and standing order 52 is really about transparency of the executive government. I suspect Treasury might not be particularly forthcoming in providing more funds to provide for that.

Nevertheless, we have not found ourselves in that situation in the past. Even during the periods where we have had the heaviest use of the process, it has not been a significant issue to date. In the past, that would have been the beginning and end of any role that I have. Once the former arbiter was appointed, we would deliver the relevant documents to the arbiter, together with their letter of appointment and the letter of dispute from the member. The arbiter would do the work offsite. We would get a report some weeks later. The report would be reported to the House et cetera and the subsequent steps would be taken in the House.

Since Mr Mason's appointment as arbiter, the process has developed somewhat. Those developments are very consistent with the recommendations of the privileges committee in the Mount Penny report from 2013, in that Mr Mason has adopted a process whereby submissions are sought from the relevant government agencies through the Department of Premier and Cabinet. The member may get a second opportunity to respond to the submissions from DPC and the other government agencies. I guess what this process provides is that rather than -

At the time of Legislative Council Privileges Committee report in 2013, DPC said that they were at a disadvantage because they really only had one shot at making a privilege claim when they were returning the documents initially. They felt that they were at something of a disadvantage in that regard. So, this process that Mr Mason's is following is a more iterative process, it is more consultative in that it allows further submissions to be made and considered. It often sees the range of documents in dispute being narrowed down because in some cases the agencies will say, 'Now that I know the members disputing the claim over these 50 documents, we will no longer press our claim into relation to 40 of them'. So, you end up with a much narrower sort of dispute in the end.

CHAIR - This reflects the recommendations made by the privileges committee so in the future, in your view, would it be sensible to amend the Standing Orders to insert this sort of consultative process within them?

Mr BLUNT - At the time when my view was sought by the privileges committee I suggested to them that it was not necessary to change the standing order. It was really up to the arbiter appointed at any time to determine on a case-by-case basis the particular approach that they wanted to take. I have not changed my view in that regard.

CHAIR - You think it better to be silent on that and let the arbiter make the decision?

Mr BLUNT - Yes, that's right. From my point of view, it seems to be working and working really well.

Just coming back to answering your question about the role that I play. With that consultative process that Mr Mason has adopted, I am in a sense the conduit for those submissions. He will ask me to approach DPC to request submissions from them. I will receive those submissions and pass them on to Mr Mason. There is a new and more involved role there with the arbiter's process.

Look, to be frank, at times we will have some discussions around the things that he is doing, but certainly the determinations about those disputes concerning claims of privilege are very much the arbiter's determination and his alone. Their recommendation is really to the House. It is then for the House to decide what to do with those recommendations.

CHAIR - Just one further question. You talked about when the documents are received by you and you notify all of the members, those who have a claim of privilege over them, all members of the Legislative Council can view them.

There are two questions on that. I am sure this must be a problem in all parliaments where you have party members in both Houses. You have opposition members in the Legislative Council; obviously, the lower House members would also like to know what is in the documents. Similarly, the government members might want to see what is being released to see what they might expect to come up. Has that presented any challenges? The other is the Victorian situation, which I will come to in a minute.

Mr BLUNT - When members come to inspect the documents I give them a little homily about the rules for the inspection of privileged documents. One of the things I emphasise to them is that in the 20 years since the Egan cases, more than 300 returns to order, more than half of those, including documents subject to a claim of privilege, we have never had a leak in 20 years. I know that members from some other parliaments find that extraordinary. I think it is extraordinary.

CHAIR - You must be very convincing.

Mr BLUNT - I think it is an extraordinarily good thing. It reflects very, very well on our methods. They can take handwritten notes. They can obviously inform themselves by what they are reading.

CHAIR - They have to do it in your offices? You can't remove documents?

Mr BLUNT - Yes. In fact, I was going to extend an invitation, if I can go on a tangent. Can I extend two invitations to you as a committee? I think a picture tells a thousand words. When you have a break, perhaps before you resume in the afternoon, you are very welcome to come up to my office. I can show you the conference room where you can see the papers around the table at the moment in various documents subject to a claim of privilege covering about 10 different orders.

You obviously can't inspect any of the documents, but I can just sort of show you the facility and what it looks like.

CHAIR - It will be interesting and we appreciate that opportunity, thank you.

Mr BLUNT - The second invitation is for you to come sometime between 2.30 and 3.15 take a seat in the President's Gallery in the House so the Acting President can introduce you to the House this afternoon after it starts.

CHAIR - That would be great. Thank you.

Mr BLUNT - Coming back to the homily for the members, number one, there hasn't been a leak in 20 years; number two, what they can do is take handwritten notes and they can inform themselves; number three, what they can't do is photograph the documents or photocopy them. They can't discuss their contents with anyone other than the other members of the Legislative Council. They can discuss them with Legislative Council colleagues. They can't discuss them with their staff. They can't discuss them with members of the other House, and they certainly can't discuss them with the media or anyone else.

If they feel that they are constrained in their ability to perform their parliamentary duties by that, the appropriate thing for them to do is to lodge a dispute about the claim of privilege and effectively try to get the critical documents into the public domain. That is the only way they can do that.

CHAIR - I don't have a legal background and there may be a very legalistic, complicated document I am reading and not fully understanding the implications of it, for example. If I don't feel I have the confidence in any other member of the Legislative Council being able to provide a better explanation than what I can ascertain, is there any avenue other than lodging a dispute that I can actually get some assistance in understanding it? No.

Mr BLUNT - No.

Mr WILLIE - How confident are you that members haven't discussed it with a third party in confidence?

Mr BLUNT - With anyone else outside the Legislative Council? Absolutely. My understanding is that the significance of the power of the House to order the production of documents, the significance of the fact that the Legislative Council has put in place a mechanism for dealing with claims of privilege, a mechanism that has not been found or achieved or put in place in other jurisdictions; it has not been put in place in the Australian Senate, has not been put in place in other states, hasn't even been put in place in the US Congress, which is grappling with these very issues, nor the House of Commons in the UK. I think members of the Legislative Council appreciate the significance of the mechanisms that are in place. There is a great respect for the need to maintain that confidentiality they have had over that 20 years.

Mr DEAN - Where it has occurred, say, in the last few years, has every member of the House taken advantage of that and come to you to look at those documents? Or have there just been a select few?

Mr BLUNT - No, not every member has done so. There are probably some members in the House who have never been to see any of the documents subject to a claim of privilege. Under standing order 52, I need to maintain a register. Each member who comes to inspect a document subject to a claim of privilege needs to sign in, needs to indicate which documents they are looking at and which subject matter. We have a record of that going back over 15 years now.

In every case the member who has initiated the order, who has given the notice of motion and the moved the motion, will come and inspect those documents. Sometimes that is the only member who will come and inspect the privileged documents. On other occasions though, when there is a matter of significant interest across political parties within the House, there may be one representative of each political party, or each of the key groupings in the House, who will come and examine those documents or at least some of them. Don't forget, though, that in addition to the documents subject to a claim of privilege, there is often a greater volume of documents returned that are not subject to a claim of privilege which are available for public inspection. On every occasion members and members' staff will come and inspect those, members of the media and so on, but particularly members' staff will be put to work to go through those with a fine-tooth comb.

Mr DEAN - You probably covered it in your submission, but how often has it happened in the last two to three years?

Mr BLUNT - It varies with the dynamics in the House. During the last four year term, from 2015 to 2019, we probably saw a record low number of orders for papers agreed to by the House, until the last 12 months of the term when it started to return to more usual levels.

So far this year in the sittings we have had since May 2019, in this term of parliament, we have seen a return to almost record high levels so we are probably up to about 30. I will just ask my colleague - yes, we have had about 30 orders for production responded to in something like 20 sitting days.

Mr DEAN - That is where the applications have been made within the House for the call for those documents?

Mr BLUNT - Yes.

CHAIR - Have you had requests from committees or is it only members in the House?

Mr BLUNT - That's a really good question. As addressed in my submission, I told the story of what happened in the Legislative Council last year in the committee space. Just to recap in a few minutes or less, immediately after the Egan cases, it was assumed that because of the terms of the standing orders, which afforded committees the powers to send for persons, papers and things, it was assumed that the power of the House, as had been found in the Egan cases, was a power that was available to committees. So we saw a number of orders for production of documents made by committees in those early years, which were responded to. Some very significant orders for production of documents were dealt with.

Mr DEAN - Where the member is seeking an order for production of a document through the House, I take it that there has been a lot of effort prior to that in trying to access that document?

Mr BLUNT - That may well be the case; it hasn't necessarily been in every instance. It may be that the member has - and/or interest groups that are working with the member on a particular

issue have - sought access to documents by the Government Information (Public Access) Act, which is our equivalent to freedom of information legislation, and that those applications have been declined. They may have sought the information directly from ministers through correspondence; they may have sought the information through questions on notice et cetera. They may have followed quite an involved process over a number of months and then come to the House with a notice of motion for an order for production of documents, as really a last resort. That is not always the case though. Sometimes there might be an exigency, an urgency about a matter, a matter of such public interest and with the decision perhaps coming up, that the decision is taken to go straight to the House.

Just coming back to the committee story, in the early days a number of orders were complied with; however, in the early 2000s, the crown solicitor in New South Wales advised the executive government that they should resist such orders by committees and recommended that any committees seeking information should do so via the House under standing order 52. That was reflected in guidelines issued to public servants. We began to see committee orders being resisted and refused.

Often what committees did in those circumstances were committees agreed to resolutions that notwithstanding the view of the committee that they have the power to order the production of documents, the committee requested the chair to go to the House and give a notice of motion, et cetera. The committee still has access to information, but in a roundabout way. Things changed last year and there were a number of concerted efforts by committees to obtain documentation directly, either via a summons under the Parliamentary Evidence Act. This summoned a person to attend to give evidence and the giving of evidence to include not only coming to give oral evidence, but also to bring along documentation with them, or by way of orders for production under the relevant standing order of the House. There was a mixed result from those instances. There were three instances last year. In two instances the documentation was produced. In one instance it was not. In response to this, a number of members were interested in putting a framework in place; if committees were to continue to press this matter in this new parliament, there would be an agreed mechanism by which such orders would be made. Importantly, there would be a mechanism by which the executive government could make claims of privilege in responding to such orders by committees.

So far, in the four or five months since May 2019 we have not had any orders for production by committees yet.

CHAIR - In the parliament or in the committees?

Mr BLUNT - Within committees. We have had about 30 orders from the House. We have had committees getting close in a couple of instances. The committees are seeing with the sessional order now in place, setting up that mechanism as a last resort. A committee will request the information through the relevant minister, will even made a request a second time. There are a few instances at the moment where committees have made one or two requests and we will have to see what happens over the next few months.

CHAIR - Would they seek a summons prior to seeking to make a request for an arbiter or dispute through you? How would this happen with a committee?

Mr BLUNT - The mechanism in the new sessional order provides where a committee orders the production of documents under standing order 208, the order is to identify clearly the relevant

enquiry, the agency involved and the particular document or documents being sought. That order is to be communicated to the Department of Premier and Cabinet by myself as Clerk and a summary of the terms of the order are to be reported to the House by the President on the next sitting day.

CHAIR - That is order 40(7)(1)?

Mr BLUNT - Yes, sessional order 40. Then the sessional order goes on to provide some steps by which a claim of privilege can be made. If a claim of privilege is made and a member of the committee disputes the claim of privilege, an independent legal arbiter can be appointed to deal with the dispute.

CHAIR - It does not have to come back to the parliament?

Mr BLUNT - Yes, absolutely. The sessional order is there. It has not been used yet.

CHAIR - In Victoria, I do not think they have used theirs yet. We are going there tomorrow to talk to them. It seems when the documents are received, only the member who moved the motion can view them. Do you have a view about whether this might be a better or not so effective model?

Mr BLUNT - Again, I come back to my initial comments. It is not for me to suggest to another House, whether it is in Tasmania or Victoria, how that House should go about solving these challenges and issues. That House no doubt has its own practices and culture.

From the NSW Legislative Council process though, it has always been part of the process all members of the House can inspect any document subject to a claim of privilege. In further answer to the question from Mr Dean a little earlier, it is not uncommon for the only person to choose to inspect documents subject to a claim of privilege to be the member who has initiated the order and moved the motion. Certainly, if there is a dispute in relation to the claim of privilege and the independent legal arbiter has provided a report with a recommendation to the House. Often after the arbiter's report is notified to the House, there will be a motion that the arbiter's report be tabled and be made public. There will then be a motion the arbiter's recommendation be implemented, which will involve certain documents to a claim of privilege being made public. At that point, often other members of the House come to view the documents in question, as well as reading the arbiter's report to be able to turn their mind to whether it is a good idea to lift the claim of privilege in relation to those documents.

CHAIR - So it narrows it down?

Mr BLUNT - For us in New South Wales, it would be a deleterious step to wind that back so that only the member who initiated the order is able to view the privileged documents. Other members would not be able to form a view about the merits or otherwise in lifting the claim of privilege if they could not actually view the privileged documents.

CHAIR - The proof is in the pudding as you have not had any leaks.

Mr DEAN - The position often raised is that it is all very well to look at a document in confidence, but what real value is there to the member, as it is in confidence with very strict controls on how the member can use or do with it. I question the actions that can come from a member viewing a document in confidence as to how they can use the information. Members in our place have at times simply said they do not want to be involved in that process, because they are restricted

in how they can use it. If they come by the information some other way, they are then able to do whatever they want. It is a free-for-all. From your position as Clerk, is this whole thing working well?

Ms BLUNT - In answer to your final question yes, I think it is working well. The reason I make the comment - it is not really for me to make a judgement as Clerk - however, the fact arbiters' reports when they are notified to the House, the House almost always resolves to make them public and the House then almost always resolves to implement the recommendations of those reports suggests to me that in the collective view of the members of the House, the process is working well. I listen very carefully to every word said in debate on any motions of implementations of arbiters' reports, but I also listen very carefully to any word said in debate on the motions for orders for production in the first place. Whilst from the perspective of the executive government some anxiety is often expressed about the impact of orders upon the resources of the public service in how many person hours it takes to respond, the cost of engaging lawyers, sometimes from the private sector, to assist agencies to frame their responses, collect documents and frame their claims and privileges et cetera. It is not uncommon to hear anxiety expressed by a minister in the House about that matter. Nevertheless, in reading the *Hansard* from the debates on motions for orders for papers in the last couple of sitting weeks, I have detected a change in the tone of those debates. They are tending to be quite conciliatory; there are indications that there is a lot of negotiation going on behind the scenes.

Once a member gives a notice of motion, the relevant minister's office or public servants will come and engage with the member as to how the motion can be modified to focus on exactly what they want. When there has been that negotiation, I am hearing in those debates a degree of acceptance by the executive government that it is a reality that these motions are going to be agreed to in this term of parliament because of the numbers in the House.

CHAIR - So you think that has improved over the time? This process has been in place for a number of years now and it is developing, obviously. Reading through one of the recent reports, you can see this willingness to engage, rather than just saying 'no' and pushing back, and thinking 'How can we help?' Do you think that is what is playing out?

Mr BLUNT - Absolutely. From time to time, there are greater or lesser levels of angst expressed by the executive government depending upon the volume of orders for papers. If we went back to the month of June when there were a significant number of orders agreed to, reading those parliamentary debates in June you would have detected a different tone. It seems to have changed over recent weeks. The system is continually being refined and developed.

Ms WEBB - I am interested to pick up on some of the things we heard suggested previously from Mr Hannaford. It is around the accountability that sits around the power to call for documents within parliament. In order to best put constraint on that power and minimise opportunity for abuse, there might best be governance mechanisms or structures around that.

My understanding is that some of the things he suggested are not in place in New South Wales at the moment. So, some of those things would be that there has to be an articulated purpose in calling for the documents and also a reporting on the outcome from having achieved those documents. I wondered if you could reflect on for us: do you feel the risk of abuse of that power to call for documents currently in New South Wales is heightened or problematic? Second, if you were to contemplate the introduction of those governance structures, the articulation of a purpose

and the requirement to report on an outcome, how might that change what you see happening here within your current arrangements and processes?

Mr BLUNT - Obviously, any suggestion put forward by the Honourable John Hannaford needs to be considered really seriously. He is a person of great standing and stature and he has a great experience in relation to these matters.

Some of those matters were, however, considered by the Legislative Council Privileges Committee in its 2013 Mount Penny report. Some similar matters were considered, perhaps to a more limited extent, in some of the initial evaluations by the current independent legal arbiter, Mr Mason, through the extensive submission process he engaged in during one of his earliest evaluations. He may be able to address that for you more fully.

In relation to suggestions, for instance, that the purpose of a particular order needs to be articulated more clearly by a member initiating an order, I said this to the privileges committee back in 2013. I think the suggestions made to that the privileges committee weren't identical to what Mr Hannaford suggested. They were a little different.

Suggestions 1 and 2 appear to have been based on the assumption that the purposes to which documents returned under standing order 52 are used can be easily compartmentalised and limited, for example, to a committee inquiry. According to the Egan cases, the power exists to enable the House to undertake and fulfil its role in the system of a responsible government, including, and this is a quote from the High Court, 'in the superintendence of the executive'. As these are complex and somewhat imprecise concepts, it would be inappropriate to seek to limit the use of returned papers to only some more limited purpose.

For instance, when a member is initiating an order for papers, it may be that they have in mind some forthcoming legislation. It may be that they have in mind some potential committee inquiry in the future, or there may already be a committee inquiry underway. It may well be that they have something less precise in mind. Public interest in a particular policy issue, or decision of government, is not confined to what might be in a bill that will come before the House in the future.

That was my concern at the time. In the end the privileges committee decided it should be left to the good sense of members individually, and ultimately it should be left to the responsibility of the Chamber as a whole - a collective responsibility of the House to determine when it is appropriate to make an order and when it is not. The House collectively can always modify a motion moved by way of amendment on the Floor of the House after negotiation behind the scenes. I think that is where we are at today, with what we are seeing in recent weeks.

Ms WEBB - It would be your observation that those things moderate. I think the term Mr Hannaford used was the political gamesmanship that might be at play, where it is somewhat spurious and perverse in calling for the documents.

CHAIR - A fishing expedition, he referred to, rather than targeted.

Mr BLUNT - The Legislative Council is a political House just as every House is. It has a really interesting membership. The government is five votes short of the majority. The key thing for any question to be agreed to requires 21 votes. At different times, it is easier for an opposition, or a member of crossbench group to get 21 votes, depending upon the political dynamics at the

time. Certainly, the dynamics at the moment are such that it is easier for that to happen than it was during the last term in parliament.

Ms WEBB - Can I just pick up on the second part of my question? I am interested in your reflections. Obviously, they will be speculation, really.

If there were to be in New South Wales, the introduction of that more structured governance around this process, where a member was required to articulate a clear purpose and report on an outcome, what possible impact might you see that having? How would it look different if that were to be in place?

Mr BLUNT - Can I take that on notice and come back to you in writing, after some further reflection?

Ms WEBB - Absolutely. I realise I am asking for speculation. I suppose the sorts of things I am wondering about in asking it are: Would there be fewer calls made? Would it put a restriction on other aspects on the way the process functions? What would it do to time lines? It's those sorts of things about the functioning of the process and what may ensue if that additional governance structures were put there.

Mr BLUNT - I suspect that at the moment, an additional requirement to further articulate a purpose for an order would not have a significant impact upon the number of orders that are being agreed to. What would be more significant, though, would be the aspect of Mr Hannaford's recommendation for an accountability mechanism after the event, some sort of reporting on the value of the documentation return and the potential use that documentation can be put to. That would probably be more significant. How that mechanism would operate in relation to documents subject to claims of privilege is a real challenge because, of course, you can't talk about what is in a document subject to a claim of privilege unless the claim of privilege is lifted as a result of the arbiter's process. I am not saying it is insurmountable, but there are challenges.

CHAIR - Just on that point, and then we will finish up, I imagine that to get 21 votes, you would have to convince other members of the purpose in the debate, so maybe that issue is dealt with through the process of debate and perhaps some wording of the order, but the accountability at the other end with the reporting back may be the question that would be good to hear your thoughts on. We will write to you to give you more time to fully consider it.

Did you want to make any closing comments, Mr Blunt? We really appreciate your insights.

Mr BLUNT - No, I just want to thank you for the opportunity and reiterate those two invitations for your to visit the office while you are here today and also come to the Chamber sometime between 2.30 and 3.15 p.m.

CHAIR - That would be fine. We will take up those offers, thank you.

THE WITNESS WITHDREW.

HON KEITH MASON AC QC, CURRENT INDEPENDENT LEGAL ARBITER, LEGISLATIVE COUNCIL, PARLIAMENT OF NEW SOUTH WALES, WAS CALLED AND EXAMINED.

CHAIR - Welcome, Mr Mason, and thank you very much for presenting to this committee inquiry, particularly with the key role you play in the process under the standing order that provides for arbitration in disputes about the provision of documents. We are recording this for the purposes of *Hansard* and it will be published on our committee website at a later time. We thank you for your time and invite you to make some opening comments if you would like to describe your role and how it has evolved over time, and anything else you think would be useful for the committee if we were to set up a process, which we don't have at the moment at all, except for the power that is there to call for documents, but we don't have a process where there is a dispute.

Mr MASON - Thank you very much. I appreciate the opportunity because it is also relevant to the constant reforming of the process here, which is part of the reason I have sat in for the whole of the morning. To give you a bit of background on why I have always been interested in the political process, my wife made me promise I would not stand for parliament. I easily gave that promise, but I have been a very interested observer of politics ever since. At university I edged a future premier into second place in government - sorry to boast, but I reminded him of this once.

As counsel I was involved in public interest immunity claims for the Commonwealth government. I was solicitor-general for 10 years in this state and then president of the Court of Appeal for 10 years. I am currently the Chair of the Electoral Commission, which is not a standing appointment; I am appointed ad hoc each time, but have been the independent arbiter for quite a number of years; I have also given a report to the ACT government.

Mr DEAN - As the arbiter, you said it is ad hoc; it is an appointment by whom?

Mr MASON - By the President, but each time there is a dispute to a claim of privilege, the President appoints an arbiter. In fact, the Clerk rings me up and says, 'Mr Mason, will you do it again?', and I say 'Of course', if I am available. For reasons we will come to, we are almost reaching the stage where I am going to have to take an understudy and have a second independent arbiter - it's exploding. I was counsel in Egan v Willis in the Court of Appeal, taking the position on behalf of the executive government, but to recognise this power of an upper House would be the end of responsible government as we knew it in that the fear was that the upper House would make and unmake governments by making demands unacceptable to the Executive. That argument did not succeed in the Court of Appeal. I then became president of the Court of Appeal so somebody else took over the argument in the High Court and didn't succeed there either, hence Egan v Willis.

If I am expressing some governmental views, I am happy to do it - they are obviously my personal views. I don't think the power to call for documents has led to anything like that but it has led to an incredible amount of additional accountability of the executive arm. From my perspective, it's not so much relevant to legislation, although that obviously comes into it; the bulk of the disputes and the papers relate to what we call the accountability arm of government.

I am not sure I agree with my friend John Hannaford's statements about abuse of power, but again we can perhaps come to that if you're interested in my views which aren't worth that much.

I don't think the requirement to show one's hands in advance would be terribly realistic but again that's a matter for you. The impact of the standing order here means that only members of the upper House can see documents, and if they are documents of any complexity, they are not allowed to seek assistance from staffers or anybody else. I factor that consideration into my reports to the public interest balancing exercise that I occasionally do in deciding whether the public interest lies in suppression or in publication. The onus is on the executive to make out the case of privilege, but having regard to the importance of information documents to promoting and triggering public debate, if all that's raised is confidentiality or embarrassment, those matters tend not to get very far. In my estimation the House is free to take [inaudible].

There's a real question mark and it remains in one way: I gave another report last week, and you may find it of interest as it deals with legal professional privilege issues and some process matters. It shows in some detail how the whole thing works with DPC responding to requests for further information.

CHAIR - For the inquiry, what is its name?

Mr MASON - It's called Landcom Bullying Allegations 2019.

CHAIR - Are you happy to provide a copy to us?

Mr MASON - Yes, and the report was tabled last week so it's a public document. You'll see attached to it are the various submissions, and I'll talk about those shortly.

The standing order talks about my role as being to report as to privilege. There really is a big question mark as to what the House meant by using the word 'privilege' when the standing order was first adopted. There was a sessional order which virtually morphed into a standing order but it was made between Egan v Willis and Chadwick. At that time, when it was first made nobody knew whether the Court of Appeal which ended deciding Chadwick would say that there were privileges against the order for papers. As it turned out the court said very clearly that public interest immunity is on privilege, legal professional privilege is not a privilege against a call for papers and then there was the reservation about cabinet-in-confidence and Spigelman J whose views I have tended to rely upon, took the decision that cabinet-in-confidence was confined to documents that reveal the internal deliberations of individual members of cabinet, not the decisions as a whole or limited [inaudible] to cabinet as a whole - certainly not a rubber stamp that someone could just put on a document [inaudible] future inquiry.

CHAIR - You may not be able to answer this, but on that point, the current New South Wales government, when it prepares its cabinet minutes -we heard that in the Australian Government, it's pretty contemporaneous reporting of discussions - but in the past here it's been just the outcomes basically. Do you know how they approach that?

Mr MASON - I can only talk of 20 years ago when I was solicitor-general, a cabinet minute in New South Wales parliament was a submission to cabinet; it was a document from the cabinet office in which a few boxes were ticked - fiscal impact; impact on families; the key proposal being put for decision endorsement was spelled out. That was a cabinet minute.

As to the minutes after the event, as far as I know, they've never been kept and they're not recorded. Premier Greiner once told me - I said to him, 'Do you ever have votes in cabinet?'; 'Oh

no', he said, 'Once we had a matter that was voted 14 to 1, but I was the 1, and I just stared them down.'

Chadwick then comes and as regards the obligation to make a return for papers, the Court of Appeal rules that the public interest immunity is out, legal professional privilege is out, and yet the standing order remains in its current form. As I discussed in last week's report, one possible outcome could be the role of the independent arbiter is very simple -unless it is genuinely cabinet-in-confidence, everything gets a tick and the dispute is always resolved against the executive.

Over the years, the various reports of my predecessors and my own reports have taken more of a halfway position on that. They have taken the position that there is a very strong interest in members and the House as a whole getting access to information, that traditional categories of privilege in courts do not translate automatically across into the parliament. GIPAA has no real bearing on the matter. There has been a practice, which the House seems to have endorsed by repeatedly endorsing my and my predecessors' recommendations, that in some categories of case, the arbiter will indicate that in his - it has always been in his - evaluation, privilege ought to be afforded. Some examples would be information about current tenders that might get into the wrong hands to the disadvantage of the taxpayer generally.

CHAIR - Informers?

Mr MASON - Informers, whistleblowers, that sort of situation. So there has built up a - shall I use the very word? - 'jurisprudence' which, if the House disagrees with, they will tell me or any successor independent arbiter that there is this middle road in which public interest immunity can be recognised. It is always for the House to decide whether it's acceptable or not and to handle it by redaction for total protection. It's also been my practice on occasions to say, 'This is not privilege but I do recommend that you take care with this sort of information'. That usually translates into voluntary action.

Some of the problems I've encountered include - well, one is, as I say, the uncertainty of what the meaning of privilege is, and I've told you how I'm proceeding until I get a clearer signal. On a couple of occasions, agencies have retained private lawyers. In my perception DPC has not kept the lid on excessive claims of privilege, so we've seen a couple of situations where huge volumes of documents have subject to untenable and often inconsistent claims in their details and I have the impression of hundreds of law clerks out there somewhere going through documents in a sort of discovery action, making recommendations, and they are all presented with the claim of privilege.

CHAIR - So rather than use the Solicitor-General, they've done that? They've gone to external legal advisers?

Mr MASON - I don't know the Solicitor-General's involved in any way; in the main course - and I'm not privy to this, of course - the return is made by the DPC, but files and indexes of the papers, and against each paper privilege or confidentiality is claimed, with four or five pages of submissions in support of the claims, which tend to be fairly across the board rather than focusing necessarily on key documents. It's only when the member disputes the claim as regards particular documents that I get engaged. It's then become my practice to invite the executive to keep a more focused reply now that they know the documents are really in context; hopefully it often happens that the executive then says, 'Well, in the claims for the following documents, the member - and often it's been the leader of the opposition in the House who has tended to be the person presenting the dispute -

CHAIR - So you have been moving the order to -

Mr MASON - Well, I don't read who moves the order; I just get a letter from the President setting out the order and telling me the papers have arrived, the dispute has arrived, and I then by arrangement [inaudible] - Mr Blunt gives me an office and I look around at how many boxes there are.

One of the other things that's been developing - in some cases, we're talking about 50 boxes of documents, not all of which are blessedly subject to disputed claims of privilege. Sometimes my role takes a couple of hours and sometimes it has been a whole week of my time looking at the documents, writing the report and in some cases, as you will see, particularly from last week, asking Mr Blunt would he please send the attached memo to the member concerned and to DPC giving a response to this suggestion or whatever.

There has been a little bit of a practice, which has arisen from some of the mega-matters, in which I have tried to invite the member and the DPC to pick some sample documents.

I then look at them and report as to them and don't investigate the balance of them, and hopefully, at least for me, the problem sorts itself out because there are then agreed redactions or an acceptance that this is where the privilege line gets drawn.

CHAIR - That seemed to have been the case with the greyhound racing. It seemed to be the approach that you took there, from reading your report.

Mr MASON - Yes.

CHAIR - In your view, that worked, using a section of a group of documents?

Mr MASON - Yes, that was probably the biggest. That was one where it went to a private firm and where the entity was not a direct government department. I stand corrected - there was an advice from Mr Walker SC to the effect that it had to answer a call for papers even though it wasn't subject to ministerial direction.

I am not at all concerned with the answer; I take it as a given. Sometimes there are submissions to the effect that 'Oh, we shouldn't have produced this anyway'. I take the view that it has been produced and it is not my role. At other times - and you will see some passing reference to this in last week's report - it becomes reasonably apparent that there hasn't been a complete return to papers, but again, it's not my role to be the policeman.

In last week's matter, I signalled to DPC that given the absence of any documents in a particular context, I might draw some adverse inferences and I ended up doing so. You will see in the report that, very belatedly, a document came in from DPC that sort of said, 'What we meant to say was this'. Again, it's not my function to be -

CHAIR - In those sorts of circumstances, could the member who has been leading the charge, I guess, on that particular matter, if it became apparent that some documents were not there that probably should have been, and maybe you can deduce that in a number of ways, then put in a dispute relating to that?

Mr MASON - No, that wouldn't be my concern, but they can issue another call for papers or take it up with privileges or whatever. Sometimes, as I am going on with my report, a trickle of further documents come in. Sometimes there are claims of privilege with respect to the submissions that are coming in as well and I have, at times, indicated that I either accept or usually don't accept that the submissions are privileged.

In last week's matter, DPC put in some submissions; in my practice of allowing a second bite of the cherry, they put in some much more focused submissions, but they then objected to those submissions being shown to the disputing member.

They indicated they wouldn't object - I think by that they meant they couldn't object - to my following my practice of attaching their submissions to my report, and for the House then to decide how privileged they would treat those submissions themselves.

CHAIR - To clarify, the submission they put in said that the member couldn't view it, or that they could view it but only in the confidential setting?

Mr MASON - I read it. The week before last was pretty hectic for everybody and maybe there were pressures I was not privy to. I was aware of the fact that there were committees meetings as I was writing my report, looking at some of the subject matter of the report. Questions were being asked relevant to it. I was generally aware of that, so I am saying that partially in defence of the position that was taken.

They did say that there was a more detailed reason they suggested the document must be heavily redacted or totally regarded as non-privileged. I said, 'Since this is new material, I think it should be handed over to Mr Searle, in this case, for him to either respond to it within a very short time frame or to indicate his willingness to accept the proposed redactions that would have covered their problems'. For some reason they said no, and they didn't agree to that.

I proceeded to finalise my report. As it turned out, it was against the claim of privilege, again a matter for the House to decide whether to accept that report.

CHAIR - When you make a finding that it's against a claim of privilege, what happens then? There is a report you provide and that is tabled. Does DPC then release the documents in full or what happens then?

Mr MASON - If the House adopts the report and publishes the report, as it usually does, and in writing the report I tend to tell as much as explains without giving away the privileged details, as it were, but assuming I say, 'Except for the following passages which I agree should remain or become redacted, these documents are not, in my evaluation, privileged'. The House then, under the standing order, orders that they be made public. In other words, they lose their privileged nature so members become free to share them with staffers. In theory, journalists are free to access them and members are free to refer to them in the debates in parliament.

CHAIR - Does that happen?

Mr MASON - Yes. There might be 30 or 40 boxes of unprivileged documents. There might be 10 or 15, or sometimes more, boxes of privileged documents, some of which might be unredacted copies of the redacted versions in the other box. My understanding is that once the House has made its views known, the members and Mr Blunt's staff then proceed to take the documents from one set of boxes into another. Sometimes, and I believe this happened last week, I said that in my

evaluation certain information while sensitive and potentially causing embarrassment to individual people, not governmental people but individual people, I could not see it was privileged. In my opinion, I rejected the claim of legal professional privilege but advised the House, making it plain this was advice not evaluation, that it ought to think carefully about that. My understanding is in the motion to adopt and implement the report a regime of - in fact, it was sent back to the government to produce redacted documents that would redact the information that was sensitive but not privileged in my evaluation.

CHAIR - How have governments past and present responded to your reports?

Mr MASON - In one of the reports that you have seen I recommended that there be some sort of roundtable discussion so that as to matters of process the people from DPC who are handling this and the key players in the upper House might sit down with me and give some feedback as to whether this is working or whether it could be done in a more efficient way. Mr Blunt says that there is general support for that idea but it is a question of finding the time. That may not have been the answer to your question.

As far as I know, the government may not like it, but if the House adopts my report, the documents become public. As far as I know, the House always does, but it is free not to.

CHAIR - Do you think that has had any positive impact on the government's willingness to provide documents when they are asked for without an order? They may be hard for you to assess.

Mr MASON - You mean to produce them in a non-privileged claim or to produce them anyway?

CHAIR - Yes, produce them anyway. In a non-privileged claim but maybe not through an order, if they are requested through a question on notice or some other process.

Mr MASON - I am not privy anymore to how these things happen. My impression, for what it's worth, is that the processes of freedom of information grind very slowly and there are all sorts of exceptional claims. It is far too complicated and often irrelevant in the perception of the members; they just want the documents. They then make perhaps over-inclusive claims. Certainly, the volume of stuff coming in is quite concerning.

Mr DEAN - Could a stalemate to occur? In other words, could the government say, 'We have legal advice that says this is privileged documentation and we are not releasing it'?

Mr MASON - My position, now wearing my hat as IA, which seems to be the jargon, is that I am not involved in the return of papers. Sometimes submissions are put in that this document should not have been produced. My position is to say that is a matter between the government and the House. If the government wants to stare down the House, we can have a replay of Egan v Willis. The only area where that is really going to happen is with cabinet-in-confidence because everybody accepts that Chadwick's case has put an end to all other claims of privilege as regards to producing them to the House. It is not the same as saying the government always produces all the documents. Perhaps I didn't understand your question, Mr Dean.

Mr DEAN - My question was that when you make your position available and the government through the House gets an order to release the documents and they simply say, 'No, our position,

and our legal advice, is that these documents are privileged for whatever reason and therefore we are not releasing it'. So, you then go back to what happened previously.

Mr MASON - It's too late because my report only addresses documents already in the custody of the House. The documents have been produced to the House. Privilege has been claimed; privilege has been disputed; and if my report is accepted, privilege has been denied so they are already with the House.

Someone was talking about giving the documents back. Clearly, there's a storage space problem. My assumption is that copies are taken. Whether what is produced are copies rather than originals or whether government keeps copies, I am not sure, but I don't think government stops just because boxes of papers have been tabled. Certainly, DPC is in a position to respond and make submissions about documents.

CHAIR - Should there be a process that provides for the return of documents once a matter is resolved? They are public documents so maybe they need to be covered by the Archives Act or something.

I understand the comment about space. The point about storage has been made by other members. Do you think there needs to be something that deals with that? It seems like there is no reluctance to provide the documents sought in the order to the Clerk of the Legislative Council. There doesn't seem to be a barrier from you, but you probably can't comment on that because you are not that end of it. You are after that.

Mr MASON - I think when I lost Egan v Willis, the government realised it was subject to the control of the House provided it produces all the documents. That’s another question.

CHAIR - Ivan and I have both been on committees where the government has refused even to provide the document in confidence.

Mr MASON - Maybe you need to arrest some members and take them out to the footpath.

CHAIR - But not touch them in doing so.

Mr MASON - That's a matter for you, but yeah.

CHAIR - We reflected on the comments made by Mr Hannaford about the abuse of power. Would you like to expand on your view in relation to whether the process used in New South Wales has led to, can lead to, or has the potential to lead to, an abuse of power?

Mr MASON - I don't think I share Mr Hannaford's views. If you look at the purpose of the power as expounded in Egan v Willis - I touch on this just by repeating it in some of my reports - the executive is subject to parliament. Egan v Willis says that includes the individual Houses of parliament and anything of interest to parliament in its executive or oversight function is fair game in an order for papers.

Does politics intrude in that? Of course it does, but it's on both sides of the record. The government obviously wants to keep a lot of things confidential for all sorts of good and practical reasons. I wouldn't use the word 'abuse' on either side, but on one side of it there can be lack of frankness. We need to get on with the job of governing and we do have private interests to protect,

including commercial interests of government, so why should we be putting these documents into the public domain? Sometimes there are excessive claims of immunity. I saw that as a barrister as well.

CHAIR - Which one, sorry?

Mr MASON - Public interest immunity. Sometimes public interest immunity, even in court cases, is claimed excessively. In New South Wales, one of the roles of the SG was, in effect, to determine before any public interest immunity claim was fought in court so as not to debase the currency. Sometimes the agency would have to come up and justify its claim before making any sort of unusual claim. Is it abused by the members? Again, I say (a) that is a matter for the House and (b) that's politics. Sometimes, it is in the ebb and flow of the various parties taking opposite positions that either the truth comes out or ideas come out. As an observer of politics, it does not fuss me perhaps as much as Mr Hannaford as a government member would be fussed. I have seen both sides of the story.

CHAIR - Some might say that on your wife's advice you did not stand for parliament and that not being a politician you see things from a strictly legal perspective. I have had people say that sort of thing to me. 'That's how a lawyer would see it' or 'That is how a politician would see it'. You come at the same matter from different perspectives.

Mr MASON - As happened last week, and does happen, you get these very urgent or stringent claims; people will stop giving information to government if this becomes public. Over my years of experience, I have adopted a particular position to that which others may not share. The view I may have taken when I was the primary government lawyer in the state may be different to the view I am taking now as IA for the upper House.

CHAIR - What is your view on that?

Mr MASON - My view is to evaluate independently of what I see to be the position. I am not taking sides. In fact, I took umbrage at a suggestion from DPC the week before last that I was becoming a contradictor in the process. Informing myself through the prism of what the High Court said in Egan v Willis and recognising the executive is subject to parliament, to my view quite a convincing case has to be made before parliaments call for information and the need for information is trumped by a claim of privilege.

CHAIR - One of Mr Hannaford's concerns, and I think other political players will raise and do raise this, is the need for governments to receive frank and fearless advice without being limited or hampered in any way. That is the claim made - that if public servants felt their advice was going to be made public, they wouldn't be as frank or fearless in their approach. Do you have a view on that?

Mr MASON - Yes, I do. My perception of these things is not about embarrassment to public servants but about embarrassment to government. Decisionmakers in government who have taken a position which may be right or may be wrong, and it's now being challenged and changed, sometimes for the good motivations.

Are they going to be coy in the future? I don't think so. I think no more coy than ministers ought to be, realising that what they decide is subject to scrutiny of others.

CHAIR - Just to explore this a bit further. We have heard many times in our parliament about the need for frank and fearless advice, but not making someone feel constrained in giving advice. A public servant provides their advice based on the work, and they are employed in that role to provide that advice, and they will do it, as you would expect, to the best of their ability, regardless of the good and bad aspects of any policy. They will provide all that.

The minister, and government, who receive that advice and act on it one way or another, either by rejecting it, accepting it or modifying it - that is where the scrutiny and the accountability should be, not with the public servant. Is that what you are saying?

Mr MASON - Yes, but I am also saying that the relisting of vast masses of documents, and these things are happening day after day, and the fact that someone will come back to a public servant and say, 'You recommended that', and that public servant say, 'I'll be careful next time before I sign off', I think that is totally unrealistic. It is not the way the world operates. It all gets buried in anonymity. It is the ultimate decision that anybody is interested in.

In the area of public interest immunity, the courts are where the claims are made. The so-called candour of [inaudible] has been virtually rejected. Nobody accepts it anymore, except in the case of perhaps whistleblowers and sexual abuse officers. Their confidentiality needs to be protected, and everybody accepts that. Nobody in the courts, to my knowledge, accepts the public servants [inaudible] in relation to their fearless advice.

CHAIR - So you don't think it hampers them if they know that the work they have done in providing advice to cabinet could become public?

Mr MASON - Sorry, providing advice to cabinet - I didn't realise we were talking about the subset of the documents for all cabinet-in-confidence.

CHAIR - One of the claims made quite frequently is that the public interest immunity, which they seem to apply to that, that sometimes it is also with regard to cabinet information, or cabinet documents. So there are differing views to what cabinet documents are. Views from being that all should be available to it is only the outcomes of deliberations of the cabinet decision. Mr Hannaford talked this morning about the minute that comes from the department, or from the bureaucracy, to provide that advice to the cabinet to make that determination not to accept, reject or amend. The public interest immunity one is one aspect of it, which is used a lot. The other one, claiming that it is cabinet information based on the fact that it contains some advice from the department.

Mr MASON - I stand corrected, but my very limited understanding is that the submissions that go to cabinet are often signed off by the minister promoting the measure. He or she has endorsed the matter getting before cabinet. Once that happens, nobody cares about the head of the department who was second.

Last week's matter, as you will see, related, at least on the surface, to bullying allegations made against the chair of a large government entity involved with land development. She had formerly been the CEO. It would appear that the House is interested in the circumstances leading to her appointment and the secretary of the Treasury department, having received a report about these allegations - what I am telling you is all in the public record - determined that she should stay in her job. The upper House seemed very interested to examine the propriety of that. Clearly, the upper House is looking at the head of Treasury because parallel with the inquiry I was looking at,

questions were being asked by Mr Searle in committee to the head of Treasury. referable to the very same matter.

I briefly factor these in just to say that clearly there is a matter of public interest, in the loose sense of the word, and interest to parliament about it. I did not accept that questions of fearless advice on the part of the head of Treasury were a matter that tilted the scales. His conduct seems to be the matter that's attracting the attention of the House. There were claims that people lower down - namely, the members of staff who made the allegations of bullying against the chair - would be deterred if a report which examined in detail their claims and made findings about it upon which Treasury did or did not act. That's part of the issue. I eventually took the view that parliament's interest in getting access to that information meant there was no privilege in any technical sense and that their interest could be protected by redacting, which I recommended but didn't. Mr Searle accepted this when he moved the motion for the adoption of my report and the publishing of the documents. The documents were sent to the Department of Premier and Cabinet - DPC - to redact the names of the individual complainants, clearly because his interest is with people higher up in the entity.

To answer your question, as a barrister making unsuccessful claims of privilege on behalf of the Commonwealth government, as a judge and now as an independent arbiter, I had never given any real credence to the claim that public servants will be deterred for fear that they will be identified. I may be wrong but I do say that's the state of the law, even in court cases with respect to that claim of privilege that so-called Campbell ground just gets mentioned and swept away.

Mr DEAN - As the arbiter, you may not want to answer the question but I ask it. How do you see the process working in New South Wales in relation to the production of documents? Is it working well?

Mr MASON - I'm seeing the sheer volume of documents that are being produced and having to be sorted out with claims of privilege and then disputes. I'm trying to tighten it to the extent of anything within my control, but the obvious expense involved in the processing at DPC level is a matter of concern: the number of people under Mr Blunt's supervision who are having to number each of these documents - each of these documents IS given a separate number, we are talking about 150 boxes and each document is number-stamped - and then searching them out and finding them. Hopefully, people will get smarter about it but at the moment, with the current parliament or in the run-up to an election, there is a spike in these calls for papers. I don't know why.

CHAIR - Do you think they are just trying to snow the members or are they just trying to be overly helpful?

Mr MASON - The government is trying to snow the members?

CHAIR - Yes, with all the documents being provided.

Mr MASON - The government might be better off not claiming privilege; that would be the way to bury some of these documents.

Mr WILLIE - It could be the opposition trying to snow government ministers by requesting papers and then their departments' time is taken up in dealing with that.

Mr MASON - I don't perceive the government but I do perceive some of the claims. You have a bit of an idea what the member is looking for and you have these very broad - the form of the calls for papers are becoming more sophisticated and they include a paragraph about 'any legal advice referable to call for papers'. The sheer volume of papers that seems to be caught by the net and the processing of those is a matter of concern, just from a financial point of view.

Ms HOWLETT - Would you have an estimated cost for this process?

Mr MASON - To government? I wouldn't. I can tell you how much my fees are; I do it at government rates, which I do for mediation, which is $300 an hour.

Ms HOWLETT - No, I meant in the order of -

Mr MASON - Overall, I don't know. I am told a question was asked in the Estimates committee last week to the head of Treasury by Mr Searle. I have only spoken to Mr Searle twice or three times in my life. A question was asked by the head of the cabinet office - 'Are you concerned about the cost of this?' As reported to me, he seemed to be worried that it was a trick question and he didn't answer it directly. From my perspective, someone ought to be concerned; the cost must be huge.

Ms HOWLETT - Could it be transferred to an electronic process easily from a security point of view? All documents now are going to a storage facility, I imagine.

Mr MASON - I don't think housing the documents is the problem; it is the processing of the claim. It's a requirement to index every document and date it and make the claim a privilege. It's obviously doable but it seems to be a growth industry. As to the direct and indirect costs, I won't say I'm surprised but I notice you are not seeing anyone from DPC. I'm anxious to try to get DPC into my loop to have a discussion because, for all I know, they are happy with it, or they are spitting chips with the system.

CHAIR - We might have to write to them and ask them.

Mr MASON - There is a lady who is called Ms Boyd, who seems to be the general counsel at DPC, who is the person. I don't think I have ever met her.

Mr DEAN - If I can go back to where I was, on the issues around this and the problems that are arising in relation to the volume of documents, are any changes envisaged at this stage or being talked about as to how this problem might be overcome? Are you able to make suggestions?

Mr MASON - Not to my knowledge. Obviously the standing order could be tweaked a little bit. I heard what Mr Blunt said about him being content to leave it on an ad hoc basis. There does seem to be building up a bit of a process. In my latest report I kept the steam out of my ears, but I said I was a bit concerned about that stance taken in not being prepared to share their response. I said next time it won't happen because I may not give DPC the opportunity for a second bite at the cherry, or if I do it, it will be on express condition that it be available. Again, that's only a partial answer to what you are saying. This is very much evolving here in New South Wales. Can it be tightened? Yes, I imagine it could.

CHAIR - How would you suggest it be tightened?

Mr MASON - As to the processes which my role has taken, I think I can handle that. The idea of using samples seems to be catching on. I don't think it should be incumbent on a member that he or she disclose their hand when they are moving for the production of papers. I think it's probably bleedingly obvious anyway and the House as a whole has to adopt the motion before it is passed. Clearly, the idea of every member being entitled to access it makes a lot of sense. I am assuming that there is a growing body of negotiation that takes place while the thing is being framed. I have a bit of an inkling that there must be some government member in the House who liaises with Mr Searle, who is usually the one who moves the call for papers, but not always, and hopefully there is discussion - 'Do you really need this; can you frame it that way?'

CHAIR - You comment on your role in it, so with the standing order as it is currently framed, that is adequate to achieve what needs to be achieved.

Mr MASON - I'm not always available; I do have other things in my semiretired life. The time limits in the standing order are very tight and there are times I just don't comply with them, particularly since there are opportunities for people to make responses, but the volume is such that I occasionally say to David Blunt, 'I won't not be doing this forever.' He goes white at that stage and I say, 'Maybe we ought to have someone else coming in, trained up parallel.'

Ms WEBB - I was wondering if we were to contemplate such a mechanism in Tasmania. In your role as an arbiter, is there anything you would like to highlight for us that we should consider in the level of qualification for that role? Who we might consider in terms of a profile and whether, as a very small jurisdiction, there are particular things we should consider in how we might determine who could fit the bill for that role? We could follow up with you afterwards if there is not time to cover it.

Mr MASON - I must say I have been doing this for eight to 10 years. I have grown in to this role and learnt a lot more than I did when I started. I knew a lot more about how government works than most retired judges or barristers. I am not saying that boastfully, but I think it has helped.

Having the one person is important. A retired judge is probably the way to go in terms of the acceptability of what he or she recommends. I cannot think of any other specific adaptations.

I would be very happy to continue this conversation or develop it further if you wanted me to do so in some other mechanism.

CHAIR - We can write to you with further requests if you think more clarity is needed around the particular skillset.

Mr MASON - You do not have anyone in this role?

CHAIR - No, there is no process. Thank you, Mr Mason, for your time. Will read your most recently tabled report with interest.

THE WITNESS WITHDREW.

Mr JOHN EVANS, FORMER CLERK OF THE LEGISLATIVE COUNCIL NEW SOUTH WALES WAS CALLED AND EXAMINED.

Mr EVANS - As members are probably aware, I was Clerk of the Legislative Council for 18 years, from 1989 and was obviously Clerk during the period during which the Council decided to assert its role in ordering production of documents from the executive Government.

I will briefly summarise all the events that occurred over that time to give you a better understanding of how things progressed and developed over those years.

I might also say I have a legal background from my studies in law at Macquarie University.

Between 1856 and 1933, the practice of ordering state papers was well established in the Legislative Council. During that time, the Council passed over 217 orders for papers. Of these, 171 were complied with and 45 were not.

There were no orders made between 1933 - when the Council was reconstituted - and 1990. The reason is unclear.

Between 1991 and 1995, we had a coalition government in the Legislative Assembly. Some independents had control of the Legislative Assembly and the Labor Party was in opposition. There were quite a number of orders for papers in the Legislative Assembly during this period.

The wheel turned in the 1995 election and we had a Labor government in the Assembly and the coalition were in opposition in the Council.

In 18 October 1995 we had the first order for papers on the closure of veterinary laboratories in the Biological and Chemical Research Institute at Rydalmere.

John Hannaford, who you have already heard from this morning, was the leader of the opposition at the time. He and I had many discussions about - from a procedural point of view of me - how the Council might proceed with orders for papers in the Legislative Council.

We discussed various options about how, first, an order for papers; second, if there were no compliance censure; and then, if there was still no compliance, motion for contempt. Then if there was still no compliance, a motion for suspension - initially, for a period of one sitting day; if it recurred, for a few sitting days; if it occurred again, for the remainder of the sitting. It never, ever eventuated under the processes I am about to describe, but the ultimate sanction was, if there was no compliance with the order, he was prepared to move a motion for the expulsion of the member for failure to comply with the orders of the House.

That gives a bit of a background.

A week later, on 25 October 1995, papers were ordered on the redevelopment of the Sydney Showground as Fox Studios. When the House met the next morning, there was a further order for papers on the veterinary laboratories to be tabled by 4.00 p.m. that day. The same day, there was another order for papers, on the recentralisation of the Department of Education.

Later that day, the papers on the veterinary laboratories were not tabled, and there was a motion of censure, with an order for the papers to be tabled by 13 November.

The censure motion was amended by a cross-bench member to say that the House expressed its displeasure to comply promptly with the order. It was during that debate Mr Egan tabled some papers on Fox Studios.

There was an amendment to the motion to refer the matter of the powers of the House to call for the production of documents to the Standing Orders Committee for an inquiry report, but that was negatived on division.

It was during this time, when the House was ordering the production of papers, that I thought it was necessary for the House to get some legal advice on the powers to call for the production of documents. I consulted with the then Crown Solicitor, on the name of a barrister I should approach to obtain advice on the powers of the Council. He gave me the name of two persons, Lesley Catts and Bret Walker.

Lesley Catts could not assist us. He had provided advice to the government and later he became the solicitor-general and represented the government in the Egan v Willis High Court Case.

I then approached Bret Walker. We discussed many of the old cases - Kielley v Carson, Fenton v Hampton, and various other cases in parliaments in Australia about the powers of the Houses. Also, Armstrong v Budd in the 1960s where a member was expelled for conduct unworthy of a member.

On Monday, 13 November 1995 the opinion of Bret Walker on the powers of the House to order the production of documents was tabled.

There was a motion of censure for failure to table documents on Fox Studios and the Department of Education. A motion to a judge, guilty of a contempt, for failure to table Fox Studios and the Education department documents, was agreed to on division. This was the first time the minister, Mr Egan, was found guilty of contempt.

An amendment to refer to matter of appropriate sanctions for the failure to table documents to the Privilege and Ethics Committee was agreed to on division.

On 10 May 1996, the report of the Privilege and Ethics Committee was tabled. The committee found powers of the House uncertain and not appropriate to recommend sanctions. Legislation should be introduced to clarify the powers and privileges of the House.

On 18 and 23 April 1996, there was an order for papers on the Lake Cowal goldmine. The motion included provision for documents considered privileged by the minister to be delivered to the Clerk in a sealed package and made available to members only. The publication or copying of the privileged documents was not permitted without an order of the House. Then on 1 May 1996, there was a motion of sanction against Mr Egan for failure to table the Lake Cowal goldmine papers. An amendment to defer the matter until the privilege committee reported was defeated.

On 2 May 1996, the papers were not tabled by 9.30 a.m. as required and a motion judging Mr Egan guilty of contempt for failure to provide the documents was passed. In particular, the motion stated -

> That this House regarding it as necessary to retain information on any matter affecting the public interest and in order to protect the rightful powers and privileges of the House and to remove any obstruction to the proper performance of the important functions it is intended to execute hereby suspends the Treasurer from the service of the House for the remainder of today's sitting, orders for the Treasurer to attend in his place at the table on the next sitting day to explain for noncompliance with the order for documents on the closure of the Vet Labs, Fox Studios and Lake Cowal goldmine and his failure to table documents on the recentralisation of the Department of Education.

It was during debate on this motion that the Attorney-General tabled an opinion of the Solicitor-General on the powers of the Council to order the production of documents. Interestingly, Keith Mason was the then solicitor-general. The wheel has turned and he is now the independent arbiter.

A second motion of contempt and suspension of Egan for the remainder of the sitting was agreed to. Egan initially refused to leave the Chamber. The President left the Chair owing to disorder. During that time the Black Rod at the direction of the President escorted Mr Egan from the precincts of the House, not only the precincts of the House but out onto the footpath of Macquarie Street. As he was escorted from the Chamber, Mr Egan made some comments. They are not recorded because the House was not sitting.

The Black Rod was directed by both the President and me not to lay a hand on Mr Egan in case there could be proceedings for assault and simply to request Mr Egan to accompany him from the Chamber. Of course, the removal of Egan from the precincts became the 'footpath point' in Egan v Willis in the Court of Appeal. The court held that Egan could only be removed from the precincts of the Chamber and not to the footpath in Macquarie Street.

Following his suspension from the House, Mr Egan instituted legal proceedings in the Supreme Court for unlawful trespass by the President and Black Rod. The trespass action was to ultimately test the powers of the House to call for the production of documents both under the Standing Orders and the inherent and implied powers of the House. On 14 May 1996, the President informed the House of the institution of proceedings and the Supreme Court for unlawful trespass.

The House deferred the attendance of the Treasurer in his place until after the court case was finalised. On 24 November 1996, the Court of Appeal decision in Egan, Willison v Karl was handed down by the New South Wales Court of Appeal. The court unanimously held that a power to order the production of state papers is reasonably necessary for the proper exercise of the Legislative Council of its functions. In his decision, Chief Justice Gleeson who later became Chief Justice of the High Court stated the capacity of both Houses of parliament, including the House less likely to be controlled by the government, to scrutinise the workings of the executive government by asking questions and demanding the production of state papers is an important aspect of modern parliamentary democracy. It provides an essential safeguard against the abuse of executive power.

The courts also held that the resolution of the Council suspending Mr Egan was within the Council's power as a matter of self-protection and coercion. However, while the Standing Orders warranted the removal of Mr Egan from the Council Chamber they did not want his removal from the land occupied by the parliament. Mr Egan's removal to the footpath in Macquarie Street was therefore excessive and constituted a trespass. Following the Court of Appeal decision on

3 December 1996, Mr Egan made a ministerial statement granting the judgment of the Court of Appeal and explaining that the government intended to lodge an appeal to the High Court.

Following the ministerial statement on 14 May 1996 the President called on Mr Egan to attend in this place to explain his reasons for noncompliance with an Order of the House on four occasions to table certain papers. Mr Egan then moved as a matter of privilege and without notice that in view of the further legal proceedings he had instituted in the High Court, the order of the House be postponed again until those legal proceedings had been finally decided.

From 1996, the Council did not pass further orders for papers until 1998, pending the resolution of the High Court case, a few weeks before the judgment of the High Court in Egan v Willis in 1998. On 24 September 1998, there was an order for papers on the contamination of Sydney's water supply. It was quite a controversial issue at the time.

Following that, on 13 October 1998, the Clerk tabled a letter from the director-general of the Cabinet Office indicating that documents would not be produced on the basis of legal professional privilege and public interest immunity together with the legal opinion of the Crown-Solicitor.

Later that day, there was a motion of censure for failure to table documents and an order for documents to be tabled by 5.00 p.m. the next day. The motion provided for documents subject to claims of legal professional privilege and public interest immunity to be clearly identified and made available only to members of the Legislative Council and not published or copied without an order of the House. The motion also provided for the first time that in the event of dispute by any member of the House communicated in writing to the Clerk as to the validity of a claim of legal professional privilege or public interest immunity in relation to a particular document, the Clerk was authorised to release the disputed document to an independent legal arbiter - a Queen's Counsel, Senior Counsel or retired judge of the Supreme Court appointed by the President for evaluation and report within five days as to the validity of the claim.

The report from the independent arbiter was to be tabled in the House and made available only to members and not published or copied without an order of the House. Interestingly, the order also provided in the case of a document for which privileges claimed and which is identified as a Cabinet document shall not be made available to a member of the Council; the legal arbiter may be requested to evaluate any such claim.

In regard to the report of the independent arbiter, the President was to advise the House of any report from an independent arbiter at which time a motion might be made forthwith that the disputed document be made or not made public without restricted access.

On 14 October 1998, some documents on Sydney's water supply were tabled. The President later announced that day that summonses had been issued out of the Supreme Court in proceedings of Egan v Chadwick and Evans v Karl claiming that the Council had no power at all in the production of documents subject to claims of legal professional privilege or public interest immunity or to determine itself a claim for legal professional privilege or public interest immunity.

Secondly, declaring that the Council had no power to determine claims for privilege or immunity, and no power to appoint an independent arbiter to determine claims on privilege or immunity; and thirdly, an injunction restraining the defendants from taking any steps to compel compliance with the orders of the House made on 13 October 1998.

On 20 October 1988, further documents on Sydney's water supply were tabled. A legal opinion of Phillip Taylor, barrister, was also tabled on the failure to comply with the audit tabled. The same day there was a motion of contempt, the third occasion for failure to fully comply with an order on Sydney's water supply, with the House regarding it as necessary to obtain information on any matter affecting the public interest, and in order to protect the rightful powers and privileges of the House and to remove any obstruction to the proper performance of the important functions it is intended to execute hereby suspends the Treasurer from the service of the House for five sitting days or until he fully complies with the order of 13 October 1998, whichever first occurred.

Egan was suspended from the House for five days. On 22 October 1998, the President informed the House of an amended summons to the original claim that the Legislative Council had no power to order the production of documents the subject of a claim of legal professional privilege or public interest immunity or to determinants to a claim for legal professional privilege or public interest immunity. The order suspending Egan for five sitting days was punitive in nature and beyond the powers of the Council.

In a decision of the High Court on 19 November 1998, shortly after the October incidents, the majority of the court, Gaudron, Gummow and Hayne, confirmed it was reasonably necessary for the Council to order one of its members, even when they are a minister, to produce certain papers in accordance with the system of responsible government under which the Council has a role in scrutinising the actions of the executive in a bicameral parliament. As the majority noted, it has been said of the contemporary position in Australia that 'whilst the primary role of parliament is to pass laws, it also has important functions to question and criticise the government on behalf of the people', and that 'secure accountability of government activity is the very essence of responsible government'.

Subsequently, on 24 November 1998, there was a motion noting the decision of the Court of Appeal and the High Court on the production of documents on the veterinary laboratories, Fox Studios, Department of Education and Lake Cowal goldmine and calling on papers to be tabled by 11.00 a.m. on 26 November, which was two days later. The resolution also stated -

> Where it is considered that a document required to be tabled under this order is privileged and should not be made public, a return has to be prepared and tabled showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege.

The motion also provided for an independent arbiter provision and Cabinet documents, as in the earlier motions on Sydney's water supply.

Two days later, on 26 November 1998, some documents on four matters were tabled but not privileged documents. The report of an independent arbiter for the government, whom the government had appointed to assess some privileged Cabinet documents, Sir Laurence Street, was tabled on the assessment of privilege and a list of the documents was tabled by the Attorney-General. Subsequently, there was a motion of judging Mr Egan guilty of contempt from failure to fully comply with the four orders and the suspension for the remainder of the session, or until he complied with the order.

Several amendments were proposed to the motion. An amendment to the motion for return of privileged documents and assessment by an arbiter was agreed to. Privileged documents were to be delivered to the Clerk by 11.00 a.m. the next day. Cabinet documents could be reviewed by the

independent arbiter. Members could inspect the privileged documents, but no notes could be taken or a document copied or removed from the Office of the Clerk and I was required to keep a register of members inspecting the documents showing the date and time.

On 27 November 1996, after the five days of suspension of Mr Egan had expired, when the House met, the President noted the presence of Mr Egan in the Chamber. As no documents had been received by the Clerk, as required under the previous orders of the House, the President directed the Usher of the Black Rod to remove Mr Egan from the Chamber. Ultimately, the session only continued for three more sitting days and was interrupted by prorogation and obviously the suspension motion became of no effect.

On 2 December, after all these procedures for passing orders for papers and in which the individual orders included provisions for the appointment of independent arbiters and the processes for returning documents with returns and assessment by the independent arbiter, the House adopted a sessional order dealing with claims over privileged documents and assessed by an independent arbiter.

Then, on 10 June 1999, in the next session of parliament, the judgment of the Court of Appeal in the case of Egan v Chadwick was delivered and tabled in the House by the President. The judgment held that the Council's power to call for documents extends to compelling the executive to produce documents to the Council in respect of which a claim of legal professional privilege or public interest immunity is made; however, the majority opinion of Spiegelman and Marr did hold that public interest immunity made be harmed if access were given to documents which would conflict with individual or collective ministerial responsibility, such as Cabinet deliberations.

On 23 June 1999, following the Court of Appeal's decision in Egan v Chadwick, the House agreed to a motion by the Leader of the Opposition requiring the Government to table by 29 June documents referred to in the resolution of the House on 24 September 1998 - that's going back to those four matters relating to contamination of Sydney's water supply. The Government complied with that resolution and has since then generally complied with subsequent orders requiring a production of documents. I'm sure that David Blunt and others have been able to give an update on what has happened since I left the Council in 2006.

Egan v Willis and Egan v Chadwick have confirmed the Council's power to order the production of government papers, including those documents for which claims of legal professional privilege or public interest immunity could be made at common law, with one exception: documents that disclose the actual deliberations of cabinet.

Of course, there were complaints from time to time about the costs of government having to comply with orders for papers, but I think one must outweigh the costs of complying with orders of the House with the public interest in the disclosure of documents through the process of orders for papers. Thank you.

CHAIR - Thank you for that historical perspective. It is helpful.

It seems to me, from listening to you, that the whole process unfolded through a series of motions before the House and that, ultimately, the matter was referred to the standing orders committee. Is that how the sessional order was established?

Mr EVANS - No, the sessional order was not established by reference of the standing order committee.

CHAIR - How was it put into place then?

Mr EVANS - It was drafted by me; I could go back and look up how it occurred. I presume it was probably at the instigation of Mr Hannaford. I certainly drafted it and put together a process for requiring returns to order showing the date of documents created, the nature of the document, the reason for claim of privilege and then the process for the appointment of an independent arbiter to assess those documents.

CHAIR - Listening to what you were saying earlier, it seems you were responding to a series of motions that put in place a mechanism. With the passage of time, these things change and adapt to meet the need. If you were doing this now, what would your advice be to us - without having a system at all - that enables the breaking of the deadlock short of expelling members? At the moment, the problem for us in our House is the government ministerial representative is the Leader of Government Business. The minister is not in our house. Occasionally, we have had ministers in the House, but not as a regular thing. And so you are expelling a member who actually notionally is not in charge of the document, it is the minister. This is always problematic in terms of expelling a particular person. If you could provide some advice for us on how we would frame up a process, what would you say?

Mr EVANS - I should add in 2004 the standing order was completely revised and the current standing order - I think it is 102 - the old standing order was 52. The new standing order included the provision for an independent arbiter, based on the earlier resolution sessional order for an independent arbiter. What would I advise you to do perhaps is not to proceed down the path at this stage of adopting a sessional order - test the powers as we did in those whole series of events, order the production of documents. If the minister fails to produce them, censure the minister.

CHAIR - We cannot censure a minister who is not in our House.

Mr EVANS - You would have a responsible minister in the Council.

CHAIR - That is the Leader of Government Business who is responsible for everything.

Mr EVANS - That is what happened in our case. Egan was the responsible minister in the Council. But the ministers in the assembly were responsible for those various organisations veterinary laboratories, Fox Studios, Department of Education. But Egan as the responsible minister in the Legislative Council was answerable. As the High Court said in Egan v Willis, the government is accountable for both Houses of parliament, not just the Assembly, as Mr Hodgman would like to think in his submission to the committee. The government is answerable to both Houses and if the Legislative Council wants documents, I believe it has the power to order those production.

CHAIR - So you are saying we should test it before we actually put in place a process?

Mr EVANS - Well, it depends on what came forward. If you did not receive all the documents then you might get them all and they might say, 'Oh well, Egan v Willis said yes', you know you have to comply with the orders of the parliament, you have to provide documents subject to legal professional privilege, and you have to provide documents subject to public interest immunity.

Perhaps you do not have to provide documents which disclose the deliberations of cabinet according to Chadwick v Egan. You never know, the government might comply with them and it might not be necessary to go down that path. If they do claim certain documents should not be provided, you might want to develop a procedure for the assessment of those documents by an independent arbiter.

Mr WILLIE - Do you think the arbitration process works because the Council has demonstrated it is prepared to go the next step?

CHAIR - And expel members?

Mr WILLIE - Well, suspend members and do those sorts of things available under parliamentary procedure. Potentially, we could put in an arbitration process and it will still be ignored, because the government may run the gauntlet saying they are not prepared to go the next step.

Mr EVANS - I think the independent arbiter process has worked very well. I tried to wrack my brain as to how we came up with the idea, whether it was my Deputy Clerk or whether it was John Hannaford. I cannot recall, but I think the process has worked very well. Members have scrupulously complied with the provisions of inspecting documents, not taking copies. Nowadays they can take notes and discuss it with their colleagues, but they cannot discuss it anywhere with anyone else. Because members have adhered to the process scrupulously, the process has worked very well.

The process of independent arbiters has been developing, and I am told Keith Mason now seeks submissions from various parties about claims from public interest immunity legal professional privilege.

Mr WILLIE - Can I reframe that?

Mr EVANS - Sorry, just let me finish. When he was an independent arbiter, Sir Lawrence Street did not always do that, but sometimes he sought submissions from departments about their claims of privilege over documents.

Mr WILLIE - Hypothetically, let's pretend the Egan cases did not happen and the parliament here implemented an arbitration process. Do you think it would have been as successful in that context without that history?

Mr EVANS - We only had to develop the arbitration process because of claims of privilege. If the government had complied with all the orders and provided all the documents, we would not have had to go down the path of having an independent arbiter.

It was only through their various claims of commercial-in-confidence, legal professional privilege and public interest immunity that we had to develop this process of an independent legal arbiter.

Mr WILLIE - There seems to have been a lot of compliance from the government with this process because they were aware the Council could go the next step and was prepared to do that in the past, to censure ministers to suspend them. Our parliament has not demonstrated that.

Mr EVANS - Neither has the Senate. No-one has been game. I might say following the Court of Appeal decision in Egan v Chadwick, the ultimate sanction John Hannaford had in mind if this had continued further down the path was to expel Egan for conduct unworthy of a member but that never eventuated. The government has since mostly complied with orders of the House for production of documents, while knowing that the sanction still exists.

CHAIR - And is available. From your understanding, have any other parliaments tested that power? Victoria has, hasn't it?

Mr EVANS - Yes, I think the Victorian Legislative Council has suspended a minister for noncompliance with an order.

CHAIR - Don Harwin was censured.

Mr EVANS - Victoria largely adopted the Legislative Council procedure for independent arbiters. If you were to go down that path, I can only suggest that the Legislative Council procedure works well.

Mr DEAN - Where documents are viewed in the presence of a clerk, no copying of the documents is allowed to occur. However, is a member able to read aloud the document to themselves and record it?

Mr EVANS - No. I cannot say - no, I am not aware of that occurring.

Mr DEAN - A person with a photographic memory, and there are quite a few of them around, could read the document and reproduce it almost word perfectly if they had that capacity and ability. Has that been a criticised process to your knowledge and during your time?

Mr EVANS - It has never occurred in my time. The members would come into my office and say that they wanted to look at those documents and I would get them out.

Mr DEAN - So, they cannot take notes?

Mr EVANS - They can make handwritten notes, but they cannot copy or photograph them with their telephone or anything like that. As I said earlier, they are only allowed to discuss it with a colleague, a member of the Legislative Council. They are not even allowed to discuss it with a colleague from the other House. Those documents are strictly only available for viewing by members of the Legislative Council.

Mr DEAN - Thank you.

CHAIR - Earlier I was referring to was a New South Wales member, not a Victorian one. It was Mr Harwin in New South Wales last year. They are still obviously using the power of censure at times.

Mr EVANS - They have used it three times. They have suspended the minister from the House three times. They have found them guilty of contempt and suspended them three times. As I said, John Hannaford at the time was prepared to go through a gradual process: first, suspension for the remainder of the sitting; second, a few days; and third, until the end of the session. If it had occurred again, probably a motion of contempt and expulsion for failure to comply with an order.

CHAIR - What is the process of drafting your standing orders in New South Wales? From the time it was drafted, who needs to agree to it and what is the process to make it official?

Mr EVANS - The usual process for the adoption of a standing order would be for the House to refer the matter to the standing orders committee. That committee would inquire and report into the matter, and subsequently report back to the House. The House would consider the report and either adopt or amend the standing order. Once approved by the Council, they are then sent to the Governor for approval. I presume the same follows in Tasmania. Once the Governor signs off on them they become -

CHAIR - So the Governor has to sign off on them?

Mr EVANS - Not the Government, the Governor.

CHAIR - Are there any other questions for Mr Evans? Is there anything else you want to add, any further advice for us?

Mr EVANS - I don't think I can add anything more. I have been out of the game for 12 years now.

Mr DEAN - And very happy about it, I should think.

Mr EVANS - Certainly.

CHAIR - We thank you for your time, and particularly for the historical perspective. It gave us a really good appreciation of how it all started and how it progressed into the situation we have now. We appreciate that.

THE WITNESS WITHDREW.

Dr GABRIELLE APPLEBY, PROFESSOR, UNSW LAW; and **Dr BRENDAN GOGARTY,** SENIOR LECTURER IN LAW AND DIRECTOR OF CLINICAL LEGAL PRACTICE AT THE UNIVERSITY OF TASMANIA SCHOOL OF LAW, WERE CALLED AND EXAMINED.

CHAIR - (cont) - I thank you for appearing, and Mr Brendan for appearing again, before the committee. The proceedings are being recorded on *Hansard*, and will form part of our report, which will be published on our website. I notice you are also appearing on behalf of Professor George Williams AO, Dean of the UNSW Law Faculty, who co-authored your submission.

We thank you for your joint submission. We have spoken to Brendan earlier about one particular aspect of the submission he was more involved in.

I will invite Dr Appleby to make some opening comments about your overall submission and then committee members will have questions.

Dr APPLEBY - Thank you for the opportunity to present and engage with the committee about our submission into what is a really important issue.

We are also appearing on behalf of Professor George Williams, who was a co-author on the submission.

I do not plan to take you in detail through the whole submission. I will highlight a few key points.

The full submission breaks the question, that the committee's terms of reference raises, into two parts.

The first part of the submission talks about the types of disputes that might arise in relation to this question of production of papers, documents, and records by the Government to the Legislative Council, its committees, and its joint committees, where members of the Legislative Council have membership.

The second part looks at - once you have established the different types of disputes - who is the most appropriate person or institution to resolve them and the process for this.

As I am sure this committee knows by this stage of its inquiry and experience that determining a process is not an uncomplicated task. In our submission we state there are a number of principles that go into deciding the process. They are rule of law, constitutional-based principles, the principles of respecting the importance of parliamentary privilege and the exclusive cognisance of parliament, expectations of the rule of law and accountability of public power.

The submission also touches upon challenges that might arise in a smaller size jurisdiction around determining an appropriate process. There are also issues of the political culture of any particular jurisdiction, which will be an important factor in your decisionmaking as to what is the most appropriate process.

The submission talks about two different types of disputes that may arise.

It raises the threshold question around the Parliamentary Privileges Act in Tasmania and the extent to which those statutes extend to the production of documents by an officer of the Crown.

Brendan has already spoken to you at length about the issue of statutory construction of the relevant Parliamentary Privilege Act. I will leave that for today's purposes and proceed on the basis that legislation does extend to compelling production by an officer of the Crown. We can return to that discussion if the committee would like further clarification.

The submission then talks about two different types of disputes -

(1) Legal disputes.
(2) Public interest disputes.

I will pause for a moment to explain what we mean in relation to those two different types of disputes. Legal disputes that may arise between the government and the Legislative Council over the production of documents will be a question about whether the Council has legal power to compel the production of documents. An example of a legal dispute is whether there is a legal power to compel a government member of the other House. There is ongoing questioning in constitutional law as to whether that power exists. So that is a dispute about the legal power to compel.

Other types of legal disputes have arisen in Tasmania recently. For example, the intersection between the Parliamentary Privilege Act and the Right to Information legislation about whether there is a legal power to compel where there is a right to information request. There are other types of legal disputes - there is one example in the submission.

The other type of dispute that arises is even if the Legislative Council has the power to compel that document, whether it should - that is, whether in the public interest it should exercise the power. A number of conventions can and have been pointed to by the government in relation to this. What we refer to as a 'public interest dispute' is where the public interest means the Legislative Council should use the power. For example, in relation to the call for ministerial advisers to produce documents or appear before the Legislative Council or the power to compel documents not covered by a privilege means the Council does not have the power to compel. Nonetheless, the Legislative Council should respect a claim in relation to it because the public interest outweighs those documents remaining confidential. So, it is not that it is not a legal power, but that there is good reason they should not be compelled. Governments often claim conventions have been developed around ministerial advisers - for example, legal professional privilege - that the Legislative Council should not exercise their powers. Whether they should or should not really falls on a question of where the public interest lies and can give rise to a dispute about what the government thinks where the public should lie and whether Legislative Council thinks the public interest should lie.

Turning to the part of the submission where we talk about the most appropriate person or institution -

CHAIR - I have a couple of questions on those particular points and members may have too.

You talked about the legal power and the constitution questions - whether the head of Legislative Council would have the power to compel a minister in the upper House to produce a document. This would obviously be difficult in the House, but may not be so difficult with the committee. Can you reflect on whether that is a different approach and still in question?

The other questions that flow from this are: Given the Leader of Government Business in the House in the absence of the minister in the Legislative Council is the minister's representative in

the Council, is there a question over the ability? Or is it that you are trying to compel the minister who is in the other House?

Dr APPLEBY - They are good questions. The difference you allude to on the power of the House versus the power of a committee, the power of the committee to compel draws from the scope of the power from the House. If the power of the Legislative Council is restricted, the committee's power would not extend beyond what the Legislative Council's power would be. It is not so much there is an inconvenience or an impracticality of asking ministers from the other House to appear before the full House, it is about a legal power to require them to appear. The dispute about whether there is a power arises equally in either the committee or the House.

CHAIR - When you have the Leader of Government Business in the House as the minister's representative, is there still question in your mind about that power or not?

Dr APPLEBY - In relation to the production of documents, it would appear then the notice can be delivered to the Leader of Government Business in the House. In terms of compelling to appear and answer questions, which is a different power, the legal dispute would still arise.

CHAIR - The second you referred to - public interest disputes. Today we have been hearing about the way the New South Wales model works. There is an order to compel the production of documents and the documents are delivered to the Clerk. Some of these documents are not privileged and they are put in another room where pretty much anyone can access them. Those documents with a privilege claimed over them can then be viewed by the members. There is a difference here between the power to compel them for publication as opposed to the power to sight them. There may be value in the members being able to sight a particular document, but not have it released publicly because of genuine privilege issues. Do you think there is a difference in this?

Dr APPLEBY - As I understand the process, there are more than two different types of documents. There are documents subject to a production order being produced and with no claim of privilege that can be released. Then there are documents where there will be a claim of privilege and there will be a legal dispute as to whether it falls within a public immunity claim. These will not be able to be accessed by the members until that is referred to the independent legal arbiter. But then there are other documents as well.

CHAIR - As I understand it, they can be viewed by the members once they are delivered - even those privileged because notionally the members then may accept they should remain privileged as claimed by the government of the day. If they disagree they are being privileged inappropriately, members can then make a request to the Clerk to go to the President, to appoint the independent arbiter. Then the arbiter looks at it and decides about whether they agree or not. Sometimes the current arbiter also asks for further submissions to clarify the point further.

Ms WEBB - My understanding is that it only goes to the legal arbiter if the member who asked for it to be referred disputes the claim of privilege. It does not automatically go there until this happens.

CHAIR - That is right, yes.

Dr APPLEBY - That is the right process, but there is a question whether members can see the documents. The question you are asking is: can they then sight the documents?

CHAIR - Yes, they can, but they cannot discuss them with anybody else other than other members of the Legislative Council.

Dr APPLEBY - Yes, and they cannot refer to them or quote them in a report that will then be tabled in the House.

CHAIR - That is right.

Dr APPLEBY - You mean sight as in see, not cite with a c.

CHAIR - Sight, sorry, yes, actually look at them.

Dr APPLEBY - That makes more sense.

CHAIR - You cannot cite them.

Dr APPLEBY - You can read them, but cannot cite them in a committee report which is then tabled or given to the full House in terms of the recommendations of the committee to the House.

CHAIR - When you talk about the power to compel, the document does that. Does that line up with the power to actually have access to the document, even though it will not potentially be made public if it is considered to be privileged? The power to compel is still there?

Dr APPLEBY - The power to compel is there in relation to most documents. We have to be careful about making sweeping statements that all statements will apply across jurisdictions. The point we make in the submission is that there is a small group of documents where the NSW Court of Appeal, at least in relation to New South Wales as a jurisdiction, says a very narrow scope of documents is covered by public interest immunity which will not be compellable by the House.

This comes back to the political culture point and what appears to be the process in New South Wales, which is the government has agreed to submit the documents to this process. Then, even if there are documents that would not be otherwise compellable by the House, they might be covered in that small group of public interest immunity claims.

Would the Legislative Council be able to compel them without that agreement of submission only in relation to those small documents? No, but in relation to the other documents - yes.

CHAIR - Can everyone move on to the next session after property at personal institution to resolve disputes?

Dr APPLEBY - In the full submission we refer to three different mechanisms. I am sure you have heard lots about these already in the course of the committee's deliberations. We talk about parliament itself retaining the traditional role of resolving disputes and the process by which this occurs in relation to references to the Privileges Committee for investigation and recommendation and then be the Council's powers in relation if the Government fails to comply.

The hard consequences that might follow and the ultimate sanction in relation to contempt, but of course there are motions of censure et cetera. The House has a soft power in relation to this. The Senate has probably been the most extensive in explicitly referring to the soft powers it has, and this was in the course of disputes it was having particularly in the immigration sphere in relation to

production of documents. The Privileges Committee recommended that the Senate use soft power such as the extension of question time, removal of procedural advantages for ministers, delaying government legislation, and restricting government ministers' ability to handle government business in the House.

Yes, there are the hard powers available to the Council, but the soft powers to try to resolve disputes that may arise if the Council has determined it is pushing forward with a request for the production of documents.

The submission covers concerns about retaining the traditional system of relying on parliament to resolve these disputes. Concerns around fair process before parliament and the possible exercise of coercive powers by the House that sit behind it as the hard power, but also expectations around rule of law and accountability in a modern society and the expectation these types of disputes will be resolved by someone with greater independence than a party in the dispute itself.

We then talk about the possibility of reference to an independent legal arbiter. I am not going to go through the details of the process in New South Wales and Victoria because I know you have had submissions and evidence from people who are involved in the actual process, including the clerks.

I would say that the process has been adopted in New South Wales, and used regularly, whereas you have a process that has been adopted in Victoria but not used. This comes to the political culture point that I mentioned earlier. I think the question around political cultural fit - you see in New South Wales, a system in which the government is participating in the independent legal arbiter process, providing documents in accordance with the standing orders. You obviously have a history that sits behind that, with the Egan litigation and the Legislative Council compelling the production of documents and then following it up with those hard powers. Whereas in Victoria you have a situation where the government is not playing ball, so to speak. The government is agreeing to be involved in this process. So that political cultural fit is an important dimension of whether the reference procedure will work.

In the submission we make a point that the process has much going for it, particularly the abstract level. You have an independent legal arbiter becoming involved, injecting expertise around legal questions, injecting independence around both legal and public interest questions, while you also retain the control and final decisionmaking by the Council. There is still that retention of the power by the Council.

It is not without its challenges, and we try to set some of them out in the submission. We talked about cultural fit - will the government agree to be involved. The other challenges are the extent to which the legal arbiter should be advising on non-legal public interest issues and the extent to which guidance should be provided to an independent legal arbiter on those issues.

The other point we raise in the submission is the question around a smaller jurisdiction and how you might appoint a legal arbiter with the necessary independence and expertise to fill that role. We canvassed the possibility of intentionally using other independent statutory officeholders that already exist. Ultimately our recommendation is that may be more problematic than helpful, and that it might be best resolved by considering retired judges, retired government lawyers, particularly solicitors-general, not just from Tasmania but from other jurisdictions, to assist.

Finally in the submission we consider the courts as the resolver of these disputes, which we ultimately recommend against, with our primary concern being to maintain an appropriate separation between the courts and the parliament, particularly when it comes to questions of the public interest, which may be better resolved in the political arena. I would add there though that when we come back to this question of political culture and the difference between New South Wales and Victoria, you had a situation there where there was involvement from the courts through the Egan litigation on a couple of occasions. There were some clarifications which then led to a process and system in which the government and the Legislative Council have come together to this agreed process that seems to be readily used.

That was all I was going to say in the opening statement. We have made recommendations as to drafting standing orders that are in many respects based on the standing orders that exist in New South Wales, but I am happy to take further questions from the committee.

CHAIR - Is there anything you wanted to add, Dr Gogarty, to what Dr Appleby said?

Dr GOGARTY - Just a couple of clarifications to your question, Chair. I think you asked whether the committee has the same powers as the Council. That is addressed by the 1858 Parliamentary Privilege Act, which explicitly gives any committee identical powers, so they are treated as one and the same, but when we speak of the Council, we speak of committees in respect of those legal powers that Dr Appleby talked about.

The second is that yes, if we assume that the Crown is bound, and that includes ministers, so we move beyond that question, members can be called, very explicitly, between Houses under section 2 of 1858 act. That is done by reference to the ordinary process, which is for one Chamber to make a request to the other Chamber. Certainly, the legal power exists to call on members from other Houses. The Crown question creates some uncertainty as to whether you are calling it as minister, but regardless you have the legal power to call members between Houses. If you are then to assume that when they appear before the committee the act applies generally, any documents must be surrendered.

At present, the Legislative Council and its committees are given some very explicit laws which seem to override anything else existing in at least the general common law, so this idea of Crown privilege, which doesn't really come from any statutory source, seems to be subordinate to the privileges legislation and the law itself gives a pretty wide range of powers to the committee. I guess the question is whether the committee is willing or the Council is willing to actually go and test the limits of those laws.

The other place where this idea of executive immunity has been tried is in the court, and that happened on two occasions. One was after the Whitlam dismissal and certain documents relating to that dismissal. There was an attempt to claim Crown privilege over them; the court didn't accept that and ended looking at those documents at least to make the same decisions that the Chair was referring to today, to decide, first of all, to inspect those documents and that power does exist. Then the secondary question really becomes whether the public interest in maintaining confidentiality over those documents overrides the question of disclosure.

I think that's an ever-present question for any committee that will arise whenever a claim is made. These are the only two clarifications that I thought needed to be made.

CHAIR - Just on that, when I was talking about the powers of a committee, the current Government has been much more willing for ministers to appear before committees - the previous government wouldn't - but the current Government seems willing to allow its ministers to appear. We have summoned the minister or, in one committee, the Treasurer, to appear before the committee and table the document in question. The Treasurer did here, without the document.

Mr DEAN - He appeared with the document, a redacted document.

CHAIR - Yes, the redacted document. The summons was for an unredacted copy of the document. I haven't contemplated - perhaps we hadn't mentioned before the ability to call a minister before the Bar, I think that is what you are talking about in our House.

Dr GOGARTY - The Parliamentary Privileges Act is quite general about the power to inspect documents and demand documents as well.

[In audible] legal powers held by that minister. I am unaware of any in Tasmanian statute law. The Parliamentary Privileges Act, if we assume it applies to the Crown, as a matter of law overrides that power to redact. You have to ask the question: where did that power to redact come from?

We are in a system of responsible government where we may not have parliamentary sovereignty but we do have parliamentary privacy, certainly over the executive branch. It is my view, and I don't know what Gabrielle thinks, that the legislature has the constitutional right and obligation to inspect those documents unless there is some legal restriction which the parliament itself has passed.

CHAIR - That's a good comment.

Dr GOGARTY - I think the question should have been in that situation: where is the legal source of the power to redact these documents coming from? Section 1 of the Parliamentary Privileges Act says 'each House of the parliament', and we know that includes the committee, 'is duly authorised to send for persons and papers'. There is no restriction on that, there is no restriction in the Parliamentary Privileges Act and there is no counter [inaudible] on restriction in any other legislation.

CHAIR - Thank you, that's helpful. Gabrielle, do you want to add anything at this stage.

Dr APPLEBY - No, I am just happy to follow up the point that Brendon made. Assertions of the lack of the lack of legal power by the government to the Legislative Council are just that. The committee's powers, I think, should be tested. In jurisdictions across Australia I think too often committees and upper Houses accept assertions that there is no legal power to produce documents or assertions about public interest but also about legal power. It is important to keep in mind the point that Brendon was making - that if you go back to the statutory source or the common law source, often there is a very good argument to be made that there is the legal power. There needs to be more push on the government to make good the claim about the lack of a legal power. The attempt in the submission is to put in place a process for that to occur, but we don't see enough Legislative Councils and committees pushing on those claims, 'You don't have the power to do this; you don't have the power to do that'.

CHAIR - If you were in our position, we do not have a process in place other than the opportunity to exert the soft powers or the harder powers. If we were to implement a framework

for breaking a deadlock when there is a dispute about whether a document should be released, and we could argue that they should be, what would you suggest? Where would you start with that? Would you start with exerting the powers? Would you start with a standing order? I know you did recommend in your submission a standing order. Is that what you would recommend as the first option?

Dr APPLEBY - It is an interesting question and goes to where the political culture is in your jurisdiction right now. The New South Wales system put in place came from a political culture that came out of the Egan litigation. It came from a situation where there had been an attempted use of a hard power and it was referred to the courts in an unusual exercise of jurisdiction by the courts. There was a very much an awareness of the limits of the legal power of the Legislative Council. So, you have a government willing to come to the table in terms of being involved in a process for the resolution of future disputes.

Contrast that to the situation in Victoria where I understand that while there has been the introduction of standing orders, they require the government to submit to those standing orders and to produce the documents to allow them to be reviewed for a dispute to be crystallised and then referred to an independent legal arbiter. The question for Tasmania right now is: where is the political culture? It sounds like you have a situation where you have ministers appearing before committees but you do not have a culture in which there is respect for the powers of the Council to require the production of documents.

Does that mean that if you went straight to standing orders, you would get stuck in Victoria's situation? I think that requires an assessment of where the Government stands and whether it would be willing to be involved. If the current situation is that it is not, what can the Legislative Council do to convince the Government to be involved?

CHAIR - I chaired a committee a number of years ago when the now Opposition was in government and we requested a document through that committee. We were given a response from the premier at the time - it might have been the minister for Health - either way they basically said that the power was not there with that sort of argument. That letter remains on file in some bureaucrat's system. This is a letter that was referred to and excerpts from which were put into a letter under the current Government to a committee that I am sitting on refusing to release the document on the basis that this is what the previous government said.

You get this tit-for-tat type of stuff. It almost becomes the precedent so maybe you have to look at a deadlock for that sort of approach. The other blokes did it that way so we are going to do it this way too. How do you resolve that? Do you have to then push the point and exert the power?

Dr APPLEBY - This comes back to the spectrum of soft and hard powers of the committee and the Council. I think that in that situation it is problematic. I don't know the particular history of the one you're referring to but if there wasn't an ongoing assertion then of the Council that the power exists and we continue to call for the production of documents, you now have a precedent that can be referred to.

That precedent doesn't have legal effect but it may be politically referred to.

CHAIR - That is what was happening.

Dr APPLEBY - I think that then comes back to this point about even if a committee or a Council is not willing to exercise hard powers against a government for failure to produce documents, and there may be many reasons why that is not feasible, what type of soft powers can be used? It may be just a continued assertion in relation to powers and a non-acceptance of a government's position that the scope does not extend to that position. I think those soft powers are really important because they can help change a political culture.

Dr GOGARTY - I think what this committee is doing is seeking to clarify its own position, to the extent that this will be a public document and to push against that precedent which is developing in the executive branch.

The other thing to note is that the Parliamentary Privileges Act itself looks to a bit of a hierarchy. The first thing you do is send for papers. You do that informally. Then you make an order and then you summons. It is going to be a quite belligerent member of the executive that is going to push back very hard against a summons. I really doubt that a genuine pushback is going to happen. If it gets to that point, the legislation stands on your side. If you follow that hierarchy and start from an informal request and try to conciliate and work it towards a suitable outcome and then ratchet it up as is necessary, I think most of these disagreements would be solved.

The other issue is: what you do on the conciliatory side? Obviously, government is not going to want to have these documents published for a number of reasons, but it is within the constitutional province of the Council and its committees to make these matters public. Part of its role is to inquire into matters of public interest. Having a set of rules and orders that guide your own deliberations about when you would consider it to be in the public interest for a document to be published, then it should be necessarily in the public interest not to disclose would be very helpful at least to guide future decisions. But it's not very reactive.

There are a number of places you can look for that. Certainly, the courts have battled with it for a very long time. Then there is the issue of inspecting the documents, but then not reporting on what was inspected or maintaining confidentiality - it is very hard for the public to understand why the committee has reached the conclusion it has, absent the evidence.

There needs to be some caution about accepting all these claims, which is why you need some pretty clear sets of principles to guide these decisions in the future.

Mr DEAN - That's been one of the problems we've been confronting all along. It's not been in a black-and-white clear position moving forward. We found that with the production of the document in the Public Accounts Committee that Ruth has already referred to. There was just no real clarity over it. The Standing Orders appear to be deficient in a number of areas in relation to the calling of these documents.

When you talk about action you can take if they don't comply, that is also very vague. We were told we could do this, we could do that, we could elect not to take Government business, and we could -

CHAIR - We never tried any of those.

Mr DEAN - You are right, we did not try it because of the uncertainty around it all. We backed off.

Dr GOGARTY - The parliament was sometimes [inaudible] uncertainty to government. It seems and Dr Appleby is saying the culture is now pushing towards the government getting the most benefit from the uncertainty. The parliament can move against this by setting up some procedural rules now. It does not need to be aggressive. It can always say at the very end of this process, 'We will [inaudible] but prior to that, here are the rules we have developed to create some clarity because of the vagueness and nebulous nature of these claims is undermining public confidence and the constitutional role of this House'.

Mr DEAN - If you look at the case of the Public Accounts Committee, where the Government relied on Cabinet information in the first place, they brought in public interest immunity. It seems there is no clear definition or clarity on what is cabinet-in-confidence and what is public interest immunity. They need defining to give some clarity; it is wide open.

Dr APPLEBY - The point Brendan was making was this committee and its report actually offer an opportunity to gain some clarity or at least clearly put on the record, in a non-politically aggressive way, the committee's understanding of the scope of the number of the powers. Also, the claims because there are differences, for example, around claims for legal professional privilege or Cabinet information versus public interest immunity. It is only a very narrow scope of public interest immunity which affects cabinet deliberations that the Court of Appeal accepted there is no legal power to compel. The rest is actually subject to - yes, it can be compelled but should we compel? So, there is an opportunity here for the committee to clarify when you think you should be compelling. To start setting out what some of the factors you might consider when you will really insist on the production of documents and when you are happy to accept a claim, even if you think you might have the power to compel.

Mr DEAN - In the case we are talking, about the Government or the Treasurer's reliance that as this was Cabinet information, it would be reasonable to assume he might have thought that probably was not going to be strong enough. Then they moved into the other area, because the information was a minister-to-minister letter. It clearly was not Cabinet information; it was a letter written from one minister to another minister.

CHAIR - They both happened to be members of Cabinet was the argument they put.

Mr DEAN - Both members of Cabinet, you are right. In effect, what they were saying - any conversation between ministers would be Cabinet-protected. That was the issue there.

Did you look outside Australia? Did you look at New Zealand or the Westminster system and what applies there?

Dr APPLEBY- No, not in this submission, sorry.

I would pick up on your point around the assertion of the documents falling within cabinet deliberations, if it was in relation to what might have been an interaction might see as perhaps falling outside of those deliberations. That is where, if you can reach a point where there is an independent legal process accepted by the government, it can be really helpful. Then it is no longer an assertion by parliament against the government. You have the injection of an independent legal expert to provide the advice on which the council can then rest, as opposed to an assertion between the parliament and the government. That is the real strength of the independent arbiter model.

Mr DEAN - Yes, that is a fact.

Mr WILLIE - That was the process, from my memory, not being on the committee, outlined to the Government that an independent, eminently qualified person could adjudicate, and they rejected it.

CHAIR - They rejected giving the document to the Clerk of the House in confidence, with members able to go and view the document, have an independent arbiter look at it, all which were refused. There was no power to do that. I know talking to the New South Wales former clerk who was involved when the sessional orders were put in place, then became standing orders and what led to this was series of motions. There were letters from the committee to the minister, rather than a motion before the House. It is harder to ignore a motion before the House. Even motions of the House past were treated with contempt really.

Mr DEAN - Contempt.

CHAIR - Can I follow up on a couple of things? We talked about the power to compel being there, but basically is it the right thing to do. One of the difficulties is that it is difficult to challenge the position of whether a document is a sensitive or not without actually seeing it. That was one reason we went down the various processes of asking for an independent arbiter to look at the document or have the Clerk have it in their safekeeping as a confidential document not to be released and all of that sort of thing.

It seems the power is clearly there, but then it is very difficult to make a determination until you have seen the document. You almost need to exert that power to make a determination. Is that a fair call?

Dr APPLEBY - Again to come back to this point, it depends where you are at the point of the relationship between parliament and the government, between the House and the government. If you are in a situation where the government is not even willing to give it over to the Clerk for it to be referred to an independent legal arbiter then, yes, the point you are making, which is then maybe it is time for the House to ramp up its responses to the government refusal. The government will be aware the Council is not just going to quietly assert its power, but actively assert its power if they will not comply with the process. To a point where the government sees the process is a better outcome than simply having to comply with the motion being passed by the parliament.

If you are in a situation where the government has not come to that point yet, then, yes, I think there is. Brendan referred to the fact there is the tiering within the legislation itself, getting to a point of summons, even if a summons is responded to, there is the soft response, there is the hard response. If that is needed to get the government to a point where it realises coming on board with a process that involves an independent legal arbiter is a good thing for it as well, maybe then, yes, it is required.

If you are in a situation where you are in New South Wales, where this does not need to be asserted every time because the government is in a different headspace in terms of accepting the process, when there is a call for production of documents, this is the process we follow.

It sounds like in Tasmania you are at a point where the Government has not yet accepted that, or for whatever reason you are at a point where the Government is not accepting that over the course of the last few years, I would say a political cultural change needs to happen before you can just plonk a new process in place and think it will be complied with.

Ms WEBB - This is indicated potentially by the Government submission, which refers to it not being - I am quoting from page 1 of the Government submission - 'supportive of any change to the existing framework'. They are referring to a framework they believe exists and we are potentially proposing something changes about this. Also, further down on page 1 the Government submission speaks about -

> any change to existing privileges 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.

Their understanding of what currently exists in terms of a framework or a set of powers there sounds different to what some other members' understanding may be. Perhaps Gabrielle and Brendan are suggesting this committee's one function could be to clarify that in the first instance. What powers do exist and what process actually exists there already, whether or not that is being followed or not in recent times, but to perhaps contrast what has happened in recent times.

Dr APPLEBY - Yes, from what I understand, and Dr Gogarty made this point before, the Government is at the moment benefiting from that current process, in that its assertions of privilege, whether it is through redaction or not producing documents at all, are not being questioned. In terms of any change to the current status quo distorting the functions of the House of Assembly as against the Legislative Council, I think the Legislative Council's fundamental role is to review executive action, or at least one dimension of the Legislative Council's fundamental role is to review executive action and to bring that to account. If that's not the way in which the status quo is working, I actually think that's a distortion of the appropriate -

CHAIR - On that, do you think that the Government and the executive perhaps do not fully understand the role and the act under which we all operate? I'm just following on from Meg's point there.

Dr APPLEBY - I think that there could be an important initial step that the committee undertakes, whether it's a misunderstanding or whether it is the happy acceptance of a position that benefits them as a constitutional institution. This committee could play that really important role of then trying to shift understanding of the importance of the Legislative Council's role, through this report, as the first step in clarifying what it understands the scope of the powers are of the Legislative Council and its committees - even if there have been assertions to the contrary by this Government and by previous governments. That clarification could be an important first step to change that political culture.

Ms WEBB - Even if the Legislative Council hasn't in recent times asserted that process to the full extent of its power and its ability to respond to that, I guess articulating that now clearly is an opportunity to clarify an understanding of the Legislative Council about what may happen should that arise again.

CHAIR - Or a better understanding of each role and function of each House of parliament and the parliament as a whole, and the role of the executive within that and who is responsible to whom. There seems to be a bit of confusion about that.

Mr DEAN - I think it is pretty clear though that the shutters are down - that's exactly it. They have that strong position and it's going to be difficult to move it.

CHAIR - I think Dr Appleby is saying we can make it clear as to what the roles and responsibilities actually are.

Dr GOGARTY - I don't think that's a very hard thing to do. So much of our constitutional history is based on the supremacy of parliament over the executive branch. The very basis of Westminster governments is ministerial responsibility and responsibility to the houses and the committees. I read the Government's submission with some degree of surprise, in that there was a very clear statement that it is committed to the Parliamentary Privileges Act and the notion of representative and responsible government, and yet what the Chair has talked about is actions and activities that completely contradict that position: the refusal to hand over documents, the refusal to recognise the unbounded nature of the Parliamentary Privileges Act. The privileges act has no restrictions on the type of document that can be called; it has no provision for executive privilege or any other form of executive immunity. There is something of a dissonance between the stated commitment to the constitutional privilege system of the government and the actual acts that are prevalent in each of the departments. As Dr Appleby said, one of the most powerful things this committee could do is make a clear statement reinforcing the very basic principles of responsible government and reinforcing what it means for the Government to commit to that constitutional system and the privileges system, and then go onto explain how it will resolve the disputes that continue to arise.

CHAIR - One of the arguments put in more recent times, even by the former government, which I think was what the letter I referred to was referenced in a recent response, was the fear that your advice to a minister made as a public servant may see the light of day and be made public will prevent the provision of frank and fearless advice and will actually undermine that process. Do you have any comments on that?

Dr GOGARTY - Ultimately, it would be on the Legislative Council's head if it destroyed that system of public trust and the responsibility of departments to their ministers. I really doubt that any committee would do that.

There is also a much broader question, which maybe Dr Appleby will speak to, about the nature of the public service and ministerial responsibility - for instance, ministers falling on their swords if there is malfeasance from the department or the department itself makes a decision which fails to convince the parliament of the integrity of that department. We have lost that over time, so this notion of a department having complete and utter fealty to the minister and then the minister being responsible to parliament is somewhat archaic. I don't know what you think, Dr Appleby.

Dr APPLEBY - I agree with the first point that you are making and it feeds into the point that the Chair was making earlier. That's a question about where the public interest lies in the disclosure of this information. That's not something for the government to unilaterally assert and to be accepted by the Council; that should be something that the Council itself is satisfied of, and how could you be satisfied of that without actually initially seeing the documents? Then it's for a responsible Legislative Council to determine whether they should then be released to the public. There may be some instances where the Legislative Council is convinced that the public interest lies in retaining confidentiality to retain the political neutrality of the public service, or there may be other instances where there are outweighing factors in the public interest for the documents to be disclosed. It sounds like we've got a situation at the moment where there is a unilateral assertion that the public interest requires this to be kept confidential because of the neutrality of the public service, which is not being tested by the Legislative Council. It should be ultimately the

responsibility of the Legislative Council to exercise appropriately its power to determine whether it should be released.

Ms WEBB - There's an even longer bow being drawn by the Government in that it's not just the advice from the public servants that would come under this protection that they're claiming, but it would also be reports provided by external consultants to the public service to inform potential advice to the minister - not just the advice itself from the public servants but reports from consultants engaged independently that then inform that. That's an even longer bow to draw, as you've described, to unilaterally decide that that's not to be disclosed for the Legislative Council to make its own determination about public interest in that.

Dr APPLEBY - It comes back to this point about distorting the understanding of the responsibilities of the Legislative Council versus the government. It's the Legislative Council's responsibility under our constitutional system to hold the executive to account, to review the executive's actions and accepting those unilateral assertions that the public interest requires this not to be released means the Legislative Council is not able to fulfil that function. Hence the reassertion of that function and the explanation of the function that then flows into and this is why documents should be released to the Legislative Council, for the Legislative Council to be satisfied that that's where the public interest lies.

CHAIR - The other challenge we've had is that the Government has been unwilling to explain the rationale for claiming that privilege. We couldn't even get it to do that. That's where we're at, which is a pretty difficult place.

There is a comment made in the Government's submission, which you have both referred to. I will read you a section on page 3, which says -

> It is also submitted that any changes to the 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 at this time. I also note this lack of certainty is somewhat exacerbated by the very broad term of reference of the committee, given that the resources available to the work of the committee is finite. These potential, additional costs may further undermine the public interest in pursuing, what are arguably, unnecessary and uncertain procedural changes.

That is a quote from the Government. You probably can't comment on the cost. We had a discussion earlier with previous witnesses about where some of the costs fall. I would be interested to know if you have any thoughts on that. I would like to ask the Government this, but at this stage, they are not talking to us any further, but hopefully they will, about what additional complexities and efficiencies it may create. Can you see any issues there?

Dr APPLEBY - I mean it would be the creation of an additional process. I have no doubt that there would be administrative costs associated with that. Someone like David Blunt, as the Clerk from New South Wales, would be better informed to explain what the costs actually involved.

I think that submission, in many ways, is a reordering of constitutional principle, which I find problematic. It is an ordering of constitutional principle that puts administrative costs and efficiencies at the top, and is dismissive of the constitutional principle of responsible government, and the responsibilities of the House.

To say that the existing conventions and processes are adequate, based on my understanding of what is happening in Tasmania, is a position in which the Legislative Council has been hamstrung in its ability to fulfil its constitutional role and it is holding the Government to account. That to me, has to be the most prioritised constitutional principle.

Considerations around efficiency and administrative costs will come into it, but I think that is more a matter of how you design the process and who bears the cost et cetera, as opposed to a reason not to put in place a new process.

Dr GOGARTY - There would be no cost at all if the Government handed over all its documents. The cost created here is the result of the ambiguity. It's the other way around. It's a disingenuous statement.

Mr DEAN - It might be a cost to them, though.

Dr GOGARTY - It might be a cost to them. It certainly needs a degree of trust between the branches, but the committees will regulate its own processes.

As Gabrielle was saying, this in fact is a constitutional process, a very corporate statement that seems to confuse the role of the government as the director of a large corporation rather than responsible for parliament. Ironically, in terms of regulatory theory, most corporations would want greater clarity in the law. Uncertainty in the law, uncertainty in what the rules are and ambiguity really does create additional costs.

Here you have a situation where there is uncertainty on both sides, possibly being exploited by one over the other, but that uncertainty requires a range of legal advisers, slowed by committees. These committees have to go and get their own advice. I don't think this is a statement of some point. I think the opposite is true.

Mr DEAN - You made a comment about the committee's power being a similar power to that of the House.

This morning John Hannaford, the former leader of the opposition in the Legislative Council, came bore this committee and raised this very issue. He asked whether a committee should be able to exercise the power of the parliament. I think it is being suggested that a committee, if it finds itself in this position, probably ought to be going to the House, with their position, and for the House to move forward with that matter. How do you see that?

Dr GOGARTY - I think I'm just going to find that provision in the 1858 act.

I'm not sure if the committees are part of the House. I don't think you can distinguish the role of the committee from the role of the House itself. These are specialised Chambers which are given a role by the House to speak on its behalf. That is why the more recent privileges act treats them as one and the same.

CHAIR - Do you want to add anything to that Gabrielle?

Dr APPLEBY - No, in terms of the specialisation of the intricacies of the Tasmanian Parliamentary Privileges Act, I am happy to let Brendan answer.

Dr GOGARTY - I am sorry, I have got my laptop in front of me which is why I am trying to find you.

CHAIR - I will read this to you, Brendan. It is section 1 of the Parliamentary Privileges Act 1858, Power to order attendance of persons -

> Each House of Parliament, and any committee of either House duly authorized by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be, and also to produce to such House or committee any paper, book, record, or other document in the possession or power of such person; and all persons are hereby required to obey any such order.

Dr GOGARTY - I apologise. The 1858 act was not the only act that we have; there are more recent acts which I cannot get at the moment because -

CHAIR - If you go to the Parliamentary Privilege Act 1957, section 2.

Dr GOGARTY - Thank you very much. It clarifies that the power of the committee of the Assembly is the same as any of the committees where members of the Legislative Council [inaudible]. The notion of committees being a part of the Chamber is really embedded into our legal system. I cannot see a reason the committee would have to request the entirety of the House endorse the exercise of a power like that. It may be a better argument for me.

Mr DEAN - John Hannaford raised that issue.

CHAIR - Mind you, if we were going to use some of the soft options, you would have to go back to the House to do that because it is the House that holds up the procedures and processes in the parliament.

We are a bit overtime so thank you both very much for appearing, you again. Brendan, and you, Gabrielle, for your expertise in this area. It is really good to get a variety of views on this and to clarify a number of those points, so thank you.

Dr APPLEBY - Thank you, Chair, and thank you committee, it was a pleasure.

THE WITNESSES WITHDREW.

HON. MICHAEL EGAN AO, FORMER LEADER OF THE GOVERNMENT AND TREASURER 1995-2005, LEGESLATIVE COUNCIL PARLIAMENT OF NEW SOUTH WALES, WAS CALLED AND EXAMINED.

CHAIR - Welcome, Mr Egan, to the committee. A man of much experience in this matter.

Mr EGAN - I have been around a fair time, yes.

CHAIR - When you are ready, let us know when you are settled and ready to make a start.

Mr EGAN - I am ready.

CHAIR - Thank you for appearing, Mr Egan, with your experience. The members of the committee, myself, Jane Howlett, Meg Webb, Ivan Dean and Josh Willie and our secretary Julie Thompson. Julie is the person you have been communicating with, I imagine.

Our term of reference is fairly narrow and specific. In Tasmania we don't have a mechanism for resolving disputes where documents are called for, either by a parliamentary committee or on the Floor of the House. We know that New South Wales has - it has been tried and tested and you have been in the centre of that, I guess. It would be good if you could give us a bit of history of your involvement perhaps, the process that led to the establishment of a sessional and then standing order and your views on how it operates. Is it the most effective measure? Is there a better way of doing it? If you were starting from fresh, from scratch, what would you do?

Mr EGAN - My fundamental problem is that I do not accept that the Legislative Council has an inherent right to demand the tabling of documents.

CHAIR - Is that in the New South Wales parliament or ours?

Mr EGAN - All upper Houses actually in the Westminster system. Fundamentally, I do not accept that, under the system of responsible government, you can have the government of the day responsible to two different Houses of parliament under different control. That, to me, seems to be a split personality. Responsible government means the government is answerable to, it has to be only one House. In my view that House has to be the lower House, the House of the people.

CHAIR - You do not see the Legislative Council as having the same powers as the lower House? Is that what you are saying?

Mr EGAN - It should not have. My views on the Legislative Council are fairly well known. Essentially, I do not think it should exist.

CHAIR - The Legislative Council in itself?

Mr EGAN - The Council, yes. And if it does, it should have powers very similar to those of the House of Lords. In other words, quite restricted. Otherwise responsible government is just a nonsense notion.

Ms WEBB - In relation to your view, do you look to any particular legislation or other authority that would support that view?

Mr EGAN - I think it is fairly basic by the very definition of the understanding of what responsible government means. You can only be responsible to one entity, that has to be House which determines who forms government.

Ms WEBB - It might be described, for example, in our Parliamentary Privileges Act or any other piece of legislation that the Legislative Council does indeed hold such powers that you do not believe they should have. You are asserting a view that those pieces of legislation are wrong?

Mr EGAN - They can hold statutory powers. It is not the same thing as being part of the concept of responsible government.

Ms WEBB - The concept of responsible government, as you construe it, in this case, overrides what might be a legislative power that would be there for the upper Houses?

Mr EGAN - I do not think it overrides it, but obviously if a House of parliament is established under a constitution, say the New South Wales Constitution, it has certain legal rights. But it is not akin to the rights of the lower House, which is the House that determines who forms government. I think for the upper House to - I am talking about New South Wales here - for the upper House to assert that its rights are the same as those of the lower House is fundamentally anti-democratic.

Mr WILLIE - The current arbitration process that has been implemented in New South Wales, do you see that would have had an impact on the public service in terms of its frank and fearless advice to government? Do you think, since that has been implemented, public servants would be restrained in the advice they give to government?

Mr EGAN - Of course.

Mr WILLIE - Do you think there may be instances where public servants and ministers are dealing with things orally or outside a documented process to avoid -

Mr EGAN - You have hit the nail on the head.

Mr WILLIE - You think that is a regular occurrence?

Mr EGAN - Of course. Some of that is an official policy of the bureaucracy or a government of the day. But it is just human nature that people are going to be restrained in the advice they give to ministers if that advice can become public. That is the reason Cabinet discussion is confidential, because you want Cabinet members to feel unrestrained in what they say. You want them to be able to think out aloud and at the end of the day, of course, Cabinet members have to accept whatever Cabinet decision is made or otherwise they leave the Cabinet. That is really the same, I think, with the bureaucracy; they'll give you frank advice in writing if they know that it's not going to be on the front page of the *Daily Telegraph* six months later.

Mr WILLIE - We've had a lot of discussion with different witnesses around what constitutes a cabinet document. Do you have any thoughts around that?

Mr EGAN - Well, I think documents that go to Cabinet for the consideration of Cabinet are clearly cabinet documents. I agree that you have to be careful that you can't just haul documents before Cabinet, pass them over the table and then declare that they are cabinet documents. They have to be documents that are actually dealt with and considered by Cabinet.

Mr WILLIE - So, advice to government, deliberations?

Mr EGAN - Advice to government, yes.

Mr DEAN - What about the position then with joint House committees as they currently operate? If you have that position, how can a joint House committee operate efficiently and properly and track the evidence and information it should to make its findings if you are saying that the Legislative Council should not have that authority? Is there any difference there in the joint House committee?

Mr EGAN - Well, no, it is no different between a joint committee, both Houses, or a select committee of either House. They can call witnesses; they can examine the witnesses. Then they can seek the delivery of documents but again there are restrictions on the right to call for papers.

Mr DEAN - What sort of restrictions?

Mr EGAN- If they're privileged documents, if they are cabinet documents or if they have legal professional privilege attached to them, or in some cases I would think, even commercial-in-confidence documents. Governments have to be able to deal with private individuals and private companies in a way that other businesses would.

You can't expect a company to deal with government if their intellectual property is available for every Tom, Dick and Harry to see it and to benefit from it. Certainly, commercial-in-confidence is not as compelling as documents that are covered by legal professional privilege or cabinet documents.

Any joint committee or select committee can call for documents but there's still restriction on the ones that have to be published.

CHAIR - When you made the point, you are talking about documents and where they're published which is different. I understand that in the New South Wales parliament an order can be made and it is, quite often apparently.

Mr EGAN - Ridiculously often. There's a very good book written by one of the former librarians here, David Clune, and at the back of that book - and I was just looking at it this morning - he lists the subject of 'Call for Papers' between 1996 and 2006 - just 20 years - and there is more than 400 of them. It is just ridiculous.

The other point I'd make in relation to that is that not one of those that I can recall made one iota of difference to the public discourse in the state. Not one. There's never been an occasion where the government or the bureaucracy has been caught out lying.

CHAIR - So why are they so worried about releasing the documents then, in a proactive sense by putting this information out there?

Mr EGAN - The ones released publicly go through the arbitration courts and they are not released if the arbiter recommends that they not be. They are the ones which are the sensitive ones. The assertion the upper House here has made over the years is they had a right to call for the

publication of any document, anything, quite apart from whether there was no particular privilege attached to them.

CHAIR - They are still receiving documents, some of which are marked as privileged and they remain as privileged unless a member challenges that, and it is then referred to the independent arbiter to make a determination on that. Some of them are upheld and some are not, or there is a variation on it, maybe, that some parts are redacted but some parts are public. Do you think that system is not working?

Mr EGAN - It has made no difference to the quality of the public discourse. I can't recall one single instance when any of those papers has caused any controversy or found the government out, or found the bureaucracy out. It is a harassment of the Queen's ministers.

CHAIR - For example, the greyhound racing report, there was a piece of legislation that came before the House. As I read through that it seemed to me that the motivation behind that, or the purpose of that, was to get access to documents that might assist members in making a decision on the way they voted on a particular piece of legislation, or whether it should be further amended or whatever. I am not sure how you measure that. That would have had an impact.

Mr EGAN - I don't think it had any.

CHAIR - You don't think?

Mr EGAN - Not at all. The determining factor there was the outrage, particularly in rural communities, at the closing down of the greyhound racing industry. It had nothing to do with any documentation.

Ms WEBB - You were using that as an example, but rather than going to the particularities of the example, you are using that as an example that it would be hard for us to know what impact the release of the information may have generally on things like a member's understanding and therefore voting intention, or on a member's, say, preparation for budget Estimates scrutiny next time that comes around, or a member's response to constituents who had an issue they were communicating with them about. There is no way you would have any idea from your individual observation of your community of the extent to which an impact had been made. Yes, you could make a judgment about media stories but, as the Chair has pointed out, that is an assumption that was the purpose of getting the documents. I think I would be right in saying it would be almost impossible for us to measure most of those other sorts of impacts from your personal experience?

Mr EGAN - I'll put it to you this way. In all of those, certainly the ones where the government was ordered to the table when I was a minister, what used to happen was that truckloads of documents would be delivered to the Clerk's office and very often no-one looked at them. It was really harassment of the executive government. That is all it was.

Mr WILLIE - Do you have any thoughts on the cost?

Mr EGAN - An enormous cost, no doubt, but in the scheme of things it is not a lot of money. It would be interesting for someone to tally up the cost but it is not going to get you anywhere.

CHAIR - Are you aware of any work done around costs?

Ms HOWLETT - It is a wonder that wasn't in Estimates over the years, isn't it?

CHAIR - Someone did mention that there was a question asked at Estimates last year. We can follow that up.

Mr EGAN - I am sure someone in the depths of bureaucracy has made some sort of an attempt to work out how much this has cost, but that is not the major issue, as I see it.

Mr DEAN - Just so I understand your position correctly, are you saying that the Legislative Council, for instance, and committees should have the right to ask the government for documents, but if the government says that those documents are privileged documents for whatever reason, cabinet-in-confidence or public interest immunity et cetera, that should be accepted without challenge?

Mr EGAN - Basically, yes. I think it would be different if it the House of parliament which made or unmade governments was calling for it. In that case, it would probably mean you would need a change of government because you would not have the confidence of the House.

Mr DEAN - Thanks, I just wanted to get some clarity around that.

CHAIR - You were always a member of the Legislative Council. Have you ever been a member of the House of Assembly?

Mr EGAN - I have been a member of both.

CHAIR - Which order?

Mr EGAN - First the lower House, and then later the upper House. I never supported the existence of the upper House. The reason that I ran for the upper House was because it was there and you cannot just say, 'Well, I do not agree with its existence, so I will just let my opponents, or our opponents, run it'.

CHAIR - Just taking you back to the time in the lower House, though, in government or in opposition?

Mr EGAN - In government, but not as a minister, a humble backbencher.

Ms HOWLETT - In John Fahey's government?

Mr EGAN - No, John Fahey was premier well after my time in the lower House. I was a member of the lower House during the Wran government, from 1978 until 1984.

CHAIR - Were orders ever made there for the production of documents?

Mr EGAN - Not during my time in the lower House.

CHAIR - Were you aware of it happening in the lower House when you were in the upper House?

Mr EGAN - Yes, in fact I was instrumental in it happening. I was the Leader of the Opposition in the upper House when there was a minority government in the lower House during the Greiner and Fahey terms. But again, the government did not have a majority in the lower House.

CHAIR - Did they produce the documents?

Mr EGAN - They produced the documents because the votes were against them.

CHAIR - So in circumstances where they are not in minority -

Mr EGAN - I think the lower House should have the right to demand the production of documents -

CHAIR - Even though they do not have the numbers?

Mr EGAN - It would not happen if they didn't have the numbers.

CHAIR - So there is my point.

Mr EGAN - Only when there is a hung parliament, and there was a hung parliament.

CHAIR - This is the point about responsible government and accountability to the parliament. Our Privileges Act is pretty clear on that. It says that both Houses equally have that power to hold the government to account, basically.

Mr EGAN - I fundamentally disagree with that. Where does that come from?

CHAIR - It is in our Parliamentary Privileges Act.

Mr EGAN - Okay.

CHAIR - It says -

> Each House of Parliament**,** and any committee of either House duly authorised by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be, and also to produce to such House or committee any paper, book, record, or other document in the possession or power of such person and all persons are hereby required to obey any such order.

That is giving both Houses the power to compel the production of documents.

Mr EGAN - Let's look at that for a minute. Surely that does not mean that the Legislative Council in Tasmania can order the tabling of Cabinet documents?

CHAIR - That has not been tested, but I think -

Mr EGAN - That is the end of responsible government if it were tested.

CHAIR - Yes, but the argument around that aspect is, and the courts have found, in the cases you were involved in -

Mr EGAN - Mind you, the courts often get it wrong.

CHAIR - Yes, and there should be a separation of the powers so getting the courts involved in a parliamentary process is somewhat fraught and some would suggest that's the case, but if you are using a responsible approach, you wouldn't demand -

Mr EGAN - Be careful of the word 'responsible' because it has different meanings.

CHAIR - If you are using a considered approach as a member of a committee or as a member of the House - in the lower or upper House, in opposition or as an independent member of an upper House, or not in government, whatever position you are in there - when making requests for documents the problem we've had is that the Government won't even tell us why it is exerting a particular privilege. I know what you're saying - 'No, and that's it'. Surely, there is a responsibility for the government to explain why a document shouldn't be produced?

Mr EGAN - That's probably good manners, but I wouldn't say there's an obligation on the Queen's ministers to roll over whenever a House of parliament that's not the one that determines who is in government calls for any action. They have powers as legislatures but they're not - I get back to this question of responsible government and what that means. You can't have responsible government meaning both Houses of parliament. Government can't be responsible to two separate gods.

Mr WILLIE - In the Legislative Council in New South Wales there is a double dissolution function though, isn't there? In the Council in New South Wales there is a way to dissolve the House. The upper House is kind of accountable to the lower House and vice versa. Say, the upper House blocks government legislation, the government of the day could call a general election and dissolve both Houses just like federal parliament. It doesn't happen here?

Mr EGAN - A general election doesn't mean a dissolution of both Houses of parliament.

Mr WILLIE - No, I know but there is that mechanism to do that.

Mr EGAN - There is a mechanism for resolving differences between the two Houses but I can't recall the last time it was acted upon. The bill that's disputed can go to a referendum - that is my recollection. It's so long since I've looked at it -

Mr WILLIE - There is a way to dissolve the upper House though?

Mr EGAN - No.

Mr WILLIE - There isn't? Okay.

Mr EGAN - We have fixed terms in New South Wales and before we had fixed terms, the upper House was elected for a number of parliaments. In those days it was three parliaments. So it could be a term of upper to 12 years which absolutely ridiculous. Young people coming into the upper House and sort of collecting the old age pension in their first term. But the terms were truncated if the parliament didn't run its full course. If parliament only ran three years, the 12 year

term in the upper House might be reduced to 11 years. Other than that, I'd have refresh my memory on what provisions there were for [inaudible] which were -

Mr WILLIE - Maybe joint sittings or something like that?

Mr EGAN - I'd be in favour of joint sittings, but that's not the provisions in the constitution.

Mr WILLIE - Yes. I was just interested whether there was that mechanism, because that would be an issue for both Houses being accountable to each other.

Mr EGAN - It should be - either that or the arrangement that applies to the House of Lords, where they can only hold up legislation for a certain amount of time. Then basically that's all. I'm in favour of that.

The question I want ask you is: the New South Wales upper House, as I understand it, is the only upper House in Australia that is able to enforce the call for papers - why is that the case?

Mr WILLIE - Some of your experience may have -

Mr EGAN - Because if the powers of all the upper Houses are the same, they would all be able to do what's been done in New South Wales.

Mr DEAN - It's currently being discussed across most Houses - the call for documents -

Mr EGAN - It might be being discussed, but that's not the point.

Mr DEAN - No, it's not.

Mr EGAN - If there's not an inherent power in the Legislative Councils to enforce the call for papers, it's an academic issue. I think you'll find that the NSW upper House - again, my memory is really dim on this - I think you'll find most of the upper Houses that have adopted [inaudible] the rules that apply to the House of Lords which prevents them enforcing them -

Mr DEAN - Victoria has moved a bit towards that structure of calling for documents?

Mr EGAN - They might have called for documents, but they haven't got them; that's the point.

CHAIR - When you say the New South Wales can enforce it -

Mr EGAN - Well, they can suspend the Treasurer; they can suspend the Leader of the House.

CHAIR - So can we in our parliament; we can do that. We can suspend a member; we can suspend the Leader of Government Business if documents aren't produced. The power is there -

Mr EGAN - Are you sure?

CHAIR - It hasn't been used, but the power's there, according to our Parliamentary Privileges Act.

Mr EGAN - Okay, well, I stand corrected.

CHAIR - It hasn't been used. Maybe it's time it was.

Mr EGAN - Well, in that case, you can do it.

CHAIR - Some parliaments are different in terms of -

Mr EGAN - Yes. I've forgotten the reason why.

CHAIR - Would you like to add anything else? Except that you want to abolish us?

Mr EGAN - No. How long are you in New South Wales?

CHAIR - Just for today and then to Victoria tomorrow to talk to them about how it's not working down there.

Mr EGAN - I did have conversations with John Andrews when he was the leader of the upper House in Victoria. Again, it's more than 20 years ago so my memory is very dim, but my recollection is that they were in the position where the upper House was powerless to enforce the call for papers.

CHAIR - I think they've adopted their privileges a little differently to Tasmania - Tasmania and New South Wales are very similar in the way our privileges and our constitutions are structured. That's my understanding, not having a legal background, but the advice the committee's heard would suggest that. Victoria is a little bit different.

Mr EGAN - Does that mean that Tasmania has adopted the privileges of the House of Lords or hasn't?

CHAIR - No, it hasn't; it's in our Parliamentary Privileges Act.

Mr EGAN - Okay.

CHAIR - Victoria did adopt that though - I think. I'm not an expert.

Mr EGAN - I think that's why Victoria can't do too much about it.

CHAIR - We'll ask them that tomorrow.

Mr EGAN - Generally make the point again - in my opinion, the call for papers has not made one iota of difference. It got to the stage where they forgot about it after [inaudible].

Mr DEAN - It probably made a few people feel a little better - the fact that they can call for them and get them or get some.

Mr EGAN - Yes, but it's all argy-bargy - does it do anything for the quality of government or the quality of responsible government? I don't think it does.

Mr DEAN - That's the question, isn't it?

Mr EGAN - Yes. So, good luck.

CHAIR - Thank you and thanks for your thoughts and contribution on that. The experience of being in both Houses has been a bit insightful too. Thank you.

THE WITNESS WITHDREW.