THE LEGISLATIVE COUNCIL SELECT COMMITTEE INQUIRY ON PRODUCTION OF DOCUMENTS MET IN THE G3 MEETING ROOM, PARLIAMENT OF VICTORIA OFFICES, MELBOURNE ON WEDNESDAY 25 SEPTEMBER 2019

Dr ANITA MACKAY, LECTURER, LA TROBE LAW SCHOOL, WAS CALLED AND EXAMINED.

CHAIR (Ms Forrest) - Welcome, Dr Mackay, and thank you for your submission. We have been in Sydney talking to people involved in a protracted process over a number of years toward production of documents and the development of their standing order. We are interested in what you have to say about the Victorian system. This meeting is being recorded and will be transcribed by *Hansard* and published on our website once it is available. It will inform our report, which will be released in due course.

We've read your submission and appreciate the work involved in the Fiskville inquiry. That was quite interesting. We would appreciate it if you could give us a broad view of the process around production of documents in Victoria and your views as to the benefits of the approach taken. As far as we are aware, the standing order hasn't been used as yet, so we will be interested in your thoughts and whether there are other mechanisms that may be a more appropriate.

Dr MACKAY - Certainly, if I could give you a little bit of background about myself initially: I worked for the Commonwealth public service for a number of years as a senior legal officer. I had the experience of drafting terms of reference for parliamentary committee inquiries and responding to recommendations. I wasn't ever involved in a situation in which a committee was requesting documents from the department that I worked for, but I appreciate the different classifications of internal workings of government. I have worked with cabinet documents and security classified documents in that setting.

I worked for the Environment, Natural Resources and Regional Development Committee here in Victoria when it was inquiring into the CFA training facility at Fiskville. As its legal research officer I was responsible for coordinating its document discovery process which, in the end, led to it gathering between 15 and 20 000 documents for the purposes of the inquiry. I was supervising a team of paralegals who were sifting through all those documents.

Since commencing work as a lecturer at La Trobe Law School three years ago I've been, from an academic perspective, considering various inquiry mechanisms, including parliamentary committees and royal commissions and the way they gather evidence. I can come to this topic from a range of different angles.

A couple of the things that I could speak to in opening are the lessons that can be gained from the Fiskville inquiry about the importance of documents for parliamentary committees. If you wish, I could talk a little bit about the guidelines Victoria has introduced as a direct result of a recommendation made by the environment committee. I can talk a little bit about some stronger legislative powers that could be informed by the provision in the Audit Act. That was something that my co-author and I wrote about in our journal article, that the Audit Act has actually been amended since then. It was amended in June this year.

CHAIR - Was that to give effect to the recommendations that you made?

Dr MACKAY - No, I think separate to that. It just means that the provisions we were referring to in our journal article have been changed. I think that the Audit Act now has a lot more detail about information-gathering powers of the Auditor-General. I can't talk about how they actually work in practice because I haven't worked in the Auditor-General's office but I could talk about the legislative provisions.

CHAIR - I understand the Victorian Auditor-General can demand or compel the provision of cabinet documents, which the Tasmanian Auditor-General can't. Victorian powers for document procurement is in its Constitution Act, whereas ours is under our Parliamentary Privileges Act. Victoria has adopted the House of Commons approach, which we didn't. We are like New South Wales in that regard, so there are severe differences around the head of power.

Dr MACKAY - I am not familiar with the details of how the Tasmanian Parliament was set up.

CHAIR - That's okay.

Dr MACKAY - I do need to make an important disclaimer, which I am sure all of you would appreciate, which is that I can't speak on behalf of the environment committee about anything to do with their inquiry but I can talk about things that are on the public record that are informed by my experiences working in the secretariat of that committee.

I think there are two lessons that inquiry provides about the importance of parliamentary committees being able to get access to documents. There were terms of reference for that particular inquiry that required the environment committee to look at the role of past and present executive management of the statutory authority, the Country Fire Authority, between 1970 and 2014 when the inquiry commenced. They were looking at a period of a number of decades, and the committee thought that the best way to understand the role of the executive management was to access the minutes of the board papers. They were the documents that became the subject of the dispute.

Of course, it wouldn't have been possible to actually call members of the executive into public hearings covering that period from 1970 to 2014, so the documents were the only way to get an understanding of that authority's decisionmaking. The environment committee made a number of findings in its report that those documents were absolutely essential. Findings 14 and 15 said that the documents were required to respond to the terms of reference that the committee had been given by the parliament and also to be able to use the documents in public hearings, which was done quite a lot, and to then write the report. The report made a number of findings about malfeasance of public agencies and those findings would not have been possible without the board papers that the committee ultimately did get access to, so they were very central to that particular inquiry.

CHAIR - What was the process they used to access them?

Dr MACKAY - They initially issued summons. Our understanding is that the Country Fire Authority provided all the documents to its legal advisers, the Victorian Government Solicitor's Office. That office then went through all the documents to determine if any of the content was covered by executive privilege and redacting huge chunks of those documents. That was a short-term measure, so they were providing redacted documents to the environment committee while there was a lengthier process for the government to determine if they actually wanted to claim

executive privilege over that content. Once that lengthier process had taken place it was found that, in 85 per cent of cases, the committee could have access to the material. There was a very large -

CHAIR - Who found that?

Dr MACKAY - The Victorian government. There was a large disparity between what the Government Solicitor's Office thought might be covered by executive privilege and what was later actually found to be covered by executive privilege. I think this really demonstrates the nebulous nature of these claims of privilege.

CHAIR - I note in your paper you said one of the findings was the Victorian Government Solicitor's Office was obstructive and uncooperative in the document discovery process. Was that where problems were, either in redacting swathes of parts of those documents or not providing them at all?

Dr MACKAY - Yes, that's correct. Those were the two scenarios, yes. For the majority of the documents that were initially provided in a redacted form, the environment committee was eventually provided with them in full, but it cause a significant about of delay to the work of the committee -

CHAIR - How was that achieved? We are at a stalemate like that in a committee in the Tasmanian Parliament where we have a redacted document and all requests to receive it unredacted failed, including asking for it to be provided in camera and asking for it to be assessed by an independent arbiter. We don't have a standing order that provides a process for that at this stage. Another option was to ask for it to be left in the custody of the Clerk. Members could read it but not photograph it, do anything with it or repeat back. Can you outline the process you went through to get them from being almost fully redacted to completely open?

Dr MACKAY - There was no use of the standing order that provides for an arbiter to make a decision. I understand that Victorian standing order has never been used, so that wasn't the process. There was an internal government process. I don't know whether it involved going to Cabinet or not, but the Department of Premier and Cabinet actually assessed the claims of executive privilege and determining whether the government did want to claim executive privilege.

I don't have much more information about that the internal workings within the Victorian public service. From the perspective of the committee secretariat, yes, they did initially get hundreds of documents in redacted form that were then later provided in full. They eventually had access to the information but it caused a lot of delay because a lot of the information came in at the eleventh hour and it was a lot harder to use it at that point.

CHAIR - I'm interested in whether the departments then decide to snow the committee or the secretariat with information so that it becomes difficult to find what you are looking for. You said there were up to 20 000 documents.

Dr MACKAY - Yes, approximately. They were coming from a range of agencies. There was a huge number of documents. The view of the environment committee in both its special report on documents and the final report was that this was a delaying tactic.

Mr DEAN - Did you say it could have been a delaying tactic?

Dr MACKAY - The committee formed the view that it was a delaying tactic.

Mr DEAN - If these documents are relevant to the matter or the claim being made, they have to be provided, I suppose, in their defence.

Dr MACKAY - Yes. Certainly, the committee viewed the documents as absolutely essential to being able to respond to the terms of reference.

Ms WEBB - The delaying tactic they felt had been employed was that the two-stage process in which the solicitor assessed in the first instance and did a large amount of redacting, and then there was a second process of review through DPC that eventually undid a great deal of that redacting and provided a full document. The period that elapsed meant that when those documents arrived, the committee had very little time to make use of them.

Dr MACKAY - Yes, precisely. It also meant the secretariat was required to go through the same documents twice.

Ms WEBB - The redacted version and then the unredacted version.

Dr MACKAY - Exactly.

Mr WILLIE - It wasn't the volume of documents provided that was the problem, it was the two processes the member for Nelson as outlined that were the problem. As a committee, you would naturally want all the documents that are available to assess them yourselves, wouldn't you?

Dr MACKAY - Yes. It was a combination of the volume of documents because there were board papers covering several decades, with bimonthly or sometimes monthly meetings of that board. It was a combination of the volume of the documents and the two-stage process. There was also -

Mr WILLIE - Is that the committee not narrowing the request?

Dr MACKAY - The committee's summons was for all board papers, so it wasn't willing to narrow the request, and I suppose

Mr WILLIE - What I am trying to establish is that it wasn't a deliberate tactic of the government to provide a volume of papers to make it difficult. That was the request from the committee.

Dr MACKAY - Yes, that is true.

CHAIR - Do you think it would have been of benefit to request all the board minutes at the outset with the next step depending on what that showed? You still have the issue of the documents being fully redacted, probably almost. There are also supporting board papers that may be relevant to particular meetings.

Dr MACKAY - In some cases it was quite difficult to understand the minutes if you didn't have the supporting documentation, because the minutes may have referred to particular attachments that were with the agenda. It was certainly the case that to get a full picture of the decision of a particular board meeting, you needed all the related documents.

CHAIR - You couldn't have asked for less, is that what you are saying? In order for a committee to make a determination about the matter they were investigating, they needed access to all those papers, even though there were a lot?

Dr MACKAY - Yes. That was the view of the committee.

Ms WEBB - Can I clarify: even if they had asked for half as much, there still would have been that two-stage process, potentially? The time line may still have been extended in that sense. What was the duration of time between the first stage when they got the very redacted versions through that second stage of review by DPC and received the documents in a more complete version?

Dr MACKAY - The initial summons was on 8 September 2015. The redacted documents came in a number of tranches. It wasn't a single delivery of them. The first delivery of documents was on 16 September 2015. I am referring to a time line in the appendix to the committee's special report about the production of documents. There were seven tranches of documents; the seventh tranche arrived on 16 October 2015 and more documents arrived on 6 November 2015.

Ms WEBB - These were still the redacted -

Dr MACKAY - These were still the redacted documents. I am not sure if I can provide the date that they got the unredacted documents, but I would be happy to take that on notice if you would like me to.

CHAIR - It would be interesting to do that because the guidelines you referred to - and I appreciate you will be speaking to those shortly - were prepared and released in December 2017. When did the committee actually report and was this a direct result of that or did other things happen?

Dr MACKAY - The committee produced its final report in May 2016. I will not estimate; I will take the question on notice about when they got the unredacted documents. In terms of the connection between the committee's report and the guidelines, there is a direct connection because the environment committee recommended that the DPC update its guidelines and the government response to the Fiskville inquiry report said that they were going to be updating the guidelines as a result of that.

CHAIR - You know the standing order has not been used. It was developed toward sending the documents to an independent arbiter. Has the implementation of the guidelines been effective in accessing documents or is there still an issue? If you cannot answer, it is fine. I wonder if you think the guidelines have done their work or does having the standing order there for possible use provide the tool?

Dr MACKAY - I have done an on-paper analysis of the guidelines and compared them to the previous guidelines, and I think significant improvements are introduced by the guidelines. I am not able to comment on whether there have been, since the introduction of those guidelines, any committee inquiries that have led to the seeking of documents and the guidelines being invoked.

Mr WILLIE - Do you have any comment on the standing order potentially being used and why committees have not gone down that path?

Dr MACKAY - No. I think the Clerk of the Victorian Parliament would probably be best placed to comment on that. I am not really sure.

Mr DEAN - Were there any other lead-ins to the Fiskville inquiry? Had this happened on many occasions, say, in the last two or three years? Was it an ongoing issue that this brought to a head?

Dr MACKAY - Do you mean committees having trouble accessing documents?

Mr DEAN - Yes. Committees requesting documents that were not being produced or being heavily redacted.

Dr MACKAY - I have had the opportunity to read the submission by the Victorian Clerk to your inquiry. I think that outlines a couple of other instances where Victorian committees have had trouble accessing documents, a couple of them were before the Fiskville inquiry and I think one of them was more recent. I don't know that any of those other inquiries were trying to access the volume of documents that the environment committee was trying to access. As far as I am aware, that is an unprecedented number of documents for a Victorian joint investigative committee to be trying to get access to.

Mr DEAN - Thank you.

CHAIR - Do you know what happens to the documents after the committee inquiry has reported and effectively closed?

Dr MACKAY - I gather that they remain the property of the Victorian Parliament. I gather that with some other inquiries - there was an inquiry into institutional child abuse and there was an agreement that documents would be returned to the agencies or institutions upon completion of the inquiry. There was not any such agreement about returning documents after the Fiskville inquiry. They may still be here in this building because this is where the secretary was based for that inquiry.

CHAIR - One of the challenges we face in our parliament is that the governments of the day, past and present, I am sure, in some respects, have made executive privilege, public interest indemnity and other claims without substantiating the basis for the claim. In the Fiskville inquiry, were reasons given for the redaction? It went through the Solicitor-General's Office. Were reasons provided or was executive privilege, as it was in that case, claimed, and that was it? If you look at appendix A of the guidelines, it sets out when a claim of executive privilege can be made. One would think that if you were going to claim, they would say that it breaches that the fourth dot point, which is 'reveal confidential legal advice to the executive government' Can you explain what happened with the process there?

Dr MACKAY - The Solicitor's Office wasn't willing to provide any reasons for the basis of the claim of executive privilege. That was something that did frustrate the environment committee. I believe there was correspondence from the chair of the committee asking for the reasons. The only information available at that time about the definition of executive privilege in Victoria was a letter from the Attorney-General of Victoria to the Victorian Parliament. That was an attachment to the submission that the Clerk has provided to your committee for this inquiry. There was the letter from the Attorney-General addressed to Mr Andrew Young, as the Clerk, from 14 April 2015. That information was available but the environment committee was not given any detail of the basis on which these executive privilege claims were being made over the documents in question.

CHAIR - This is the challenge we have come up against in Tasmania. We asked several times in one committee for the reasons for the claim. You cannot assess the document without seeing it. You cannot assess the claim without a reason. Maybe we need to ask the Clerk more about it how effective these guidelines have been. Is it resulting in a more thorough approach to refusal to release documents or unredacted documents, at least?

Dr MACKAY - Yes, I would certainly be interested in the answer to that question myself, as to whether there has been some inquiry since December 2017 where the guidelines have been invoked. They do at least provide a definition of what executive privilege is and some illustrations of the types of documents that might be covered. That is an improvement on the situation with the Fiskville inquiry.

CHAIR - Do you have any views as to why the Victorian standing orders have not been used, when there has been a dispute, to send the documents to an independent arbiter to make a determination about whether privilege should prevail?

Dr MACKAY - I could only surmise that the Victorian Government was not willing for anyone to look at these documents until they had gone through the internal process. I don't have an informed view as to why the standing order hasn't been used. I think Clerk could be the person to answer that.

CHAIR - It is interesting to contemplate why it seems to work in New South Wales but not here. Other witnesses have talked about different cultures within the parliament, which may be the answer, but it's a bit hard to understand.

Mr WILLIE - There are different mechanisms in state constitutions. Potentially they're not invoking that standing order because it might end up in the court.

CHAIR - Yes, it would be interesting to find out. Did you want to speak more to the guidelines as they were developed?

Dr MACKAY - Yes, I've mentioned that one significant advantage of the guidelines is that it has an appendix that defines executive privilege. Another improvement that's been introduced by the guidelines is that they are encourage agencies to be flexible and to ensure timely provision of documents to inquiries. There's not really any detail as to what the enforcement mechanism is if they don't comply with that, but it at least expresses the intention that agencies should be cooperating with parliamentary committees.

Some of the wording that has been used comes from the model litigant guidelines that public agencies are required to comply with in a litigation setting. That does stem directly from the environment committee's report. It recommended that the model litigant guidelines also be amended to cover agencies dealing with parliamentary committees. That recommendation wasn't accepted by the Victorian government but they were willing to take some of the wording from the model litigant guidelines and put it into these guidelines for agencies dealing with parliamentary committees.

CHAIR - It would be accurate to say that it only really applies to public servants, certainly not to ministers. In Tasmania we have generally gone through the minister to seek a document or

documents. Are you aware whether that was used in the Fiskville inquiry, or were they sought only through the various departments?

Dr MACKAY - Yes, the environment committee was going directly to the departments and it wasn't only the Country Fire Authority, it was other agencies like the Environment Protection Authority and WorkSafe Victoria.

CHAIR - Were they independent?

Dr MACKAY - Yes, independent statutory agencies. I think they were also trying to access documents from departments as well. It wasn't just statutory agencies but I don't recall them making any requests to a minister for documents.

CHAIR - You may not be able to answer this. With our Tasmanian committees we tend, particularly in the Legislative Council, to go to the minister, even if we are inviting the secretary of a department or someone in that sort of role to present to the committee. The minister decides and informs us whether that senior public servant can appear. Is that process used in Victoria? We might go directly to an independent statutory body, such as the Auditor-General or the EPA, but we go through the minister to invite anyone from a department.

Dr MACKAY - The environment committee did hear from a number of public servants during the hearings. I think the invitations for statutory agencies went to the CEO and the invitations for members of government departments did go to the secretary of the department rather than the minister but I'm stretching my memory a little bit. It was a few years ago, so I may be incorrect on that.

CHAIR - There may be more than one relevant minister, but did ministers appear before the committee?

Dr MACKAY - I don't recall any ministers appearing. I am referring to the list of public hearings to refresh my memory. There were local councils, the chief executive officer of a council, the Emergency Management Commissioner as well as the chief executive officer of Emergency Management.

CHAIR - Not the minister for emergency management or whoever the relevant minister is here?

Dr MACKAY - Not the minister, no. The Chief Veterinary Officer from within the Department of Economic Development, Jobs, Transport and Resources and the CEO of the Environment Protection Authority. There were no ministers before that committee.

CHAIR - Do you think - and this might be outside their experience - but I am interested in your experience as to whether papers, particularly where there are contested documents, that a claim has been made of some privilege, that the document should be requested through the minister, of the minister, being the minister responsible for the department who holds the documents, assuming there is a minister in charge of that department? They all have ministers somewhere sitting above. Do you have a view on that?

Dr MACKAY - I am not sure that the outcome would be any different because either way the department would be able to still make the claim of executive privilege.

CHAIR - Sometimes putting a bureaucrat, for example, in an invidious position perhaps of beings summonsed to produce a document or documents maybe more challenging, hence the guidelines, I suggest. Whereas for a minister, that is part of the game, really. It is interesting that in the Fiskville inquiry it did not appear to go to the minister for the information; it was directly to the agencies.

Dr MACKAY - I am not sure what the rationale for that was.

CHAIR - To your knowledge, documents have not been sent to an independent arbiter in the process with Fiskville or any others that you are aware of to assess the claim?

Dr MACKAY - No and I am relying on the submission of the Clerk in Victoria for that information.

Mr DEAN - There is clear evidence to show that these guidelines are not a panacea, but from where you sit how do you see the changes to the guidelines and so on? I guess you have looked at or considered them, but in your view what probably would be an improvement on even the current guidelines? Have you addressed that?

Dr MACKAY - I think having a combination of guidance in place, for want of a better word. So, having the guidelines is useful, having a standing order is useful; probably the only other addition that could be made is to amend the legislation that allows parliamentary committees to call for documents.

There are probably differing views about the advantages and disadvantages of putting more detail into that legislation because some would say it is a very broad power and that leaving it broad would be better. I think there could be some scope for adding more detail and that is where I have looked at the Audit Act and its provisions which were amended in June this year. They are quite detailed now and refer to the Auditor-General being able to serve an information-gathering notice. They clarify that can include access to cabinet-in-confidence documents. There is also an offence provision, so it is an offence not to comply; so, whether introducing some sort of legislative offence would be helpful -

Mr DEAN - Who would the offence be targeted at? Who would be committing the offence, the minister or the department? Who are you going to find responsible? The premier?

Dr MACKAY - Those types of offence provisions probably do not lead to any criminal charges in reality, but they are there to act as a deterrent. There is an offence provision in the Commonwealth's Royal Commissions Act, section 3. That makes it an offence to refuse to comply with a royal commissioner's request for someone to appear or to provide a document. That is just another example of an offence. But I do not know that that actually gets used in practice to prosecute. It increases the indication of how serious it is to not provide the document.

Mr DEAN - It indicates it is a serious matter and there is a penalty in place if it is not complied with. When you read through the notes, one of the comments says -

> However, the executive branch remains in control of how documents are, if at all, provided to JECs. It also retains complete control over how it interprets the operation of its own privilege in respect to those documents.

Maybe an intervention with some independent person becoming involved, I guess, before it even gets to the arbiter, at an early stage, might be a better way as well. It is taken out of their hands immediately these documents are asked for and they claim that there is control over them. Executive privilege, cabinet discussion or public interest immunity are involved, and that there should be some other process to get immediate control of that. Do you wish to make comment about that?

Dr MACKAY - Yes, I agree that we probably need some type of additional reform. Clearly, with the current provisions, guidelines and standing orders and everything in place in various parliaments around Australia, committees are still being blocked access.

Mr DEAN - It is the time frame, isn't it? If you block them long enough, as in the case that the Chair has referred to in our parliament, it just went on and on over a long period of time, and was interfering with the inquiry -

CHAIR - A couple of inquiries have done the same.

Mr DEAN - That is right. It just caused all sorts of disruption, just the time lapse, while it was trying to be sorted out.

CHAIR - Then the government starts criticising you for taking too long to report.

Dr MACKAY - That is right. Usually when they issue the terms of reference, they give a deadline for the inquiry.

CHAIR - We do not in our House. They do in the House of Assembly, but not in our House, which is one of the benefits of it.

Mr DEAN - But it is normal in some cases that we will identify a rough time frame for it, then we keep getting pestered - Where is the report? What is happening? Where is it going? That would perhaps speed up the process, wouldn't it? If there was earlier intervention in relation to what is executive privilege, what is public interest immunity and whatever other claim they might want to make to control that document or the documents.

Dr MACKAY - Yes, I would agree with that.

Mr WILLIE - I want to explore that idea of an offence a little bit more. Under responsible government, the executive is accountable to the parliament. Ultimately it is for the parliament to resolve these issues, isn't it, rather than a Criminal Code offence or whatever it may be? Ultimately these things come back to the parliament. Under responsible government, it would be going a step outside that, wouldn't it?

Dr MACKAY - Yes, it would. I realise it may be a controversial suggestion. As I mentioned, I think that it would be something that would be on paper, and would not necessarily end up in any type of criminal prosecution in the same way that I think it operates under the Royal Commission Act.

Mr WILLIE - Would it have a value then, if it is not going to be invoked and used?

Dr MACKAY - That leaves it with a symbolic value.

Mr WILLIE - More about changing culture, rather than enforcing the law.

Ms WEBB - Strong sanctions around.

Mr WILLIE - On the political culture though, that was talked about a lot yesterday in New South Wales and how different jurisdictions have different political cultures.

CHAIR - That needs to be taken into consideration when determining what is likeliest to be the most effective approach.

Dr MACKAY - I can give you another example of a criminal offence that applies in this context. If a witness appears before a Victorian parliamentary committee or a royal commission and misleads them, there is a criminal offence imposed there. Presumably, that is to encourage witnesses to be truthful at all times, so they don't risk being subject to a prosecution. I think it is probably something that doesn't get used.

Mr WILLIE - That is different, though, because that is a person from outside the parliament appearing before a committee, not a member of the executive.

Dr MACKAY - Yes, definitely quite an important distinction. I am not, I suppose, coming in and strongly advocating for a legislative offence provision. I just think that when you are looking at alternative avenues, that is one that can be on the table for consideration.

CHAIR - Prior to updating the guidelines, members of parliament have been suspended in the Victorian parliament over the years. There was Mr Lenders in 2009 and Mr Gavin Jennings in 2016. That didn't seem to make a lot of difference. In an ABC report, Mr Jennings said he had been suspended for doing his job and he was being suspended for representing the government and protecting the commercial and economic interests of the state by not releasing documents that would have led to the State of Victoria being sued. That is his view; obviously there are other views about that.

It is interesting that there were censure motions and suspensions in New South Wales, too, that led to the cases of Egan v Willis and Egan vs Chadwick, which clarified the powers as much as anything. This hasn't been tested in a court. Some would argue that courts should keep out of it and parliaments should sort it out. Do you have a view? We are going to what the process should be. Is it purely a political process that parliament should sort because the executive should be responsible to the parliament and the parliament should hold it to account?

Dr MACKAY - I don't feel well placed to really comment on that. Hopefully, you will be able to get some information from other witnesses about the Victorian suspensions and whether they have been viewed as achieving the desired outcome or not.

Mr WILLIE - There have been significant suspensions. I read in the Clerk's submission that there was a six-month suspension of the leader of government business in 2016.

Dr MACKAY - I am aware an academic from South Australia by the name of Greg Taylor has written some journal articles about the Victorian suspensions and some of the incidents that are referred to in the Clerk's submission. Perhaps that would be a useful reference.

CHAIR - Which university?

Dr MACKAY - I can't remember which university -

CHAIR - We can look him up.

Dr MACKAY - He was at Monash University for a number of years. He recently moved to South Australia. Greg Taylor.

Mr WILLIE - It would be a question for some of the other witnesses today. Perhaps some of those suspensions haven't ended up in the courts because of the situation of Egan v Willis, which was out on the street and that was a trespass, whereas it was the parliament dealing with it.

CHAIR - You have to have a reason to get to the court.

Mr WILLIE - Yes, that is right.

Mr DEAN - An issue was raised in Sydney yesterday. When looking at the committees and the parliament, should a committee be able to exercise the power of parliament? You might not be in a position to make some comment on this. Perhaps when an issue like this arises within a committee of documents being requested and those documents being refused for whatever reason - executive privilege or whatever - the matter then should pass over to the parliament, to the House. If it is a Legislative Council committee, it could go to the Legislative Council for the House to make a determination on where it goes and whether the request is pursued. Do you have a view on that?

Dr MACKAY - My view is that the environment committee, by tabling the special report in parliament, was in some ways referring it back to parliament because they were reporting the difficulties they were facing -

Mr DEAN - In effect, they were calling on the parliament to pursue the matter for their position, is that what you are saying?

Dr MACKAY - That's formally bringing it to the attention of the parliament, but there wasn't a response, so that didn't lead to a suspension or anything like that.

Mr DEAN - Was that prior to the final report being completed?

Dr MACKAY - Yes, it was. The special report was in November 2015 and the final report was in May 2016. It was an interim procedural step. I noted that the Tasmanian committee that was having trouble getting access to the report from the minister for Health also tabled a special report. I'm not sure how common those special reports are in Tasmania but, as far as I'm aware, the Fiskville special report on documents was the first report of its kind.

Mr DEAN - They are not all that common. The situation in Tasmania with the calling for documentation that has been stalled or stopped has been infrequent. I only know of about four occasions in 15 or 16 years that it has occurred, so it's not an issue that arises in every other inquiry.

CHAIR - Going back to the comments you made about the importance of getting access to the documents for the Fiskville inquiry, for the committee to be able to make a meaningful assessment

of what had or hadn't gone wrong and what had happened, I am going back to the Victorian situation. It seems that sometimes the documents are being provided in the House saying that they were going to provide them anyway, even though they might have refused earlier, which is an interesting approach.

We know it's difficult to assess because the standing order hasn't been used. If the standing order was applied and the document or documents were delivered to Clerk, they're only available for examination by the mover of the motion. If it's a committee that wants the document, it is probably the chair of the committee or an individual member seeking access. In New South Wales, every member of the Legislative Council can view the document. They can't photograph it or copy it in any way, but they can take handwritten notes. They can only discuss it with other members of the Legislative Council, not colleagues in the Legislative Assembly. This is a very big difference. In Victoria, you could only have the member moving the motion, and I am interested in whether you think that it has benefits or disbenefits, being as you're working with the committee that needed lots of documents.

Dr MACKAY - That's right. I don't think that it would have provided the same opportunity that the environment committee ultimately had. Once they did get access to the documents, they were able to use them in public hearings and they were able to quote them in the final report. You can only access the documents if -

CHAIR - These are the documents that privilege was still claimed over. I probably didn't explain it fully. When these documents were provided to the Clerk, they were often delivered in a number of boxes. Some boxes were not privileged, so they went to a room where anyone could look at them, including the media.

There were some over which privilege was still claimed, so all the members of the Legislative Council could look at those but not everyone did. They would remain privileged unless a member appealed to the Clerk to write to the President to appoint the independent arbiter to challenge the privilege of a set of or a particular document. That means that everyone in the Legislative Council had access to the documents, but if the same process were to unfold in Victoria, only one person would get to go through boxes of documents that could be very complex in nature, trying to find the 'needle in the haystack' if there is one.

Do you think there are benefits in having more members access the document? In the Fiskville inquiry they were public, so everyone, even in the media, could get hold of them, if they requested it, I assume.

Dr MACKAY - Well, I can see the logistical challenge for one individual having to go through a large volume of very complex documents. I think if you have, as in the New South Wales situation, multiple people who can look at those documents, they might have different views as to their significance.

One person may look at the same document and decide it is insignificant and another person may see some significance in it. That was certainly the case with the documents we were going through in the secretariat. There were different views about their significance.

My other point about looking at a large volume of documents is that it was only when you could see multiple documents together and could draw connections between them, that you started to paint a picture of what had happened.

One document in isolation may not have been very informative, but in the context of multiple documents, it was.

CHAIR - You said you worked with a team in sifting through these documents, and that was helpful to have more than one set of eyes.

Dr MACKAY - The team mostly comprised law students. They spent hours and hours going through documents, and summarising them according to certain criteria. Based on that summary I would go in and look at the documents.

CHAIR - That would have been good practice and experience for them. It is difficult for anyone to assess this, because it hasn't actually been used.

Is there anything else you wanted to add, Dr Mackay, on your overall views of the process and particular focus on the Fiskville inquiry. Is there anything else you would like to add that might be helpful for us, particularly when we talk to the former clerk?

Dr MACKAY - I think we have highlighted a number of things that the clerk would be best placed to answer, but thank you for the opportunity to come and speak to you. I hope I have been able to provide some useful information.

CHAIR - It's interesting to be able to talk to you because you were involved in a pretty full-on inquiry with a lot of documents. That was one of the things we heard in New South Wales, when you get boxes and boxes of it, it is a bit difficult.

THE WITNESS WITHDREW.

HON GORDON RICH-PHILLIPS MP, MEMBER OF THE LEGISLATIVE COUNCIL, PARLIAMENT OF VICTORIA WAS CALLED.

CHAIR - Thank you, Mr Rich-Phillips, we appreciate you coming in to speak to us, particularly as you were chair of the gaming and licensing inquiry. Our term of reference is very specific, as you probably have read.

In Tasmania we do not have a sessional or standing order that provides for the use of an independent arbiter. I understand from the New South Wales approach they initially did it through a motion on the Floor, then a sessional order and then a standing order was put in place. We note that Victoria has a standing order that provides for an independent arbiter but it has not been used.

We are really interested in a couple of things from your perspective. Why hasn't it been used? What are the barriers? We understand some suspensions of members over a number of years may have contributed somewhat to that. But what do you believe is the best process in terms of where documents are requested by a committee or by a member of the House? We are focusing on the Legislative Council because we are a Legislative Council committee and we have our own Standing Orders, as you would as well. Do you think there are better or more effective ways of doing it?

It seems to work in New South Wales that when an order is made, documents are delivered to the Clerk's office. Then documents that are not privileged are put in one room where any member, or any person, can look at them. Where privilege is claimed for documents, all members of the Legislative Council can look at them. They cannot discuss them with anybody other than another member of the Legislative Council. They cannot copy them or remove them, obviously, from the Clerk's office. If they wish to dispute a claim of privilege, they then go through the Clerk, who then would then be able to appoint an independent arbiter, which has happened on a number of occasions. There was a report tabled just last week into one specific issue there.

In Victoria only one member can look. We would like your views on that and the different processes, and your role in getting Brett Walker's advice too, which is very legal.

Mr RICH-PHILLIPS - It is very legal. I guess I would say at the outset, one thing to keep in mind with this process is that it is more a political process than it is a legal and constitutional process. You would have seen that the experience in Victoria started with orders through the House in 2007 and the inquiry into gaming and licensing, which raised a whole lot of issues and had that initial Brett Walker advice.

We really got to a situation of the parliament, or the parliamentary committee, asserting that it had the authority to ask for documents and the government denying that. Frankly, that is a political call of government. Probably the best demonstration of that is to look at the fact that our Audit Act makes it very clear that the Auditor-General can call for whatever documents he wants. Under the Audit Act, any claim of privilege, any claim of cabinet-in-confidence, is overridden by the Audit Act. That has not been disputed. In fact, those provisions were changed by an amendment to the Audit Act this year, brought in by the government but those basic tenets still remain.

That is important because the Audit Act and the Auditor-General, as an officer of the parliament, is subordinate to the parliament. The parliament could not give the Auditor-General the power to obtain cabinet documents if it did not itself have that power. By the very existence of the Audit Act, which makes it clear the Auditor-General can access Cabinet documents, and that

overrides claims of executive privilege or cabinet-in-confidence, and the fact that the government has accepted that and has provided documents as the Auditor-General has required them over the years, and in the most recent interpretation of the act as well -

Mr DEAN - They would be documents that only the Auditor-General could use?

Mr RICH-PHILLIPS - Correct.

Mr DEAN - For the Auditor-General's purposes?

Mr RICH-PHILLIPS - For the Auditor-General's purposes. That is right.

Mr DEAN - Would the Auditor-General be able to disseminate publicly any of the information coming to him in that situation?

Mr RICH-PHILLIPS - To the extent that it is relevant to an inquiry the office is undertaking, yes. But if it is not relevant to an inquiry, then no. The act is quite clear about that. But the threshold issue there is the parliament has given the Auditor-General this power. That has never been disputed by the government. The mere fact that we have given it to the Auditor-General says that we ourselves as a parliament have that power.

Ms FORREST - Are you suggesting to that - because in Victoria you have given the power to the Auditor-General to access cabinet documents -

Mr RICH-PHILLIPS - Yes.

Ms FORREST - That the parliament also has the power to access cabinet documents?

Mr RICH-PHILLIPS - Absolutely.

CHAIR - Could they give that power to somebody else -

Mr RICH-PHILLIPS - The premise is we cannot give a power to the Auditor-General that the parliament itself does not already have. Importantly, that has never been disputed by government.

Mr WILLIE - What about the principles of collective responsibility of the executive? Does it not undermine that, and being able to have frank conversations and make decisions with that collective responsibility?

Mr RICH-PHILLIPS - That is an interesting point as well, but that does not take away from the capacity of the parliament to, as a right, access those documents. The Audit Act is quite clear, notwithstanding any other convention, any other rule of law, the Auditor-General can access those documents. The issue of - you talk about collective decisionmaking, one of the big questions around this issue of cabinet documents, the language is typically that we should not disclose documents that reveal the deliberations in cabinet.

The reality is, most cabinet documents - certainly ones I saw as a minister - do not reveal the deliberations of cabinet. They reveal the decisions of cabinet. They show the information that was given to cabinet to make decisions, but typically they do not record cabinet at a meeting. It will

discuss issues, it will reach a decision. More often than not, a paper that goes to cabinet will already have a recommendation on it.

Ms HOWLETT - Just like a PLP paper that is taken to cabinet. Like a parliamentary paper. Like you would have a -

CHAIR - A paper. A party in government produces documents for the parliamentary Liberal Party, the parliamentary Labor Party, when they are producing documents to go to cabinet.

Mr RICH-PHILLIPS - A minister will typically go to cabinet saying, this is what I want to do, this is my recommendation. It will be discussed. It will be agreed, or it will not be agreed. The discussions that take place in the cabinet room are not recorded. To the extent that they are the deliberations of cabinet, releasing a cabinet document is not going to disclose those, anyway. It will disclose the decision that was made. It may disclose the information that was provided to make that decision in the sense of background papers and so forth. But deliberations typically are not recorded, so they are not likely to be disclosed with cabinet documents.

Mr WILLIE - In Victoria, it is my understanding it varies from jurisdiction to jurisdiction on what minutes are taken at a cabinet level, and even federally.

Mr RICH-PHILLIPS - Certainly the minutes that we see released under the 30-year rule at the Commonwealth level contain much more detail certainly than my experience of minutes in Victoria. The issue of disclosing delivery of processes is certainly an issue, and the question there is whether the parliament would want to do that, but that is a different question as to whether the parliament has the power to get the documents in the first instance.

Mr WILLIE - So you are saying that parliament has the right to request the documents. Whether that is made public is a different matter.

Mr RICH-PHILLIPS - The approach the government I was a member of took in relation to orders for documents was typically - this is at a time when our government had a majority in the Legislative Council as well as the Assembly of 21 to 40 - but motions were moved seeking documents; the government never opposed those motions. They were passed in the House and the government, on receiving the order from the House, would consider the documents and would write back to the House providing documents. Where there were documents that government did not want to provide, it would typically write to the Clerk saying why it did not want to provide those documents and requesting that the House not insist on the production of those documents.

CHAIR - In terms of the reasons they give, because we've heard that often claims of commercial-in-confidence and sometimes public interest immunity are made but when you go to the guidelines that are in place in Victoria it does step out executive privilege. So, you would expect that if you are claiming executive privilege you would say on what basis you make that claim.

Did these reports back to the parliament contain reasons for such a claim?

Mr RICH-PHILLIPS - Typically, the ones I've seen didn't go to the issue of executive privilege, they did go to commercial in-confidence. They also went to issues of disclosure not in the public interest which, in fact, going back through documents was one I put forward as a minister in relation to certain documents. The request was that the House not insist on receiving those

documents. The political reality of the numbers of the House, the House never insisted on receiving those documents.

The approach that government took wasn't to assert that we had the right to withhold, it was to request the House not insist, for the reasons that we had set out in the letters. The approach that the subsequent government has taken is different in that it has set out, by way of a letter to the House, the basis on which it seeks to claim executive privilege and it has subsequently asserted that it doesn't need to provide the documents because it can claim executive privilege over those documents. So, it's a subtle difference in approach between the two governments, and I readily admit it fitted with the political make-up of the House to be able to do that for the previous government versus the subsequent government, which didn't have a majority in the House but in terms of acknowledging the realities of the House's power, it is a subtle difference in the approach those two governments took.

CHAIR - In Tasmania our Auditor-General's act, the Audit Act, doesn't provide that same power. The Auditor-General can have access to normal documents, but it seems that he currently doesn't have the power to compel the provision of cabinet documents. Tasmania is facing a slightly different example. It hasn't been agreed unreservedly, if you like, by government or the parliament that that's a power that the Auditor-General has so you could argue that, or could you question whether we have that power in Tasmania?

Mr RICH-PHILLIPS - I imagine you could without having a clear understanding of the Tasmanian constitutional arrangements to the extent that they derive -

CHAIR - Ours aren't in the Constitution Act; ours are in the Parliamentary Privileges Act, which is very similar to New South Wales.

Mr RICH-PHILLIPS - Right, which we don't have.

CHAIR - You've adopted the powers of the House of Commons.

Mr RICH-PHILLIPS - Correct, and we don't have our own explicit parliamentary privilege act.

CHAIR - That's right, which we do.

Mr RICH-PHILLIPS - And that may be a limiting factor for Tasmania in seeking to assert those powers for the Auditor-General, whereas as I said that here, it's never been contested that the Audit Office as a subordinate officer of the parliament has those powers. Yet at the same time, the government asserts that the House can't require the provision of those documents. So there is an inconsistency in the approach that the government has taken in dealing with the House versus the auditor.

Mr DEAN - Provided the documents or information required are related to the case in which the Auditor-General is dealing with, then that document has to be released and there are no questions and no argument that it can't be released at all.

Mr RICH-PHILLIPS - Correct. There is a provision which allows an officer to withhold a document but it is very clear that cabinet confidentiality is not a legitimate reason to withhold. It also provides an indemnity for any officer who releases a document to the Auditor-General in

response to an order from the Auditor-General. It indemnifies that officer against any subsequent action that they've breached, any suggestion they've breached commercial-in-confidence or cabinet-in-confidence et cetera, which is also an interesting point.

Through a number of our parliamentary inquiries, in particular committee inquiries, we had examples where we had sought documents from a particular officer or sought the attendance of a particular officer at a hearing and the Attorney-General would intervene and direct that officer not to appear or direct that officer not to provide the documents. That then put the particular individual in an invidious position as to whether they respond to what the committee has ordered or they accord with the direction from the Attorney-General. The Audit Act is very clear in that a person who responds to the Auditor-General's order for documents is indemnified from any further any other action that otherwise might apply.

CHAIR - Under the Audit Act, the documents that may be related to cabinet, for example, or other matters like commercially sensitive information, can they be provided to the Auditor-General in confidence or do they have to be open documents?

Mr RICH-PHILLIPS - How do you mean 'in confidence'?

CHAIR - The Auditor-General can receive it, read it and be informed by it but not able to use it directly in a report the Auditor-General may release as a result of the inquiry.

Mr RICH-PHILLIPS - That would be at the Auditor-General's discretion. The Audit Act certainly empowers the Auditor-General to use documents. To obtain documents relevant to any of his inquiries, be it performance audit, financial audit, whatever, and then to use those to the extent they're relevant to the audit, it would be to the auditor's discretion not to use them. Off the top of my mind I can't recall the Auditor-General disclosing cabinet documents or attaching them as appendices to audit reports. It hasn't been the practice.

CHAIR - Our Auditor-General can also not report or just report to the public accounts committee only. We have a variety of different -

Mr RICH-PHILLIPS - Oh, I see. No, I think all audit reports are to the parliament, effectively, and tabled as public documents.

CHAIR - We are all a bit different.

Mr DEAN - To your knowledge, has the Auditor-General ever been criticised or held to answer for release of any information obtained through a privileged document that's been released in a report or been released outside of the report?

Mr RICH-PHILLIPS - Not to my knowledge, no.

Mr DEAN - It's a good process; it's strong, it has worked well.

Mr RICH-PHILLIPS - As I say, I am not aware of the government ever balking at providing documents under that legal framework. From time to time, governments disagree with the Auditor-General's findings or conclusions, but I am not aware of the government ever refusing to provide documents to the Auditor-General or there being issues about how the Auditor-General has used documents.

CHAIR - Do you have a view as to why the standing order hasn't been used, whether it's a former government or the current government? Formerly, the House was asked not to exert the power. The current government has a different approach. For the documents not provided, why hasn't that order been implemented?

Mr RICH-PHILLIPS - That mechanism wasn't in our standing orders at the time the previous government was asking the House not to insist. That was inserted in October 2014 prior to the 2014 election where there was a change of government. It comes back to the basic politics of the way governments operate, their interests and the relationship between government and parliament.

The reality, the current government may dispute it, my colleagues may dispute it, but, for members of a government, parliament is largely a peripheral issue. Most ministers don't bring a lot of legislation through parliament. The Attorney-General does but most ministers don't. Ministers are charged with administering their departments and the acts of parliament that are assigned to them. The vast majority of their work is not related to parliament. Parliament is, in many respects, a distraction for a minister. They have to attend 30 days, 50 days, whatever. They front up to question time. Most of the rest of the time, unless they have a bill themselves, they'll be in their office working on their ministerial administration. Parliament is not front and centre for ministers unless they have a lot of legislation to put through, so it's a distraction. It's a risk to the extent that its exposure. When a committee or the Legislative Council suddenly bowls up with an audit, they want all these documents related to something in your portfolio, there's going to be a natural reluctance or resistant to expose the minister, to expose themselves or their department to that scrutiny.

CHAIR - Do you believe that governments, current and in the past, accept that the executive is answerable to the parliament and the parliament has every right to ask for that information?

Mr RICH-PHILLIPS - That is a good question because it goes to the fundamental issue we are talking about. In theory, yes, but in practice there is resistance. The reality is a government can be far more nimble in the way in which it responds to orders for documents than the House can be in responding to the government. That is something we particularly find in the Legislative Council in Victoria. It is a House of 40 members. Currently, the government is close to a majority but doesn't have a majority, it only requires two crossbench members. Opposition has 11 of 40. There are 11 crossbench members and the rest are government. The government is close to a majority. The House moves much more slowly and even in the previous parliament, where the numbers were closely balanced between government and opposition, neither had a majority. They still needed to work with the crossbenchers.

The government can move far more nimbly in dealing with documents and requests for documents and refusing those than the House can respond, which I think is part of the problem with documents orders. If it was a court, for example, that wanted discovery of documents, a judge presiding in a court can move very quickly in making orders and enforcing those orders. A House can't.

CHAIR - The House has to be sitting.

Mr RICH-PHILLIPS - The House has to be sitting, your House has to -

Mr WILLIE - The House and the current make-ups, just to clarify, because of the opposition you have to get 10 crossbenchers to vote with you.

Mr RICH-PHILLIPS - Correct, which is, frankly, unlikely when we have a full spectrum of crossbenchers, literally across the full political spectrum. It would be easier in your House, with your numbers and the large block of crossbenchers, if there is a common view across the crossbenchers.

CHAIR - Which there rarely is.

Mr RICH-PHILLIPS - Okay. Even on procedural matters such as this?

CHAIR - Maybe.

Mr RICH-PHILLIPS - That reinforces my point. Governments can move nimbly. You will typically have a subcommittee of cabinet that is deciding on response of production documents - the Attorney-General and a couple of other ministers - it can move quickly. The House can't move quickly.

CHAIR - In terms of the Tasmanian Parliament, as an outside observer familiar with the processes Victoria has, we don't have a standing order. We haven't exerted some of our powers. We haven't suspended or censured any member in our House. We haven't slowed down government business. We have tabled special reports complaining about the lack of cooperation. Acknowledging the slowness of movement of the parliament, what would be the most effective measure? Would you begin with using some of those measures, what measures would you use, or would you look at implementing a standing order to give that power and try to exert the power through that?

Mr RICH-PHILLIPS - I think the most effective course of action in the long term would be to try to get agreement across the parliament, which is with the government of the day, about an agreed mechanism for documents. I know the current government opposed the establishment of this inquiry, which incumbent governments will do. New South Wales has its experience with the Egan v Willis matter, which precipitated the current process it has. In Victoria, we tried to go down that path with our standing order, but the government has elected not to use that. It hasn't needed to use that and we have had, as on the record, a couple of suspensions on the leader of the government and the Council.

CHAIR - An unprecedented six-month suspension.

Mr RICH-PHILLIPS - I will come back to that because that actually wasn't how the matter was intended to proceed. Between 2006 and 2010, I think the leader of the government was suspended twice for the remainder of the day for non-production of documents.

The intention was to get the government to provide the documents. The reference to suspension for up to six months was only inserted in the motion quite late to avoid any suggestion of a de facto expulsion of the member. The intention was not to suspend for six months; it was to suspend the leader of the government until the government complied. It was only that concern was raised that it could be seen as a de- facto expulsion that a default of six months was inserted.

CHAIR - Unless the documents were provided earlier?

Mr RICH-PHILLIPS - Correct, unless the documents were provided earlier to the satisfaction of the House. The focus became the six months and the government - frankly, it was not the leader of the government but the government more broadly - saw that as a way to deal with the matter rather than provide the documents because there was a default of six months. That was not the intention and it was not the desire when we went down the process of moving that suspension motion. It was actually to get the documents provided as quickly as possible.

Mr WILLIE - Once that happened, did the House explore some of the softer powers, putting the go-slow on government legislation or particular ministers or -

Mr RICH-PHILLIPS - Not surprisingly that led to a breakdown in relations with the House. Yes, things like that happened and other things also happened. For example, casual vacancies in the Council in Victoria are filled by joint sittings of both Houses. A casual vacancy arose, an opposition member of that time, and the government refused to convene a joint sitting to fill the vacancy. There were things like that in response. In terms of an outcome, it was not successful in getting the outcome -

CHAIR - The outcome being the production of the documents?

Mr RICH-PHILLIPS - The outcome being the production of the documents.

Mr WILLIE - And it escalated the politics.

Mr RICH-PHILLIPS - Some members of the government were keen to find a way forward but my sense was the overall will of the government was simply to run the clock down on the six months and move on.

One of the issues there, and it may be a factor for your House as well, is the split in understanding between the two Houses. Members of the Assembly have a very different perspective to members of the Council on parliamentary process. I saw that in government; I've seen it in opposition. The government I was a member of, my lower House ministerial colleagues had a totally different view of parliament to my upper House ministerial colleagues who had to deal with committees and deal with Committee stages on bills and all the rest of it. It is a very different perspective and that can colour the way in which a government responds to things where the government majority does not necessarily appreciate the realities of the Legislative Council.

CHAIR - On that point, you said a short time ago that your advice would initially be to establish an agreed mechanism by both Houses. With that lack of appreciation of the differing roles of both Houses by lower House, and the government of the day often, is that possible?

The Legislative Council is in charge of its own business; we look after our own affairs, we have our own Standing Orders, we have our own committees. We do have some joint committees, which are standing committees, but overall, we do what we do. Our job is to scrutinise legislation, hold the government and the executive to account. Is it possible to think we can get an agreed mechanism from both Houses when clearly the lower House does not appreciate the function and role of the upper House?

Mr RICH-PHILLIPS - I am not suggesting it is easy. I think it would be the best way forward but it may be difficult to achieve. It will come down to the will of the government to do so.

CHAIR - Did you have a chance to read the government's submission to our inquiry?

Mr RICH-PHILLIPS - I have not read the government submission but I know the government did not support this inquiry.

CHAIR - You should read the submission and see what you think after that.

Mr RICH-PHILLIPS - Right, I am sure that is not unique to your government in Tasmania. It would be replicated by many governments; incumbent governments. You do have the power, or the capacity, to slow the government's legislative program but that can have other political consequences. The House can be seen as a roadblock. You do not have ministers sitting -

CHAIR - We have done in the past; we don't at the moment. We had the Treasurer there for a number of years and we have had other ministers.

Mr RICH-PHILLIPS - But at the present point you don't. What does the Government want that the Legislative Council gives it? That would be the passage of legislation. That is where your leverage is.

CHAIR - So your first suggestion would be to try to establish an agreed mechanism, acknowledging perhaps that there are challenges with that. Should that not work, or be unsuccessful, where would you go next?

Mr RICH-PHILLIPS -I think that is where the Council asserts its authority unilaterally and that could be where you could slow down the passage of legislation.

CHAIR - So soft options and powers to start with?

Mr RICH-PHILLIPS - The government needs to understand it is in its interests, and the interests of the state, to have a working mechanism. We haven't landed it here in Victoria yet, in terms of an effective one. We have a standing order but it has not been used. I am not sure I can give you the best idea.

CHAIR - In your view, is there any value even in having that standing order there as one of the options? Maybe that is plan C, or plan B+.

Mr RICH-PHILLIPS - Establishing a process where the government can see -

CHAIR - Which may be part of plan A; it could be the standing order.

Mr RICH-PHILLIPS - Where the government attends and sees what you intend to do, sends a signal, lays down a pathway. That could come before you seek to have discussions with the government, it could come after you seek to have discussion with the government. You make the standing order, then say to the government, 'This is what we intend to do', and let them come back with an alternative, if they wish, or proceed to use an order through that mechanism, through a standing order.

CHAIR - The agreed mechanism that you're suggesting would be the plan A, could be the proposal of a standing order to deal with a process similar to New South Wales and Victoria?

Mr RICH-PHILLIPS - I think that model is good, it just hasn't been used here in Victoria, notwithstanding we have it. I think if it was to be used it would be a good way forward and I think it has worked effectively in New South Wales.

CHAIR - One of the key differences in the two is that when documents are provided to the Clerk, those over which claims of privilege remains, in Victoria can only be viewed by the member who moved the motion. In New South Wales they can be viewed by all members of the Legislative Council. They can talk to each other, but they can't talk to any external party and they cannot copy them. Do you know why that one-member approach was taken and do you have a view as to whether that is a preferable approach over all members having access?

Mr RICH-PHILLIPS - I don't recall why that difference was made between the two models. Frankly, I think it is an issue of semantics in terms of getting an outcome. If you could get either model into your standing orders as a way forward I think that would be a good thing. Whether it is one member; obviously the whole House would be better to facilitate discussion about whether that claim for privilege should be allowed. If the compromise was the member moving the motion only, that would be the starting point.

CHAIR - I think there are concerns about leaking. In New South Wales, of all the uses they have had, there has not been one leak.

Mr DEAN - In saying that, where it has happened, it hasn't been all the members viewing those documents. As the Clerk said, in most cases it has only been one or two members at any time who have viewed the documents.

Mr WILLIE - Or none in some cases.

Mr DEAN - Yes, it is not as though they have had the whole 45 members coming and looking at the documents.

Mr RICH-PHILLIPS - I think that is likely to be the case wherever such a mechanism is used.

CHAIR - The capacity to have more than just the mover view them in your view would be the preferable model?

Mr RICH-PHILLIPS - I think it would be, but I wouldn't let that be something on which the model stood or fell.

Mr DEAN - The mover in some instances, when it comes from committees, can be the chair. It can be something that's been raised within the committee by another member but the chair takes the matter on. For the chair just to be able to review the document may be the best process.

Mr RICH-PHILLIPS - Our practice would typically be for the chair to move a motion in the House if the committee's been frustrated earlier, and under that model we would then put it in the hands of the chair.

Ms WEBB - Your first recommendation would be to try to get that agreement across parliament for a mechanism to be put in place, such as here in Victoria or New South Wales. Do

you see any disbenefit in proceeding with developing and putting in place a mechanism in the absence of agreement with the government of the day?

Mr RICH-PHILLIPS - Not really, it flags the House's intent to continue to pursue the issue. It may not be as effective as if you could get agreement. In terms of flagging it's your intention to pursue this, it's probably a good signal to send. Whether that is something that then prompts discussion with the government -

Ms WEBB - You wouldn't think that it might drive greater resistance to engaging with that mechanism once it's there?

Mr RICH-PHILLIPS - I wouldn't have expected that. I think there would be resistance but I don't know that putting something in standing orders would make that a greater resistance.

Mr WILLIE - We established earlier that deliberations of cabinet are not really minuted in the Victorian jurisdiction. Yesterday, we heard a variety of views in New South Wales, including the honourable Michael Egan, who was involved in the court cases. He had a very strong view that there is an unintended consequence with the New South Wales system in that public servants may be restrained in the way they interact with government. Do you have any thoughts on that?

Mr RICH-PHILLIPS - Yes, I gave some thought to that before today's discussion. I think back to my time in government, the things that governments did and the discussions we had in cabinet subcommittees and so forth. Getting back to my earlier point that parliament wasn't front of mind, I have my doubts that the unlikely prospect of a document being subject to a document order, of all the tens of thousands, hundreds, millions of documents that are created across the public sector, is going to influence a public servant in the creation of a document. I don't see that as being front of mind to such an extent that it's going to -

Mr WILLIE - Does that apply to high-risk situations?

Mr RICH-PHILLIPS - Those documents will be subject to access by the Auditor -General. They could be subject to claims in court in any case, so -

Mr WILLIE - I'm talking about documents deliberately not being created, but perhaps a particular risk to government being managed orally, through conversation, that sort of unintended consequence -

Mr RICH-PHILLIPS - I think that risk is unlikely. Parliament is not front of mind for government and I don't think those sorts of risks are front of mind for government when it's going about its business. The risk of parliament wanting a document is no greater than the Auditor-General wanting a document. If that is going to happen, it would happen anyway with the Auditor-General having capacity to access documents. I don't see creating a mechanism for your Council to get documents is going to suddenly cause that to occur.

Mr WILLIE - It would only take one scenario in which advice from, say, a public servant is made public and it's very high profile. That could have an unintended consequence and you have to look at the jurisdiction, too. Tasmania is particularly small. The public service is particularly small and the opportunities to move and change positions and all of those sorts of things are very limited, so perhaps they would be restrained if there was a culture of fear.

Mr RICH-PHILLIPS - That could be a concern in the Tasmanian jurisdiction. I can't comment on that but, if that is the case, it would be the case now with what your Auditor-General can do and what can be obtained in disclosure through courts. A public servant who is going to be concerned that parliament may obtain a document is, presumably, also going to be concerned that a court may obtain a document that they are creating and not create it or create it differently. Certainly, from a Victorian perspective, I don't see that as a substantial -

Mr WILLIE - I don't have a view, I am testing some of the thoughts we had yesterday.

Mr RICH-PHILLIPS - I can understand, Michael Egan being strong on his -

Mr WILLIE - He did say that the upper House should be abolished and he served in it for some time.

CHAIR - I did challenge him on that point. One of the frequent assertions we have received in correspondence with ministers seeking documents is this impact on the capacity of public servants to give frank and fearless advice and not be constrained in doing so. We heard some views expressed in New South Wales similar to yours but also the differing view that, yes, it would constrain.

One view was put that the document is prepared by the public servant for a purpose. It is then provided to the minister or to cabinet. Usually, when it goes to cabinet, the responsible minister signs off on it. It becomes the minister's document rather than the public servant's document. The advice feeds in, the minister will make a determination or recommendation that will then go to cabinet, which may or may adopted, amended or rejected. One view was expressed, like your view, that they didn't think it would have much impact on the ability to do that. In your experience of that process as a minister and the knowledge that the Auditor-General - even though they couldn't get cabinet documents at the time when you were a minister -

Mr RICH-PHILLIPS - No, they could.

CHAIR - They could. Did you find any evidence of a concern about that?

Mr RICH-PHILLIPS - No, I didn't.

CHAIR - The Auditor-General reports to parliament.

Mr RICH-PHILLIPS - Correct.

CHAIR - Notionally, it comes via the Auditor-General's office to parliament.

Mr RICH-PHILLIPS - As I said, there's not been any history of the Auditor-General attaching reams of cabinet document to his reports.

CHAIR - They would certainly inform his reports.

Mr RICH-PHILLIPS - They are certainly available to him; definitely, unequivocally available to him. That has been the case for a long time, certainly back to the Audit Act in 1994. Interestingly, it has been updated, as I said, just this year but those provisions remain. That was not front of mind at all. I think the prospect of that deterring the provision of that -

CHAIR - Frank and fearless -

Mr RICH-PHILLIPS - is pretty limited.

CHAIR - It is a very commonly used excuse.

Mr RICH-PHILLIPS - It is, because it comes back to the fundamental issue that governments don't want to disclose documents, of course they don't. Coming back to what I said before about the role of parliament in government, you go there for 50 days and it is a distraction from your real job as a minister, in reality. You can ask questions in question time, a lot of which have come out of the newspapers and a lot of which do not go to the key issues you're dealing with as a minister.

You might have 10 issues on the boil that are quite difficult, quite problematic, but the things you are asked in parliament are not going to be those 10 issues, they will be what was in the paper last week. When you are asked to provide the documents in relation to the 10 things you are working on that are problematic, of course there is going to be a reluctance to do that, whether it is cabinet-in-confidence or commercial-in-confidence.

CHAIR - That is often when committee inquiries delve down. The question in the parliament is usually what is in the media because that is an easy target, if you like.

Mr RICH-PHILLIPS - Yes.

CHAIR - Committee inquiries are much broader-focused and often look at the perceived or real underlying failure of a particular department, whether it be health, education, police et cetera. That is where the resistance seems to be.

Mr RICH-PHILLIPS - Absolutely. That is understandable. Ministers in government know the problems that are going on there. They're not going to want to air their dirty linen. Understandably, from a minister's point of view or a government's point of view, that is seen as a political exercise. Your House is a little different, perhaps, having a majority of crossbench MPs. Typically, it is going to be an opposition that's going to want access to documents and they are going to want access to documents to embarrass the government. We might talk about the good work that parliamentary committees do and so forth; in reality an opposition is going to want to get documents that are going to damage the government. The government is going to want to withhold documents it thinks might be damaging to it.

CHAIR - The risk of embarrassment is not a reason for withholding documents.

Mr RICH-PHILLIPS - Correct, it's not. That doesn't take away from the parliament's ability to require the presentation of documents. It does inform the motivations that government and opposition have in seeking and seeking not to provide documents. You need to keep that front of mind in whatever mechanism you seek to put in place that there are those political realities.

Mr DEAN - That was an issue coming out of yesterday's discussions, and that is the real reason as to why these documents are being requested - whether they are simply being requested for the purposes of causing embarrassment to a government or whether the facts or truth of what might be in those documents is pertinent to the inquiry on the report that is being done. That was an issue.

Mr RICH-PHILLIPS - In my view, that is not a reason not to provide documents. From time to time, we have had responses in the House over here that you only want the documents because you want to cause trouble, or words to that effect, and we are not going to give them to you. My view is that is not in any way a legitimate reason not to provide the documents.

Mr WILLIE - You still need approval of the House too. You have to outline your purpose for the request to the House and then get a majority in the House.

Mr RICH-PHILLIPS - Yes, that ebbs and flows, how easy that is. Our approach in government when we had a majority of 21 was not to oppose any documents motions. They all went through on the voices without division and then we dealt with them on a case-by-case basis. That has pretty much been the practice since, even with the current government which doesn't have a majority. It hasn't sought to oppose those motions. They have let the motions go through and then dealt with them against their claim of executive privilege as they have come through on a case-by-case basis.

CHAIR - Just going back to that point. The current government has dealt with them, as your government did, on a case-by-case basis. They have not provided some documents claiming a level of privilege. Has there been any motions put to order the production of those documents in question under that standing order?

Mr RICH-PHILLIPS - Absolutely. Basically, every document order we have made since 2014 has been under the standing order. I think most of them would have referred, in accordance with standing order whatever, the reality is though that the government has chosen not to comply with the element of the standing order.

CHAIR - Comply fully, maybe?

Mr RICH-PHILLIPS - Comply fully with the element that requires documents to be given to the Clerk for assessment by an arbiter. The order has certainly been made under that standing order.

CHAIR - So then do the standing orders not provide an opportunity to resubmit or put another notice of motion on?

Mr RICH-PHILLIPS - Yes, and typically we have done that. If the response comes back that we are withholding these documents, or here are some and not the others, the House typically will pass another motion restating the order, asserting the House's privilege on those documents and setting a new date for their presentation. That is actually what led to the suspension of the leader of the government in the last parliament. We had made a number of initial orders for documents which had been partially complied with. We then restated those same orders, a second time; I think it was on the third occasion that we said that because you haven't complied, we have made these orders twice, you have an opportunity to comply by this date - if you don't comply by that date you will then be suspended. The footnote was for up to six months.

Those were restated initially and then restated twice before that action was taken against the leader of the government. They are all nominally done in the name of the standing order with reference to the standing order.

Ms WEBB - Is there a date in that standing order?

Mr RICH-PHILLIPS - We set the date in the motion of the House.

CHAIR - In order for the arbiter to be appointed, you can't appoint an arbiter unless you get the documents?

Mr RICH-PHILLIPS - Correct and we've never got to that stage. We have either received the documents the government wishes to provide or we have received a letter which claims privilege and not actually received the documents.

The then Attorney-General set out the basis for the government's claim of executive privilege back in 2015 and all subsequent claims refer back to that letter, which was tabled in the House. I don't know if you've seen that; I've a copy if you haven't.

CHAIR - Which letter was that?

Mr RICH-PHILLIPS - The letter from the Attorney-General, Mark Fuller.

CHAIR - I don't think I have a copy of that.

Mr RICH-PHILLIPS - I can hand that over to you, for the committee.

CHAIR - Are you happy to leave that with us?

Mr RICH-PHILLIPS - Yes. That sets out, I think it was 2015 one of the first orders for documents that were made in the last parliament and the new government then set out the basis on which it claims privilege and it is now, and every subsequent claim of executive privilege, has referred back to that letter as the basis for executive privilege claims.

CHAIR - It is a stock standard response now?

Mr RICH-PHILLIPS - There's a pattern. The first response typically is a letter from the Attorney-General on behalf of the government saying, 'Your deadline for the production of documents has not allowed us enough time and therefore we need more time and we will come back to you as soon as possible', and then it's followed up by, 'Here are some documents and in accordance with the letter of February 2015 we claim executive privilege over the other documents'.

CHAIR - Looking at the letter, it says -

> In considering the claim of executive privilege, the Government must assess whether the release of the information in question will be prejudicial to the public interest. In doing so, the Government considers whether disclosure would reveal, directly or indirectly, the deliberative process of Cabinet.

And it goes through these dot points, which I assume pretty much are taken out of the guidelines.

Mr RICH-PHILLIPS - They are incredibly broad. In effect, the government can claim executive privilege on anything it wants to claim executive privilege on under those criteria.

CHAIR - How can this be resolved? It's a matter for parliament to resolve. Obviously, New South Wales ended up in court -

Mr RICH-PHILLIPS - It did.

CHAIR - That confirmed the powers of the House through charges of trespass and other matters.

Mr RICH-PHILLIPS - To be frank, we thought there may have been a prospect of Victoria ending up in court as well on those occasions when the leader of the government was suspended, which was the path that took New South Wales to court. That didn't happen and it hasn't happened and it's possibly not a good either for the court to be determining the powers of parliament, but it is fundamentally a political question.

Ms WEBB - To clarify, what we've seen play out here is the effect of putting a mechanism in place without the agreement of the government of the day. Therefore, it stalls at a certain point part way through that mechanism and never gives full effect to the mechanism, until such time as the government is no longer willing to withstand the political consequences of stalling at that point. Correct me if I'm wrong, but so far, the government has been prepared to withstand the political risk and consequence of stalling at that midpoint through the process and bear the consequences of it - six months of suspension. They haven't been pushed beyond what they're willing to politically withstand, therefore the full effect of the mechanism has never been able to come into play.

Mr RICH-PHILLIPS - That's correct. The point I would make there though is when the mechanism was adopted, it was adopted unanimously. There was no opposition. When standing order 11 was inserted in our standing orders in October 2014, there was acceptance across the House. When it came to being used, the scenario at that stage, the now government was the opposition and that has subsequently changed. But you're right, the government has accepted and it came down to that point, at the six-month suspension which, as I said, wasn't the intent but when the government realised, 'We can run the clock down on this, yes it's six months, yes that comes at a cost, it's painful but' -

CHAIR - It is only going to be effective when the numbers aren't there so if you lose votes on the Floor because your member is are out of the House, that's when the real power would -

Mr RICH-PHILLIPS - That's where we had the unfortunate situation of having casual vacancy that the government then refused to fill, which restored the numbers in the House. You are right. The government has been willing to withstand the political cost and that included suspending the leader of the government for six months, which the government sort of made noise about getting agreement but then the broader government, that's the upper House - and this comes with the issue I made earlier about the views of the lower House and members of the lower House about this strange upper House thing - they were simply happy to run the clock down and move on.

CHAIR - That may be of benefit in a small jurisdiction like Tasmania if the leader or whoever in our House was suspended for a period, it would make every newspaper and continue for quite some time. The political heat may be more, I don't know.

Mr RICH-PHILLIPS - That could well be true. This is not something that has excited the *Herald Sun*. This process and even the suspension of the leader of the government got a couple of column inches on page 5 and that was it. It's not an issue that's generated a lot of media interest.

Mr WILLIE - The difference between a Victorian and, say, a Tasmanian standoff between an upper House and the government of the day is that you have all-in, all-out elections in your upper House and it can be potentially be resolved electorally if that is so wished. In Tasmania, there's no way to dissolve the upper House. Do you have any thoughts on that? It could end in a potential constitutional crisis. That's probably excessive language.

Mr RICH-PHILLIPS - As I said earlier, if the government is not willing to participate it really comes down to what leverage the Legislative Council has to encourage participation.

Ms HOWLETT - It is certainly not in the best interest of the state to slow down legislation.

CHAIR - Well, it's arguable.

Ms WEBB - It depends how you determine the best interests of the state and weigh -

Mr RICH-PHILLIPS - That's one of the political questions. Ultimately, that could be at the legal question that the people determine. If the Legislative Council frustrates the government's legislative program, the people may have a view about that and say it at an election.

Mr WILLIE - There has been a history of the Legislative Council not passing a state government's budget, the lower House had to go to an election and the upper House stayed put.

Mr RICH-PHILLIPS - What's interesting is that capacity was removed from our Legislative Council in 2006 with the changes that were made.

Mr WILLIE - Do you think that should be something we should consider if we are looking at these sorts of provisions and ways to resolve deadlocks?

Mr RICH-PHILLIPS - It would be a political consideration and you have to weigh it. Are the documents you're seeking of such gravity that it would justify delaying a budget or delaying legislation? That is the consideration you would collectively need to make. Only you could judge the appetite of the Tasmanian people for such a step, but I would think it would have to be a fairly critical issue to take steps like that.

Mr DEAN - You said that cabinet deliberations would rarely form part of a report coming out of cabinet. It would simply be the decision taken and so on. One of the reasons this inquiry was set up was because of a situation in which a joint House committee - the Public Accounts Committee - called for a document. The document was provided and it was heavily redacted. Important information was taken out of that document and there was a whole process in relation to that. We summonsed a document and the government took its position of not providing it. It related to a letter written by one minister to another minister.

It was claimed by the government that they were cabinet deliberations, related to cabinet discussion. Later, it came under public interest immunity and involvement for the protection of the information in that document. Are you saying that could not form any part of cabinet deliberations? What would your position be?

Mr RICH-PHILLIPS - Without knowing the contents of the letter, it may well have reported disagreement between ministers and back and forth between ministers on a decision that related to

a cabinet matter. Without seeing it, I must say I am always cautious when you see shifting sands as to the reasons something is withheld. If it was initially withheld on one ground and suddenly it is withheld on another, that is a bit of a flag.

CHAIR - There were three processes. The initial one was being assessed under RTI and they were trying to apply the same approach to parliament. That shows a level of lack of understanding.

Mr RICH-PHILLIPS - We've seen a bit of that in Victoria, too, with the Freedom of Information Act.

Mr WILLIE - I don't think it was necessarily a lack of understanding.

Mr DEAN - I think you're right.

WEBB - A wilful lack of understanding.

Mr RICH-PHILLIPS - When the argument shifts or the grounds for withholding shift, that is a bit of a flag. Certainly, formal cabinet minutes in Victoria, cabinet submissions, don't record deliberations. They record recommendations and decisions.

Mr DEAN - It seems to me that it is not quite understood what cabinet deliberations are. You start to look at it to see whether there should be some defining of these terms, what constitutes what. It is the same with public interest immunity, it is such a wide-open area as to definition. It's not clear.

Mr RICH-PHILLIPS - It comes back to that basic political point I made earlier. There is incentive for opposition to want documents, there is incentive for governments not to provide documents for the same counter-reason. We saw, with the inquiry that one of our joint committees did into the Country Fire Authority base in Fiskville, some bizarre arguments made for withholding documents, they didn't exist and then they did exist, the shifting sands as to why those documents weren't provided. What was interesting with that is that those claims were made under the jurisdiction of a new government in relation to matters that preceded governments back 30 years. Those documents weren't damaging to the current administration. We had this bizarre circumstance of claiming they didn't exist, then claiming a whole range of exemptions over them. We have seen documents ordered by the House that have been refused, but we already have copies that have been released under FOI, which is just outrageous.

CHAIR - Tasmania being a small jurisdiction places additional challenges in having high-level legal advice on these things at times. It may not be a wilful ignorance, it may simply be an ignorance sometimes. I don't know. It is important that those advising have a good understanding of the powers of the parliament as a whole and each House within that. You said you have had some similar challenges with this sort of carrying on in terms of shifting sands of reasons for withholding documents. Do you think there is a problem that needs to be addressed as well?

Mr RICH-PHILLIPS - That's an interesting point. I don't think the parliament is well understood in the public sector - what it does, what its powers are. Whether improved knowledge and education in the public sector would help, it probably would, but that is something the government would need to be responsible for facilitating through the public sector. There is no doubt that there is not a lot of deep understanding of the parliament in the community or in the public sector and I am sure that doesn't help. Quite often with documents, the public sector will

fall back to what they do know, which is the FOI act, which is quite irrelevant to an order for documents from the parliament.

CHAIR - Just one final question, if I might. If an arbiter were to be appointed, do you have a particular view about who that person should be, what skills they would need? In Tasmania, we are a small jurisdiction, maybe we can borrow yours. But what are the skill sets required for someone to act as an arbiter?

Mr RICH-PHILLIPS - I think the most important skill - if you can call it a skill - is credibility. Our standing orders talk about a retired Supreme Court judge or similar. It really needs to be someone who is credible. I think in New South Wales they used Sir Laurence Street for a long time.

CHAIR - They are using Keith Mason at the moment.

Mr RICH-PHILLIPS - Keith Mason now. Obviously, both very credible. I think that is the key. Possibly with Tasmania getting someone out of jurisdiction, because it is small. A retired Supreme Court judge from Victoria or New South Wales may be a suitably removed party. But credibility is key there.

CHAIR - Thank you very much for your time with us, and your frankness. We appreciate it.

Mr RICH-PHILLIPS - Thank you. I hope it has been helpful.

CHAIR - It has been helpful being around the traps for a while and actually seeing some of these things play out in your jurisdiction here. It has been really helpful.

Mr RICH-PHILLIPS - Hopefully you can find a workable solution that we have not found in Victoria.

Mr WILLIE - They were laughing in New South Wales yesterday when we went into the House and they said that while we were there.

CHAIR - We will just suspend for a couple of minutes while members take a brief break.

THE WITNESS WITHDREW.

Mr WAYNE TUNNECLIFFE, FORMER CLERK OF THE LEGISLATIVE COUNCIL (1999-2014), PARLIAMENT OF VICTORIA, WAS EXAMINED**.**

CHAIR - Thank you, Mr Tunnecliffe, if you would like to take a seat. Are you enjoying your retirement?

Mr TUNNECLIFFE - Loving it. I can recommend it. I have been doing plenty of work in the Fiji parliament for the last four years, since their return to the Commonwealth and democracy.

CHAIR - Does your parliament have a sister relationship with them?

Mr TUNNECLIFFE - We twin with them. We do Fiji, Tuvalu and Nauru. Fiji, of course, there was a fair bit of work to be done after 2014. I arrived there for my first trip the day after the 2014 election. We did induction with the new members. I have done a lot of work with the Speaker since then. It has been quite interesting. Personally, it has been a good transition to retirement.

Mr DEAN - Our Auditor-General has been doing a lot of work with them as well, quite a lot of work.

CHAIR - You are probably familiar with committee processes. It is being recorded on *Hansard* for our purposes and to use in our report, which will be released in due course. The transcript will also be published on our committee website once it is available. Just keep that in mind.

In terms of what we have been up to, we have had some hearings with members, people in Tasmania, but also yesterday in New South Wales, talking to the New South Wales people about the application of their standing order that provides the arbitration process for contested documents, if you like.

A similar standing order in this parliament here that has not been used. It was interesting, a lot of people talked about the culture of the parliament, as to maybe why it did not work. We are really interested in your insights over your years as Clerk in dealing with these matters, providing advice. Also, what you think, if Tasmania were to start from fresh, not having a standing order and not having any formal process for resolution for disputes in this area, what would be the best approach. Having never exercised our power in terms of censuring a member, suspending a member or slowing down government business, for example.

Mr TUNNECLIFFE - Thank you for the invitation to appear before the committee. A lot happened in relation to the production of documents during my time as Clerk. I have had to have a bit of a refresher. The guys at work have done so. I am very happy to talk to the committee about it.

The committee would be aware that it was 2007 when the Legislative Council in Victoria first adopted a sessional order. I think it is significant to note that the Sessional Order came about because the government of the time did not have a majority in the Legislative Council. I think, from memory it was 19 government to 21 non-government. This was the first parliament under the reconstituted format of the Legislative Council.

CHAIR - Mr Rich-Phillips said it was introduced with the support of both parties.

Mr TUNNECLIFFE - It was. I think it is fair to say that probably if the government had a majority, there probably would not have been the move to do it with the enthusiasm that the non-government parties showed. He was right - it was introduced unanimously, but there has been a great deal of contention and dispute ever since. I know that the committee is principally looking at the best means to resolve disputes. Victoria, as the committee is aware, has provision for an independent arbiter, but the position in 2019 is pretty much exactly the same as it was back in 2007 or thereabouts, when I was Clerk.

I do not know to what extent you want me to give background on the position in Victoria. I gather Mr Rich-Phillips has covered a bit of that. I know Andrew Young has in his submission. I am very happy to if you would like. As I said, do you want a bit of background?

Mr DEAN - Yes, I would like it.

CHAIR - I think it is helpful to have it from different perspectives too, particularly in New South Wales, for example, the standing order, or sessional order originally now standing order, effectively came out of a series of motions. The motions were put that did what is notionally happening now under the standing orders. I am interested in how Victoria established that.

Mr TUNNECLIFFE - The move to introduce a sessional order for the production of documents was in 2007. At the time, the then leader of the opposition who moved the motion argued that the power already existed in the constitution. That is a view I share. As I think the committee is aware, in Victoria, the powers of the House of Commons as at 21 July 1855, in relation to the privilege, powers and immunities of the Houses, do apply. There is no explicit constitutional provision other than that.

In relation to select committees and standing committees, they have had the power to call for persons, papers and documents for as long as I can remember. There was certainly a view that the Council already had the power to require documents, and that the move to introduce a sessional order was the first step in formalising this process. As is often the case with something new, it is introduced firstly as a sessional order and the privileges committee will have a look at it down the track and often, ultimately, the sessional order then becomes a standing order. That, as you know, is certainly the case at the moment.

This was the first formalisation of the rules underpinning the production of documents in the Council and it remained for the rest of that parliament, that is the Fifty-sixth Parliament. In the Fifty-seventh Parliament there were no standing or sessional orders for the production of documents, none at all. Nevertheless, the Council agreed to 38 orders for documents, based on the inherent right of the Council under section 19 of the Constitution Act I referred to earlier, to produce documents. At the end of the Fifty-seventh Parliament, the leader of the government moved for the introduction of the new chapter in the standing orders for production of documents, which was agreed to, and that is still in the standing orders to this day.

Back in 2007, when the sessional order was first introduced, we had a look at models for resolving disputes because it is inevitable with things of this nature that government and non-government parties will not necessarily take the same view. The New South Wales model, which provided for the independent arbiter, was particularly attractive because, as I heard you say before, Sir Laurence Street had been the arbiter. He was previously the chief justice of New South Wales and he had been the independent arbiter for quite some time. He had been particularly busy because the House up there was ordering the production of documents quite regularly. He also had

a great deal of - and I will use Mr Rich-Phillips' word - credibility, apart from the fact that he was independent, he was impartial, he was a former chief justice with a significant knowledge of the constitution and a pretty good knowledge of parliamentary practice. With him in charge, the system worked very well. That was the advice we had.

We consulted with the Clerk and others in the New South Wales Legislative Council and they certainly recommended that approach. No-one else had a simpler model, not even the Senate. Since then, the Senate may have tried to introduce an independent arbiter or may even have one -

CHAIR - No, their committee has looked at it twice. The first report suggested that they would review it again in 12 months. The second said they believed it was not necessary at that stage. I am paraphrasing what I recall of their reports.

Mr TUNNECLIFFE - In New South Wales, that system had worked for some time and, as far as I know, was accepted by all sides of the House as being a good system for the resolution of issues. The president of the time and I spoke to a retired Supreme Court judge who was very interested in the job, if I could put it that way -

CHAIR - He hasn't been very busy, then.

Mr TUNNECLIFFE - It never went anywhere because we could not get agreement that it was the way to go. There was a view by some people in the House that this whole notion of providing documents that had not been provided when requested and this whole notion of providing documents to the Clerk and then any member of the Council could examine them would jeopardise confidentiality. Therefore, you would get documents with a whole range of alleged impediments to making them available, such as public interest immunity, commercial-in-confidence and all the rest, could somehow, maybe even inadvertently, become public documents.

The process just never went anywhere. Subsequent to that, it hasn't stopped the Council from calling for documents and there has been, as the committee would be aware, a whole range of responses from successive governments. Some governments have refused to provide documents on the grounds of cabinet-in-confidence, others on the grounds of commercial-in-confidence, public interest immunity and the like. At the moment, and for some time now, we've really got a standoff between one side and the other. Despite the fact that there have been four suspensions of leaders of the government in the Legislative Council, three in my time to John Lenders -

CHAIR - They were very brief.

Mr TUNNECLIFFE - They were very brief - and one in the last parliament to Gavin Jennings, which was six months, the issue still has not really been resolved. We still have the government refusing to provide documents on grounds A, B, C, D. You have the House continuing to call for the documents to reassert its rights and privileges, to condemn the leader of the government for not providing them, sometimes to judge the leader of the government guilty of contempt. We still do not have a resolution of the issue.

I think it is fair to say that the order for the production of documents has certainly been partially successful because there is at least a mechanism for calling for documents. A number of documents were being provided during my time as Clerk and are still being provided. If it comes to the crunch, there is still no effective process in Victoria for resolving disputes. To that extent, I do not know how useful we can be, except in my view, the independent arbiter is still potentially the best way of

resolving the issue. It has been accepted for a long time in New South Wales, but the culture in Victoria seems to be quite different.

I know in the Legislative Council in New South Wales, back in the early 1900s almost running through, I think, until the 1960s or 1970s, it was quite routine for the House to call for documents. The practice was then not used for a while, then, of course, in later years, it has been used regularly. That was not the case in Victoria. Whilst the House had the power to require documents to be tabled, most of the documents that were tabled were relatively routine. Ministers can be called upon to table documents at any time by way of a return to order but there were no actual orders for the executive to produce the document. I think you are aware of the process followed. The House passes a resolution, the Clerk conveys that to the Secretary of the Department of Premier and Cabinet; there's a deadline and then the government will respond. Quite often, the government will seek more time. It will claim executive privilege; sometimes it will say that the volume of documents is too great to justify the amount of time. I know that's happened. It's also happened in New South Wales. So we've had a variety of responses. Now quite often what's happened in the Legislative Council here is that there would then be a follow-up motion. Generally if the government said they required more time, that was accepted. If the time elapsed and the documents hadn't been produced, there might be a follow-up motion which might require the documents by a particular date; if that failed to have the documents produced, there was often yet another motion which might seek to condemn the leader of the government - and it's generally the leader of the government as the leader of the government in the House that has carriage of this issue. Whether the documents are necessarily his or hers, he or she tends to have carriage of it.

CHAIR - Being the representative of all ministers in that House.

Mr TUNNECLIFFE - Yes. That tends to be the way it's worked. Then of course as the ultimate step, as the committee is aware, John Lenders was suspended three times for relatively short periods for failing to produce documents and was adjudged guilty of contempt, and then, of course, in the last parliament, Gavin Jennings was suspended for six months.

CHAIR - So when a member here is adjudged guilty of contempt - we can refer that matter to our Privileges Committee - is there a similar committee in the Victorian parliament?

Mr TUNNECLIFFE - Yes, there is a privileges committee -

CHAIR - Has that been used?

Mr TUNNECLIFFE - Not in relation to these matters.

CHAIR - Do you think that is an avenue that should be pursued?

Mr TUNNECLIFFE -Well, the problem with that is that it's still likely that the issue will be resolved on a political basis. I don't try to detract from the members of the privileges committee, but potentially they are still members of the House; in some cases members are required to support their parties - that's just a fact of life. Probably in your House, which I gather is still predominantly independent, an inquiry by the Privileges Committee might potentially work, whereas in Victoria, I think probably it has more potential not to be as effective, and that's probably why we thought that the -

CHAIR - Well, the leader sets on the privileges committee too.

Mr TUNNECLIFFE - Yes, they do; it's a fairly high-powered committee. So we never even considered referring these matters to the Privileges Committee and preferred to do it by resolution of the House, depending on what the outcome was.

If you talk about possible sanctions, we got advice from Bret Walker SC - I gather the committee has -

CHAIR - We've got a copy of that.

Mr TUNNECLIFFE - He, of course, was very supportive of the Council's right to require documents based on the doctrine of reasonable necessity. That, of course, has been upheld in Egan v Willis and Egan v Chadwick. I don't think there's any doubt about it. If the House reasonably believes that a document should be provided, it has the right to call for the document. How the government then responds is a matter for the government. If the government claims that the document is cabinet-in-confidence, that is probably I think the only reasonable ground that the House would agree that the document should not be provided. I've said cabinet-in-confidence; I probably need to be a little more specific - if it is a document that discloses the deliberation of cabinet, there is general agreement and acceptance that documents of that nature should not be provided.

CHAIR - So advice to cabinet doesn't fit into that?

Mr TUNNECLIFFE - Not in my opinion it doesn't; that was certainly Bret Walker's view. I agree with Bret Walker's view. As Clerk, I would readily accept that documents that divulge the inner workings of cabinet - I suppose a good example would be cabinet minutes; I don't know to what extent cabinet minutes -

CHAIR - It appears they vary from jurisdiction to jurisdiction -

Mr TUNNECLIFFE - That wouldn't surprise me. I think one of the difficulties has always been -

CHAIR - and government to government too, possibly.

Mr TUNNECLIFFE - Yes, I think that's probably right. Apart from Chief Justice Spigelman's attempt to define what might be a cabinet document, there hasn't really been any great success in doing so. I think Spigelman wasn't far off the mark, actually. Bret Walker certainly had that view - that a document which divulges the inner workings or deliberations of cabinet is justifiably prevented from being produced.

CHAIR - On that basis, in my view it's impossible to claim that a bureaucrat's advice to the minister to take to cabinet would reveal the deliberations anyway because the deliberations haven’t happened at the time that the document's produced.

Mr TUNNECLIFFE - I think that you have to examine each issue on its merits, but in a general sense, that would be my view - that advice to cabinet from a bureaucrat is not exempt and should be provided. That would be my view.

Ms HOWLETT - I think you've answered it, but out of curiosity, what would happen if you did suspend the leader for documents not being produced and the government only had one member in that House who was the leader?

CHAIR - Just to explain that question - there are 14 other members in the House, just pick one.

Ms HOWLETT - So the Government would then choose someone else to be leader?

CHAIR - The Liberal Party has had to appoint independents in the past to act as their leader, yes.

Mr DEAN - Just getting back to the position at hand, that would throw the public servant into the whole mix - I think Josh has previously covered this - and could cause concern with the public service that its officers were being thrown amongst the wolves, as it were, and were the ones being attacked or their decisions being pulled to pieces or what have you because of the documentation they provide to cabinet. What is your view on that?

Mr TUNNECLIFFE - I can understand that; that gets back to what I said before - that I think you need to examine each case on its merits, and that's where the independent arbiter can play, I think, a very significant role. I still believe that apart from a document, as I said, that divulges the inner workings or deliberations of cabinet is justifiably not required to be presented. I think any other document which comes before cabinet can potentially be produced. I think there is an argument for examining each case on its merits. I accept what you've said.

Mr DEAN - I put that position yesterday and today in relation to a number of these issues - the concern that is hurled -

Mr WILLIE - Just on that way of thinking, so in that scenario where advice has been provided to cabinet, potentially the arbiter or government could claim, not executive privilege on that document, but public interest, so there are other mechanisms -

Mr TUNNECLIFFE - Yes.

Mr WILLIE - to protect that piece of advice if it's not in the public interest to release it.

Mr TUNNECLIFFE - Well, Bret Walker's view is that public interest immunity as a right is not a ground for refusing to produce documents, but he took the view - and that certainly was my view; still is, for what it's worth - that where there is a dispute, you've got to have two things: first, an effective system for resolving the dispute, and I believe that the independent arbiter is probably the best system; but, second, I think you need to have an effective system for maintaining confidentiality. The way that you could achieve that is that the document is produced, but it only made available to the mover of the motion, for example, rather than all members of the House, as is the case in New South Wales. I understand that these issues can be a bit tricky; they are not completely black and white by any means.

Mr DEAN - This is what I raised yesterday and today - that there's no clear process or definition around what is cabinet deliberation. I suppose it could be argued that a document from a public servant informing cabinet deliberation could be seen as part of cabinet deliberation. It could be argued that way. I don't know whether Bret Walker or anybody else has considered that sort of

position, but that position could be taken by a government in withholding information upon those conditions. Do you have a view on that?

Mr TUNNECLIFFE - Well, I agree that a government could claim that, but on the strict test of divulging cabinet deliberations, in my opinion advice from a public servant would not meet that test and therefore could potentially be a document that could be tabled. But I get back to what I said a minute ago, you have to have a process for resolving disputes. It's not as black and white as we'd all like it to be, I think.

Mr DEAN - Just to take it one step further, if in the cabinet deliberations, they have gone through that document that's been provided to them by that public servant and that has informed them of the direction they are going to take, I would have thought that could be considered to be part of government deliberation in that situation, whereas properly taken into account to - it's a grey area.

Mr TUNNECLIFFE - It's a very grey area. I agree with that; I accept what you've said. It gets back to the problem we find ourselves in, in that there is no specific definition of what is a cabinet document. That's where I believe you need to have an effective mechanism for resolving the disputes and to say again, in Victoria, we don't have that at the moment. New South Wales has probably got the best model; it may not be perfect - the committee's been to Sydney so you've gathered information about it and I guess you'll come to a view as to whether that could be implemented in Tasmania or not.

Mr WILLIE - We've heard evidence that there's not even a definition of cabinet.

Mr TUNNECLIFFE - That's interesting.

Mr WILLIE - There are provisions within our Constitution on how ministers are appointed - this is from a professor at the University of Tasmania - but there's no clear definition of what a cabinet is.

Mr TUNNECLIFFE - Well, I suppose the reason may well be that in some jurisdictions cabinet does not consist of all the ministers. I think in the Commonwealth that may well be right - they have inner and outer. I'm just trying to think of a possible reason. I know in Victoria -

CHAIR - There's also the kitchen cabinet federally.

Mr TUNNECLIFFE - Yes.

Mr WILLIE - We had a scenario in Tasmania there were some issues around whether the Leader of Government Business in the upper House was in cabinet or not, and covered by cabinet.

Mr TUNNECLIFFE - I know in Victoria there's a provision in the constitution in relation to the appointment of ministers, which I think from memory is under the heading 'Executive', but I don't think in Victoria the word 'cabinet' would actually appear in the constitution; I don't think it does. I stand to be corrected.

Mr WILLIE - It's hard to have a definition of what a cabinet document is when you don't know what a cabinet is.

Mr TUNNECLIFFE - I guess the general notion is that cabinet is the ministers and they meet every week or fortnight or whatever as a cabinet to determine policy and so forth. I think that would be how I would understand it.

CHAIR - General understanding.

Mr TUNNECLIFFE - Yes.

CHAIR - Can I take you back to the process where the sessional - and now standing - order in Victoria was established? One of the key differences is the number of people who can actually view the documents once released to the Clerk, where privilege is claimed. You mentioned trying to maintain issues of confidentiality, that it may be assisted if you only have the mover of the motion, but in New South Wales all members of the Legislative Council can view the documents. They can't discuss them with anybody other than Legislative Council members and they can't photograph or reproduce them in any way. They haven't had a leak, which is pretty impressive. I guess if there were leaks, that would shoot down the whole process pretty promptly. I am interested in why Victoria went the path of one member, the mover of the motion. I've read through some of Keith Mason's reports where his approach is to consult with both parties. For example, if a member makes a claim that something should be sent to the arbiter for consideration for the claim of privilege, where there is only the mover of the motion, they may see things differently - there may be boxes of very technical documents, which makes it almost impossible for one person to achieve, whereas if several members can read documents, they could perhaps find information that should be made public or can't substantiate a claim of privilege.

I'm really interested in the differences - why you went down the path of one.

Mr TUNNECLIFFE - I think the best way to describe it is that it was the cautious approach. We were certainly, as I said earlier, attracted to the New South Wales model. As you say, there'd been no leaks. I think there'd been no leaks because there was acceptance across both sides of the House that this was a good system. In Victoria we were introducing something that was quite new. It was certainly suggested by some people that confidentiality could be compromised and that almost, I suppose, a compromise position that might be acceptable to all sides of the House was that you limit the disclosure to the mover of the motion rather than everybody.

I understand your point: if the documents are technical, and quite often they are - I've seen some orders for production of documents that I'm sure would be over the heads of many members simply because they are very technical. I understand the point; I think it is a reasonable one, but -

CHAIR - New South Wales put in place measures, I assume, to try to deal with it. I don't know whether we got this on the record; we may need to clarify this in writing with them. We went to the office of Mr Blunt, the Clerk, and met with him there Mr Blunt talked about their register; any member who comes to view the documents has to complete the register and has to identify which documents they're looking at by number. If document 235, for example, became public and only one member had looked at it, you'd obviously have a pretty clear idea of where that came from. There a certain checks and balances. Do you think if there were a robust mechanism around that, that more members having access would reduce that concern about losing the confidentiality of some of the documents?

Mr TUNNECLIFFE - Yes, I do. I've actually been in Sydney in David Blunt's office when they've had a whole stack of documents -

Mr DEAN - Still there.

Mr TUNNECLIFFE - when I was there, they were in the Clerk's conference room.

CHAIR - That's where they still are.

Mr TUNNECLIFFE - Yes, they still are.

CHAIR - Except for the ones that have been moved to the Archives Office.

Mr TUNNECLIFFE - They are locked away; as you say, there is a register and so forth, and there have been no leaks. I think you could conclude that is not a bad system.

Ms WEBB - Moving on from the issue around confidentially but still looking at the aspect of a single person - the mover of the motion - being able to look as opposed to everyone, and that being relevant not just at the time of considering whether to dispute the claim of privilege, but then again being relevant when, say, the dispute has gone to the arbiter and the arbiter reports back. In fact the whole House has to vote on whether to go with the recommendation of the arbiter or not. So all members of the House have to, in a sense, then make their own deliberation in voting, but only one of them has had access to the document in the first instance. The rest must rely on what is reported to them in the arbiter's report. I note that the Clerk of the House here in his submission states that he is concerned that Victorian model, if the arbiter process were ever activated, may not be as effective as the New South Wales' one because of this constraint too on the members of the House being to fully engage with their role because they have no access to information beyond what's in the arbiter's report to assess to vote with it or not. Could you comment on the robustness of the constraint that it put on it?

Mr TUNNECLIFFE - I think I agree with Andrew Young's comment; I think if you accept the principle that members should be as informed as possible in debating an issue, it is a potential shortcoming in the system if all you have in front of you is the independent arbiter's report. I tend to agree with that. We are speaking a bit hypothetically because we haven't seen it work. We have never even thought about whether the arbiter should have guidelines as to what they can put in the report. I don't know what they do in New South Wales. I think they have pretty much left it to the arbiter. Of course all members can see - any member who is interested - the document anyway. I accept that is a possible problem.

It also raises the other issue - I know I am digressing - as to whether or not the independent arbiter's report should be final.

CHAIR - Which was what the last point was in the submission.

Mr TUNNECLIFFE - There are two sides to that argument. If you take the view that it has to be a matter for the House to determine, then you don't accept the view that the determination of a matter of this nature should be given to an outside body. On the other hand, if you have appointed an independent arbiter on the basis that they are independent, skilled, expert, there is an argument for saying, 'Their report should be final', and I have to say I don't really have a firm view as to which is the better way to go there.

Mr DEAN - A couple of points from that. One is, as David Blunt told us yesterday, that I don't think it has ever been that the whole Legislative Council has gone in and viewed a document. In some cases there has been none, and other cases just the one person. So the confidentiality thing is not as real as what it might seem.

The point I want to make, it would be interesting - and perhaps you would know - as to whether or not any member of parliament reporting on a matter where they have viewed a document in that situation, that raising an issue in the parliament has been of concern to any other members. I am not quite sure how much they are able to refer to a privileged document. It's from memory - they are not able to record it, photograph it, copy it, or whatever - so the statements they make in relation to the information they have reviewed would be from memory, from what they had been able to retain.

It would be interesting to know whether any issues have arisen within the parliament when those matters have been spoken of, or within report - where they might have been included in a report.

Mr TUNNECLIFFE - They certainly weren't in my time as clerk, and I don't believe there has been any since, in relation to production of documents. There have been some issues over the years in relation to the divulging of committee reports, which were privileged at the time, and they have been dealt with -

Mr DEAN - We have had a similar -

Mr TUNNECLIFFE - I think most parliaments deal with them from time to time. That is potentially contempt of the House, as you know. But to my knowledge, not in relation to the production of documents order. No.

Mr WILLIE - I talked about this with the previous witness. Tasmania is unique because the upper House cannot be dissolved, and we are talking about deadlocks here. I am thinking of a possible scenario. For example, let's say there is an incoming government that has been resoundingly elected. There is a Legislative Council committee that is looking into an area. They are requiring the production of documents. That government is refusing to do that, and there is a whole lot of things happening - legislation is stalled; that sort of stuff.

There is potential for a constitutional crisis. My question is: should this committee be looking at that power in the context of the production of documents, or is it just a matter for the Legislative Council to show restraint?

Mr TUNNECLIFFE - When you say a constitutional crisis -

Mr WILLIE - If you have a government that has been recently elected and has the will of the people -

Mr TUNNECLIFFE - I wouldn't describe that as a constitutional crisis. I actually think it is probably a political issue rather than anything. The government and/or the opposition probably have to wear it and stand the heat.

As to whether the committee should - I don't quite know what you could do about it apart from having a system whereby - one, if you accept that the House has the power to call for documents; two, you have an independent arbiter to look at disputed claims; and three, you have some sort of process to resolve it in the end, which I think is probably is still a matter for the House. I am not sure what else you could do. I don't know whether I'm missing your point.

Mr WILLIE - Could it be a finding of the committee that there is that overarching power that needs to be a consideration in the deliberations of the Council?

CHAIR - Or are we muddying the waters in that?

Mr WILLIE - Or do you see them completely unrelated?

Mr TUNNECLIFFE - I probably do. The whole Westminster system is based on the notion and principle that the executive is accountable to parliament. Provided that the Houses have the capacity to exercise their power of scrutiny, and they can do that by a range of things - questions, debates and so forth - the power to call for documents is a part of that armoury. The High Court has upheld the fact that the Legislative Council in New South Wales had the power to do what it thought was reasonably necessary to fulfil its scrutiny function.

These are the principles under which our system operates. That's the theory on the one hand. On the other hand you have the political side of things. The parliament consists predominately of members of parliament from political parties - predominately - and political considerations will often be paramount and determine what happens in parliament. Whether you can effectively reconcile the two, I guess has proven over the years to be rather difficult sometimes.

CHAIR - That's a query I had right from the beginning - I wanted to ask you your view. You made the statement that the executive is accountable to the parliament. It seems that there is a lack of understanding of that out there in public sector land. Do you have a view on that, particularly with the role of the Legislative Council?

We talked to Hon. Michael Egan yesterday -

Mr TUNNELCLIFFE - Oh you spoke to him. Oh good. Well done.

CHAIR - We did; he has a particular view about the Legislative Council even though he sat in it for a number of years. It seems that there's perhaps a lack of understanding about the role and the power of the Legislative Council as a House of parliament. Sometimes the advice we seem to get in our parliament via the minister regarding a call for documents or information or whatever it is, seems to be influenced by a lack of understanding of that accountability of the executive to the parliament. Do you have a comment on that?

Mr TUNNELCLIFFE - Yes. In my latter days as Clerk, the parliament here started running seminars for public servants, which were designed to try to educate the public servants and to help them in their roles assisting ministers and so forth. I was given the job of talking to them about privilege and their responsibilities to the parliament because it was something that I had a great deal of interest in. Of course, in Victoria we'd had the issue of ministerial advisers and the capacity of committees to summons them and the government at the time refusing to allow them to appear.

My message to the public service was pretty simple: if you don't appear before a committee or even the House, if you are required or summoned, or you don't provide material or information, you can potentially be in contempt of the House - it can be treated as a breach of privilege and you can be dealt with accordingly.

Now, the public service will say,' Well, we are only doing what the minister wants'. It's not quite as simple as that in my opinion. Under the Westminster system of responsible government, you are required to be accountable to the parliament and the parliament has wide powers to deal with you if you're not. That's why we have privileges committees, to deal with potential issues of contempt.

I used to take great delight in stressing the point. I used to have a little bit of fun, but the message was pretty clear that everybody has an obligation. Parliament is the grand inquest of the nation. I know that's high-sounding but it's true. Parliament has the capacity to conduct inquiries either by way of committees or the House itself. It has the capacity to call for information and to call for individuals, and if you do not comply, you can potentially be in contempt. That's not a very difficult notion. There will always be grey areas, but this is the principle that underpins our system.

I think it fair to say the problem we now have with the public service - I don't say this in a derogatory sense at all, and I can go back to the days in the late 1960s when I started in the public service - is that it is more politicised than it used to be. The notion of permanent, impartial, independent people providing impartial, independent advice to the government has changed markedly. You now have, for example, people on contracts and short-term contracts, you've got people who are appointed -

Mr WILLIE - Ex-political staffers.

Mr TUNNECLIFFE - Yes, all that sort of thing. The notion has changed a lot. With that goes this lack of understanding, recognition or acknowledgement that parliament has significantly wide powers. That's our system. I used to try to explain it to public servants and quite often they'd say, 'Well, I didn't realise that'.

CHAIR - Maybe there's a need for that in our parliament?

Mr TUNNECLIFFE - I don't know whether we are still doing them or not. Are we, Richard?

Mr WILLIS - I don't think so.

Mr TUNNECLIFFE - I think it was very useful.

CHAIR - We tend to, when we call for documents, go through the relevant minister to produce it. There has been a reluctance to go to the secretary of Health or the secretary of Education, for example. We can summons the secretary. We have summonsed ministers from the other place in the past, and one did appear before a joint committee but not with the document. He partially complied with this summons. He claimed he had because he turned up. I am interested in whether it would be preferable to summons the secretary of a department to produce the document, rather than the minister?

Mr TUNNECLIFFE - On balance, I would probably require the minister to table the document because, as a member of the House, he or she is responsible to the House, but the secretary

of the department, for want of a better word, is an adviser to the minister. I think I would favour it being the requirement of the minister.

CHAIR - When the minister or the Attorney-General's adviser was summonsed and the minister refused to allow his or her adviser to appear, was that the first time that sort of request had been made?

Mr TUNNECLIFFE - In Victoria, I think it was. This was the Windsor Hotel issue. It became public that an adviser to the minister for planning at the time had proposed a sham system of: sorry, I am just trying to get my memory.

Mr WILLIS - I ought to talk to this.

CHAIR - You can come over. We just need to get your name.

Mr WILLIS - Richard Willis, Assistant Clerk Procedure in the Council. At that time - 2009 just before the 2010 election - there was a standing committee into public land, into public administration, which looked into the Windsor development. The planning minister's staff apparently put out some sham consultation process that they were going to do this consultation process even though they knew what the outcome was going to be. The media adviser emailed it to the minister and minister's staff, and mistakenly emailed it to an ABC reporter.

Of course it then all blew up at that point. The only thing I found ironic in that whole process was that the witness we tried to summons refused to come, based on the advice of the Attorney-General - 'You are not meant to have given evidence to this committee' - and then ultimately the House referred the matter to the Ombudsman to investigate.

Ironically, the Ombudsman actually took evidence behind closed doors from this person and, a bit like Mr Rich-Phillips indicated in earlier evidence to the committee, the Ombudsman was created by parliament but seemed to have almost, in that instance, greater power than the parliament itself.

Mr TUNNECLIFFE - The problem we saw at the time was if you took the Attorney-General's position that ministerial advisers were in a class all of their own, apart from members of either House, ministerial advisers could not be compelled to be summonsed to give evidence to a committee. That simply is not the case.

It was known sort of colloquially as the 'McMullan principle', named after former Senator Bob McMullan, who I think subsequently has even disowned it. There is no basis in parliamentary law for what the Attorney-General claimed at the time. None at all.

CHAIR - That his adviser was not, or could not, appear?

Mr TUNNECLIFFE - The reason the ministerial adviser was summonsed was because it was her document.

CHAIR - Not the minister's document?

Mr TUNNECLIFFE - Not the minister's document. That's right.

CHAIR - That's like *Utopia.*

Mr TUNNECLIFFE - In the end it wasn't resolved, of course, because we then had the dissolution prior to the 2010 election. It is an important principle. Interestingly, I was in Canberra at a conference marking the fortieth anniversary of Senate committees, and I attended the session on privilege at which senators Robert Ray and George Brandis were on the panel. I asked both of them the same question. I raised the issue of ministerial advisers, and I said, 'Will you both now agree that the McMullan principle is in fact a myth and that ministerial advisers should be compelled to appear before parliamentary committees if their appearance is deemed to be reasonably necessary?' Of course, not surprisingly both of them did not agree with me because one is in government, one is the alternative government. I don't want to sound too cynical. That's just the way it is.

CHAIR - Thank you. This is something we have struggled with a couple of times in various committees that I've sat on. Certainly, it is helpful to have that insight and explanation because it will inform the hard work of this committee. It's about getting documents from where they come from and if they are in the custody of a person other than the minister, that may be appropriate.

Mr TUNNECLIFFE - I don't think you can get away from the fact that the minister as a member of the House is responsible to the House. That underpins our system.

CHAIR - That's right. Are there any final comments you would like to add? We are just a little bit over time.

Mr TUNNECLIFFE - No, but thank you for the opportunity to talk to the committee. I think it is fair to summarise Victoria as being partially along the track, but we have a mechanism in place. If governments choose not to abide by it, we don't yet have an effective way to resolve the dispute, but I think the independent arbiter is still probably the best way to go in the absence of any other system that I am aware of.

CHAIR - If Tasmania can achieve it and overtake you, we will be pleased to let you know. Thank you very much for your time and your expertise because the wealth of knowledge in the historical perspective is really helpful for the committee. I appreciate your time, both of you.

THE WITNESS WITHDREW.