THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON THE PRODUCTION OF DOCUMENTS MET IN COMMITTEE ROOM 1, PARLIAMENT HOUSE, HOBART, ON FRIDAY 1 NOVEMBER 2019.

Mr TOM DUNCAN, CLERK, AND **Mr DAVID SKINNER**, DIRECTOR OF THE OFFICE OF THE CLERK, LEGISLATIVE ASSEMBLY OF THE ACT, WERE CALLED AND EXAMINED VIA TELECONFERENCE

CHAIR (Ms Forrest) - Thank you for joining us. All the members of the committee are here and it is a public hearing. I believe there are media in the room that will be listening in, and it is streaming as well, so your friends can watch it on our website.

Mr DUNCAN - Can I introduce David Skinner, who is Director of the Office of the Clerk, who is also with me here in the office?

Mr SKINNER - Hello, Chair.

CHAIR - Thank you. Members of our committee are Josh Willie, Jane Howlett, Meg Webb and Ivan Dean. We appreciate your taking the time to speak to us. We have read and digested your submission and appreciate you taking the time to explain it more fully. As you are probably aware from discussions elsewhere, Tom, we have looked at the New South Wales and Victorian models, we are aware of the Western Australian model and we are talking to the Western Australians later regarding a different model they have as well to encourage the production of documents by the government to parliamentary committees.

If you could talk us through your submission and emphasise any particular points; we are particularly interested in how your scheme works and its effectiveness, why and how it was established, and if you were starting again, whether you would do it the same say - if you would do it basically the same way, what tweaks it might need to make it more effective if it is not as effective as it could be.

Mr DUNCAN - Thank you for those questions. I will start by saying that our scheme has been operating since February 2009. The way it came about was that after the election of the seventh Assembly there was a parliamentary agreement between the Labor Party and the ACT Greens. In that parliamentary agreement one of the items was a new standing order to resolve disputes for orders of papers through the provision of an independent arbiter to determine if a claim of executive privilege is legitimate, such as that provided for in the NSW upper House. The Assembly was very much looking at the NSW upper House model. Through this parliamentary agreement, the government agreed that it would progress this in cooperation with the Greens, so that motion was moved, I think, on 12 February 2009 to amend the Standing Orders and that is how it came about.

We didn't adopt the full NSW model in that once the documents are provided by the Executive, it goes straight to the independent legal arbiter and members can't access the documents, whereas in the system that operates in NSW, they actually get to see the documents. Here in the ACT, they don't see the documents unless the independent legal arbiter doesn't uphold the claim of privilege made by the Executive.

There was some discussion at the outset when we adopted the standing order as to whether we should adopt the NSW model in full. We have a version of the NSW model but not quite as transparent and open in terms of members being able to see the documents that have been provided.

CHAIR - In the course of its operation, Tom, do you have an idea or an actual number of requests for documents that have been proceeded with?

Mr DUNCAN - We have had it in operation for about 10 years. We've only had four requests for documents in that time. I think there was some nervousness that the legislature would run amok and be calling for documents once a week or once a month, but it's certainly the case that they've used it very sparingly. Of the four requests, the Executive claimed privilege on all four documents that were requested. The independent legal arbiter upheld the claim of privilege on the first one, didn't uphold the claim on the second one, upheld the claim of privilege on the third one and mostly upheld the claim on the fourth one. That were three different independent legal arbiters - two from New South Wales and we used one from the ACT in terms of the origin of the judges who were used.

CHAIR - I will come back to the decisions. Who were the legal arbiters - not necessarily their names but their positions? What qualifications do they have and how did you choose them?

Mr DUNCAN - The first two were a retired chief justice of the New South Wales Supreme Court and a retired Supreme Court judge of New Wales. Both had been fairly regularly used by the New South Wales upper House and so we tapped into their experience. They were well versed in arbitrating these sorts of decisions. The third one we used is a recently retired ACT Supreme Court justice; he'd only retired about six months beforehand. I don't know what his experience was in arbitration, but he is certainly a very experienced Supreme Court judge in the ACT.

CHAIR - In terms of when the decisions were made on those four different orders, the second where it was not upheld and the fourth where it was mostly upheld but not completely, what happens to the documents after the decision is made that the claim of privilege is not upheld?

Mr DUNCAN - In the case where the claim of executive privilege wasn't upheld, the Executive was required to provide a copy of the document to me and then I indicated to members that the claim had not been upheld. I think two members of the Assembly requested access to the document and they were given access to the document. One was a shadow minister involved in the portfolio and the other was a crossbench member.

In the case of the most recent document, 90 or 95 per cent of the claim of privilege was upheld but about 5 per cent of the document was released. I think only a couple of members requested access to that document and were given access to it.

CHAIR - At that point, did the document effectively become a public document?

Mr DUNCAN - It could be, but it wasn't. It was made available to the members concerned. They could certainly use the document but it wasn't tabled. I might have to come back to you on that; I don't think either of those documents was tabled in the Assembly, but certainly if members wanted to make use of them, they were able to do so under the provisions of the standing order.

CHAIR - So they are not limited in referring to the document or quoting from the document?

Mr DUNCAN - No. They were free to use it because the claim of privilege had not been upheld.

CHAIR - I know that in New South Wales, from when we looked at the room where these papers are stored, they can run to hundreds of documents. In this case, in the ACT, was it more like a single document or a small number of documents in each order or was it hundreds in boxes?

Mr DUNCAN - No. We haven't faced the same situation as New South Wales. All these requested documents had maybe two or three volumes of documents but not huge amounts. Although if you are getting copies for each member, that can run into a lot of photocopying and things like that. I think in the last case, the document was provided electronically to me and I was able to email it to the two members who asked for it.

CHAIR - Just to confirm, does your standing order require that the members request it following a decision of the arbiter, or is it more a proactive thing such as you let all members of the Assembly know the outcome of the arbiter's decision and then make it known that they can request it, and do they need to request it to get a copy or is it automatic?

Mr DUNCAN - Once the decision comes in, I would certainly let members know they can provide it. I'll go back and correct my earlier evidence. Standing order paragraph (l) says that if the independent legal arbiter does not uphold the claim of privilege, the Clerk will table the document or documents that are being subject to a claim of privilege. In the event the Assembly is not sitting, and I think all these occasions happened when we weren't sitting, the Clerk is authorised to provide the document or documents to any member upon request, so I would inform members that the document is available and they would come back to me and say, 'Can I please get a copy of it?'

CHAIR - It does go on to say in that standing order though that the document or documents do not attract absolute privilege until tabled by the Clerk at the next sitting. It assumes there that you do need to table them when the Assembly next sits.

Mr DUNCAN - Yes, that's correct.

CHAIR - Then they're privileged. If it were received out of session and the members requested it, got a copy of it and had a look, it wouldn't actually attract privilege until it's tabled formally in the Assembly?

Mr DUNCAN - That's correct, yes.

CHAIR - Interesting point.

Mr DEAN - Are we able to ask questions?

CHAIR - Yes. I just want to go through the whole process first and then come to questions if that's all right.

Mr DEAN - I thought you had been asking a number of questions already.

CHAIR - Yes, we are going through the process.

One other question, unless there is something else, Tom, that you wanted to add: what is the cost associated with this process to date?

Mr DUNCAN - Luckily, we've only had the four independent legal arbiters so that's one thing. Broadly speaking, the cost is between $6000 and $10 000 each time. We enter into an arrangement with these retired judges who have a daily or an hourly rate. Luckily for us, because the documents, haven't been voluminous, as I've indicated, it hasn't taken them a long time to go through the documents and then make their assessments. It hasn't been too costly an exercise for us to undertake since the implementation of this standing order.

CHAIR - Is there anything else you want to add before I go to further questions on the process?

Mr DUNCAN - No, I am happy to take questions.

Mr DEAN - How long does the process take from the time the request is made to the time it comes back and privilege is claimed and it then goes to the arbiter? Is there a limit on the time within which the arbiter has to report back or is that open-ended?

Mr DUNCAN - Under the standing order, paragraph (f) says where the Assembly requires a document or documents to be returned, either the document or documents requested or a claim of privilege must be given to the Clerk within 14 calendar days of the date of the order of the Assembly.

The order of the Assembly is made, it has to be provided to the Clerk and then, if it is disputed, the independent legal arbiter -

Mr DEAN - And that is what I am getting to now: is there a time on the arbiter coming back or is that open-ended?

Mr DUNCAN - Yes. The Clerk is authorised to provide the disputed document or documents to an independent legal arbiter as soon as practicable for evaluation and report within 10 calendar days. The independent legal arbiter has 10 calendar days to conduct his evaluation and report back to me and then I'll forward that to the Speaker.

Mr DEAN - If there are concerns with the report or the position provided by the arbiter, is there a position where you can go back to the arbiter for clarification or for a consideration of reviewing the decision?

Mr DUNCAN - No, I think it's pretty much with the Assembly - that is my reading of the Standing Orders - the Assembly has delegated the power to the independent legal arbiter and that's the final determination. David and I were saying yesterday that you could suspend the Standing Orders and still have the Assembly call for the documents in a separate process and not go through your independent legal arbiter process because you have suspended the Standing Orders, but that would be effectively be throwing out the established process as set under the Standing Orders.

In all the cases we have had, the decision has been accepted both by the Executive and the Assembly.

Mr DEAN - I think you made it clear that there have been four in the 10 years of its operation so it is not used often.

Ms WEBB - When we were in New South Wales, we heard about the practice of the arbiter and how it has developed to involve some more interactions with parties on both sides of a dispute when making the determination. So beyond what was initially provided in the claim of privilege, the legal arbiter might have further interactions with the government and the government agency and further interactions with the member potentially wanting a document and then feed that into the decision. Has that happened in any of the four instances in the ACT where the determination process by the arbiters has involved more interactions and discussions?

Mr DUNCAN - It certainly has. I can say the first one was moved the day we adopted the standing order. We adopted the standing order and then the Assembly called for a document straight away. No submissions were made by other members of the Executive; they simply provided me with the document and it went off to the required Supreme Court judge.

I think in the second, third and fourth occasions, submissions were made by both sides to the argument. That is covered under standing order 213(h) which says that the Clerk is also authorised to provide the independent legal arbiter and to amend the submissions from any member in relation to the claim of privilege.

I think the second one started off where the government, when it provided the document, also provided a submission saying why the document should not be made public. I do not think the member who disputed the claim was able, in the short time available, to get her own submission.

I think in the third and fourth claims, both the Executive and the member who was disputing the claim were able to provide a submission arguing their respective cases about whether the document should be made public or whether the claim of privilege should be maintained.

There is provision for them to do that, but, again, there is a time constraint - the arbiter has to do it within 10 calendar days.

Ms WEBB - To clarify, under standing order 213(h), submissions made by a member are made available to other members: is that what that means?

Mr DUNCAN - Correct. The Government's position was made to the member disputing the claim and the member disputing the claim was also made to the -

I think it led to a further submission. When they read the other party's submission, they said, 'Hang on, you haven't emphasised this'. As I recall, there were a couple of submissions on one of the arbitration claims.

Ms WEBB - If there were submissions from the Government elaborating further in that interaction with the legal arbiter, would they be made available too, to the members?

Mr DUNCAN - Yes, absolutely, for both sides. Both sides are able to make submissions and they are made available to the other members.

CHAIR - On the same point but from the earlier process, Tom. Standing order 213(c) says -

> A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document or documents, a description …

I assume this is just in order to request the document. Are there reasons given? If you go down to (e,) it says -

> Where a document or documents is considered by the Chief Minister to be privileged, a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege.

The reasons for the claim have been working? I imagine that is where the further submissions could come under (a), as you have just described - the reasons for privilege are given?

Mr DUNCAN - Yes, that is the case. As I indicated, I think it is fair to say that all the documents requested have either been a single volume of documents or maybe a couple of volumes.

From the New South Wales' experience, I know that there have been pages and pages of a schedule showing all the documents and stuff, the reason for a room to store and house all those documents.

We have been fortunate in that the Assembly has only requested only a couple of documents that haven't been large. There certainly was a schedule showing the creation of documents but the schedule was like one line because it was only one document. That hasn't been an issue for us thus far, but I can see that if hundreds of documents are being claimed privilege for, it would be a lot of work for the person preparing the documents and a lot of work for the people examining it.

Mr WILLIE - Being a unicameral parliament, the ACT system effectively relies on the goodwill of the Executive, doesn't it? Generally in bicameral parliaments, the Executive doesn't have control of the upper House and governments have different attitudes towards releasing information. There is potential here for a future government to refuse to participate in the arbitration process.

Mr DUNCAN - I concede that's the point. Can I point out that we're in our ninth Assembly since we were created in 1989? We've only had one majority government. That was the sixth Assembly. Every other government has been a minority government, although the current Opposition would say that the combination of the Greens and the Labor Party having a parliamentary agreement is not the usual form of a minority government. But when it's all said and done, the governing party only holds 12 seats out of 25 so it relies on the Greens to support them on confidence and supply.

The first thing that has to happen, though, is the Assembly must order the documents to be tabled. So if the Government opposes it and then refuses to abide by the Standing Orders, I guess we're in a situation where the Executive is in contempt of the Assembly There is a whole range of things you can do in relation to contempt, which I'm sure you, as members, would be well aware of. It relies on the cooperation of the Executive, I think

Mr SKINNER - The difference between the model that's been adopted here and the one that's used in New South Wales is that in some respects the procedure that's adopted here gives the Executive two bites at the cherry. If the order is passed, it then has another process by which it can end up denying access to members of the document, whereas in the New South Wales model, when an order is passed, members will nonetheless get access to the documents. The question is really one about whether they are more publicly available.

In some respects our standing order is a limitation on the powers of inquiry that our parliament would normally enjoy. As I said, I think the Executive could, in essence, get two goes at trying to prevent production, first through the political process and then, second, through a procedural process.

Mr WILLIE - In New South Wales it appears that there's compliance with the arbitration process because there are further powers to the upper House in a political sense. I am interested in this as it seems to work in the ACT without that threat.

Mr DUNCAN - I guess what I was suggesting is that in some respects, once the arbitration has occurred, the Assembly is then accepting that as a final arbitrated outcome the document will not see the light of day, even to members, whereas in New South Wales, irrespective of what the arbitrator has to say, it is my understanding that members will still have access to the document and the power of the Council is untrammelled. The power of the Council to exercise its inquiry powers remains untouched. Whereas with our standing order we have a constraint. We would regard it as operating in a way that reduces the prerogatives of the legislature in a way that is in the interests of trying to have some sense of comity between the Executive and the legislature, but it does strengthen the hand of the Executive in some respects. It also keeps these sorts of things out of courts because, when it is all said and done, you don't want legislatures or executives going off to the courts to try to get documents. This is a handy mechanism that has a judicial flair to it, but, as David said, it is a balance between the Executive's needs and the legislature's needs.

Mr WILLIE - What happens to the documents after the arbitration process? Are they returned to the government agency or do they remain in possession of the parliament?

Mr DUNCAN - I liaise only with the Chief Minister's Directorate. I return it to the Chief Minister's Directorate. They provide me with the document and, if the claim is upheld, I will return the document straight back to the person who gave it to me in a sealed envelope. I have never viewed any of the documents provided to me except for the ones that have been released.

CHAIR - You have covered some of this in your answer to Mr Willie. At the outset, you said you had a view along the lines that the process in the ACT is slightly less transparent in that the members who move the order for production don't see the document unless that claim of privilege is not upheld. In NSW, the process enables all members of the Legislative Council to view the document and dispute the claim. It is only disputed claims that go to the arbiter.

In Victoria, where it is not working, the model is that only the member who moves the motion to order the production can view the document. Here, no members get to see it and you don't look at it until it comes back, if the claim is not upheld. Assuming they all worked, and that Victoria's doesn't seem to be working for a range of reasons, are there benefits or disbenefits for each of those three different approaches? If you had to recommend one, what one would you suggest would be the best?

Mr DUNCAN - I work for the legislature. I am all for the legislature's powers and members' ability to be able to scrutinise the executive and I think the NSW model provides the best model. Used responsibly, it provides the best model. I am somewhat amazed that of all these orders in the NSW Legislative Council, that all members, as I understand it, get to see the documents, yet none has ever been leaked. It is a trusting process on behalf of the Executive and the legislature but it seems to work quite well.

We have not gone that far. There was some discussion at the outset as to whether we should adopt the NSW model in its entirety but it was slightly tweaked. You will see, if you go back to the debates, there were some amendments moved to give us the NSW model but those amendments were defeated. We ended up with the model we have that has worked, but if you are after a process that allows members the ability to fully scrutinise the Executive and be able to see all the documents that the Executive has to fulfil that role, the NSW model is the one to go for.

CHAIR - Has there been any discussion that you are aware of in the ACT legislature about revisiting the question? As it hasn't been overused or abused, they might look at introducing that process so that all members would have access to the document. It is different. You have a unicameral parliament. It is a bicameral parliament in NSW and it is just the Legislative Council. Is there any mood to revisit that?

Mr DUNCAN - There was. When the Standing Orders were originally put in, there was some talk in that debate that they would review the operation of the Standing Orders within a year or a couple of years. In fact, we do a major review of our Standing Orders within [inaudible] resolutions once in an Assembly, and we just did one last year. I must say that, surprisingly, no-one has suggested a change to model more closely the New South Wales version. They seem quite content. We write to all members asking for submissions on the review of Standing Orders and we write to former members, and no-one has come forward to suggest that standing order should be looked at to make it more in line with the New South Wales model.

Ms WEBB - You pointed out that the process put in place has technically constrained the power of the legislature from what it might have been otherwise. You mentioned that this was prompted by a parliamentary agreement between the ALP and the Greens. Had there been other circumstances leading into introducing this process, had there been a history of some disputes or some issues in production of documents, some unresolved or problematic exchanges about production of documents that may have prompted this - knowing that in New South Wales it's prompted by court cases, in Victoria it's prompted by disputes and we're having this inquiry because we've had some interesting examples of difference of opinions about production of documents - did you have any of that leading in?

Mr DUNCAN - You are right. There certainly was a document. In the previous Assembly, the Sixth Assembly, which was the only majority Assembly, the government commissioned what they called a functional review. They got some outside person to review the whole of the functions of government. As a consequence of that, some big changes were made. The government closed 23 schools in the ACT which, even though we're small, 23 schools is a lot of schools to close, and all based on this functional review.

The Greens and the opposition were very keen to see this functional review and, in the Sixth Assembly, they called for that document to be made available to them and the Executive refused to provide it. When the Seventh Assembly was elected and the Greens held the balance of power, one of the first things they did as part of their procedural reforms was that they wanted a standing order for the production of documents. As I indicated before in my evidence, they adopted that standing order and the very next item of business was calling on that document. It went to the arbiter and, ironically, the arbiter said, no, it's covered by executive privilege and you still can't have it. I think it was a big disappointment to the Greens.

I think that's the major one. I can't recall too many other instances when major documents have been called for by the Assembly. They haven't really utilised it. There was a standing order in place to say that documents could be requested. Certainly, committees have that standing order in our Standing Orders, that committees can call for persons, papers and documents.

Ms WEBB - There hadn't been instances of dispute of documents claimed to be privileged.

Mr DUNCAN - No. It hasn't been heavily utilised here in the Assembly.

CHAIR - In the full reports the arbiters have provided, they give their reasons in that they are upholding the claim or not.

Mr DUNCAN - They do. Those reports are made available to members.

CHAIR - Is it possible for us to get copies of those documents, particularly those when they have refused, or are they confidential documents?

Mr DUNCAN - I will certainly take that on notice. The more recent practice has been to table the independent legal arbiter's process. The first two may not have been tabled but the Speaker has power under the Standing Orders to release certain documents that haven't been authorised for publication, so I'm sure she could be convinced to release those documents. I think I will be able to provide those to you.

CHAIR - We'll write to you to ask you to do so.

Mr DUNCAN - Okay, that's fine.

Mr DEAN - One of the main reasons for this inquiry has come from the positions of committees in this state. Committees have been seeking documents from the Executive and have failed. In the four cases that you've referred to, have they been from individual members or has this been as a result of a committee process seeking documentation?

Mr DUNCAN - I think these have all been done in the Assembly. They have not had a history of trying to get them into committee. The members have recognised that these documents are pretty close to the heart of the running of executive government and so they have gone straight to the Assembly to call for documents and not used the committee process.

Mr SKINNER - We have a standing order in that we have borrowed it, if you like, from the Senate around where claims of public interest immunity or executive privilege have been made in committee. There is a procedure that requires the relevant minister to advance those claims in fairly specific terms and not just under the broad rubric of executive privilege. There is a means by which the committee and then later the Assembly can determine the matter.

The way that this standing order 213(a) operates is not really directed towards committee. It is more to do with what happens on the Floor of the Assembly. There is a separate process for claims where committees encounter public interest immunity claims.

Mr DEAN - That is interesting, I do not know what other details you would have in relation to that because in our case the main reason for this inquiry is because of a committee, or committees, failing to get the documentation they wanted and needed. It has created quite a lot of

angst and concern so I am not sure if there is any other documentation you might be able to provide around the committee the issue that you have just discussed. Is there anything available there?

Mr SKINNER - It is continuing a resolution 8B of our Standing Orders and continuing resolution. It is titled 'Public interest immunity', and it states that it is provided for guidance for ministers and public officials around the process for raising public interest immunity claims. Essentially it is asking them to specify grounds as to what sorts of matters may fall within that meaning of 'public interest immunity'. The sorts of general claims around commercial-in-confidence and other things will not be accepted necessarily by committees or the Assembly, nor can the tactic of ministers and senior officials saying, 'That is something we are not willing to provide', without any sense that there needs to be a proper ground upon which to deny a committee or the legislature access to those documents.

It is really trying to become specific about the nature and the rationale for such a claim and allow it to be interrogated by the legislature rather than accepting on face value what the executive may wish to argue. At the end of the day, the resolution at paragraph (4) says that if the minister provides reasons as to why they are withholding the document from the committee, the committee has the option under this continued resolution to report the matter to the Assembly. It goes on to say that a decision by a committee, even if it does not report to the Assembly, does not prevent the member from raising the matter in the Assembly in accordance with other procedures of the Assembly.

If the same situation you were faced with in Tasmania came here and the committee was trying to get documents from the Executive, and the Executive, even if it used this continued resolution to detail the reasons why it was withholding the document, it would not stop a member or the committee reporting back to the Assembly and the Assembly then moving a motion under standing order 213 to formally call for the document.

Mr DEAN - If I am hearing you clearly, the committee goes back to the Assembly, the Assembly would then debate the issue and if it saw a reason to go to the Executive, it would make that determination, that decision, and it would follow from there.

Mr DUNCAN - Yes, and if the Executive still refused, the independent legal arbiter's process would be triggered.

Mr DEAN - Thank you very much.

Ms FORREST - Following up from that, the process has unfolded with a committee that was seeking documents to ask the minister responsible to provide reasons, even though reasons were not provided and there was nothing that would support the claim for non-production of the document. The committee continued to prepare a special report back to the House, to the Legislative Council, which was then debated. We didn't have a standing order to then kick in as you talked, which enabled another process to unfold, so we came to a stalemate, which we have had on a couple of occasions because it has come back to the House on both occasions. Then there is no next formal step to take.

Mr SKINNER - Yes. Perhaps one of the advantages of this type of standing order is that they allow the articulation and the ventilation of the legal principles and the underlying interactions between the executive and the legislature to be put out there in a way that raw political numbers in

a Chamber probably do not. So, having a quasi-judicial eye and legal reasoning being brought to bear on these sometimes complicated issues is seen as being a rational process rather than what might be construed as a political process. People from all sides of politics may be more willing to subject themselves to that sort of process, irrespective of which side of the Treasury benches they might happen to occupy.

CHAIR - We know in both New South Wales and Victoria, leading up to the initiation of the standing order - and probably even since in Victoria where they've used other methods - the political methods of trying to get documents like the suspension of members, there's a range of political solutions that may or may not be effective. These include suspending a member or refusing to deal with government business or a particular piece of government business until the document is provided.

Was there any suggestion that might be used in the ACT when the majority government was in position that led effectively to the establishment of that standing order in the next parliament?

Mr DUNCAN - No, there's never - we use suspensions very sparingly. We've been going for three years for this Assembly and we only suspended our second member last week. Suspensions are used sparingly and none of the sort of tactics used in the Victorian example where I understand they suspended the Leader of the Government for an extended period of time. I've never been made aware of any of those sorts of moves during the Assembly as a result of not providing documents. I think there has been a general acceptance that the standing order for the independent legal arbiter process is the way to go and everyone has respected the umpire's decision, effectively.

CHAIR - The suspension you referred to, the most recent one, was that related to the non-production of a document or some other matter?

Mr DUNCAN - I think the - that suspension - oh, sorry the one here in the Assembly? No. Sorry, I am just saying that we don't suspend people as much at all for anything, and that was in relation to a rowdy question time. That's all - no higher principles or anything like that.

CHAIR - The Legislative Council has a very civilised question time here.

Mr DUNCAN - That's good to hear, Madam Chair.

CHAIR - It must be the good President we have. Any other questions on these matters, members? Did you want to make any closing comments, Tom or David, on this matter because I wanted to go to one other area before we finish.

Mr DUNCAN - No, I wish you all the best. I think a general observation is that it has worked pretty well here in the ACT. I am surprised it hasn't been utilised more often but it's certainly been accepted by all the Clerks in the ACT.

Mr SKINNER - The only comment I would make, notwithstanding I have mentioned that it may be regarded as somewhat of a diminution of the powers of the Assembly in some respect around powers of inquiry and production, is that it still has taken the heat out of some of these issues in a way that perhaps if we didn't have this procedure there would have been additional conflict. It would be political might that would determine these matters, I suppose, rather than perhaps having a principle-based discussion about how these matters should be raised. So, it's not all a bad story. I think it is a good story as well, but I think if we were revisiting this again, the model in New South

Wales skews more closely to preserving all the powers that we would all regard the legislature as having.

Mr DEAN - You mentioned there have been four occasions when there have been disputes. I take it that the Executive is quite anxious to work with members and provide the information they are seeking from it and that there have been many applications made for documents to the Executive? Is that so?

Mr DUNCAN - They have only formally requested these documents four times. We have a very active committee system in the Assembly; we have a very active questions on notice process in the Assembly. We have 48 questions without notice every sitting day, so the Executive is well used to responding to requests for information from the legislature. That is, as a minority in almost 25 years of minority government, the Executive is used to not always getting its way on every single issue.

CHAIR - I am going to address another area. If you cannot make much comment on it, I appreciate that. We wrote to you recently about the process of releasing of Cabinet documents and Cabinet information. We appreciate you going to the Chief Minister's Office to get some clarity on that.

A number of witnesses, mainly from a public sector background, have said there is a concern that if a document is made public, it will limit the frank and fearless nature of the advice that will be given to ministers and to the Cabinet in making decisions. Do you have a view on that? If documents are being released in the ACT in various forms, do you think it is constraining public servants and advisers in anyway when providing advice to ministers?

Mr DUNCAN - I don't think we are qualified to answer that.

I think we have had some pretty progressive freedom of information and Cabinet communication legislation through here. We have just revamped our FOI procedures to try to make as much information available as possible. We have an Executive release document. After only 10 years, all Cabinet documents are released. I think when we passed that, it was in the vanguard. Most other jurisdictions have 25 or 30 years.

We are subject to the FOI procedures in the Assembly. Journalists often request travel documentation from members - you would be surprised to hear. It has not led to diminution of advice given of that sort of area at the Assembly, I can say that. As to the wider public service, I am pretty ill equipped, I am afraid, to provide an answer.

Mr SKINNER - Ultimately, there are questions about where this idea that a chilling effect could be produced by these sorts of arrangements. I guess it all comes down to balancing what is in the public interest. Is public interest in disclosure? Or is the public interest in retaining secrecy or confidentiality? That will all depend on the very particular circumstances that apply in a given instance. There may be very strong reasons why disclosure is not in the public interest, but those arguments need to be made and accepted in a principles-based framework, rather than simply on the assertion alone.

CHAIR - Thank you. That is a very helpful comment. I appreciate it is an area outside your role and function, not necessarily your expertise.

Mr SKINNER - Madam Chair, the officer I spoke to in the Chief Minister's Office was quite happy to talk to you about how it operates in the ACT.

CHAIR - That might be helpful. Thank you for passing that on; it was really helpful.

Mr DEAN - Can I just raise the issue of your Freedom of Information Act? Here we have the Right to Information Act. In your case, it was released in January 2018. Noting from what you have said here, a key feature of it was the recognition of government information as a public resource.

Have you seen any changes in the way in which the Executive is operating in relation to the release of any information now? Has that changed it in any way at all?

Mr DUNCAN - I haven't noticed any discernible change. I often see media reports where members are using the FOI procedures to access documents. You will see some press releases saying documents released through FOI have revealed *x*, *y* and *z*. Certainly, it hasn't diminished members' willingness to ask questions on notice. Questions on notice have been skyrocketing here. I haven't noticed any difference in the way the Executive operates.

Publishing ministers' diaries has also been part of that process as well. I have had some anecdotal evidence that ministers sometimes struggle a bit with that, just trying to make sure they keep their diaries up to date and make sure they are ready for publication. That has been an added feature to the whole process.

Mr DEAN - Thank you.

CHAIR - Thanks very much, Tom and David, for your time. It is helpful to flesh out each of the different models that are around the country, particularly where one is working. We appreciate your time and your expertise and we will follow up with a couple of things on notice to you.

THE WITNESSES WITHDREW.

Ms JENNY GALE, SECRETARY, DEPARTMENT OF PREMIER AND CABINET, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - Thank you, Jenny, for appearing before the committee. I am sure you are aware of how committee procedures work but I will remind you it is a formal hearing. It is being recorded by Hansard and is also being streamed over our website. The evidence you give will be subject to parliamentary privilege while before the committee but not afterwards. If there is information you wanted to give the committee in confidence, you could make that request and we would consider it.

The proceedings will be transcribed and the transcript published on the website and form part of our report at a later time. We have the Government's submission, signed by the Premier. I am not sure how much you can speak to that but we are particularly interested in your view as the head of DPAC in the whole issue of production of documents, the process involved in getting information to and out of Cabinet and the role of the Executive in that and your understanding of the various roles and responsibilities with the Executive to parliament with the Government.

I assume you have had a chance to look at other submissions in our transcripts of previous hearings?

Ms GALE - I have.

CHAIR - You are aware of the other models in the other states to some degree?

Ms GALE - Yes. Peripherally.

CHAIR - You are welcome to make opening comments and then we will take questions.

Ms GALE - Thank you for requesting my attendance at the committee hearing this morning. I wish to state for the record I intend to answer any questions within the scope of my role and expertise. However, I understand the committee is exploring matters that are complex and very technical, both in legal and parliamentary procedures. These matters have been the subject of extensive legal debate among highly skilled professionals and are matters that I'm not versed in, being legal, et cetera. I am attending this hearing as the holder of the offices of the head of the State Service and as the Secretary of the Department of Premier and Cabinet and not to advance any personal views that I may have.

As head of the State Service and as Secretary, DPAC, I consider it important to remind the committee that my role as a public servant requires me to perform my functions in an impartial, ethical and professional manner and to be apolitical. I am, therefore, not able to answer questions about my personal view on government policy that seek details of matters considered in relation to ministerial or government decisions or possible decisions, or that would require a personal judgement on the policies or policy options of the Tasmanian Government or any other government. To answer any of your questions on those matters would require me to assess and advise to the committee on the merits of a policy, which is contrary to my professional and legal obligations under the State Service Act 2000. These obligations require me to retain the confidentiality of the advice I have or would provide to the government of the day.

In your letter, Chair, to the Premier on 18 October, and you have reiterated that again today, you state your intention to ask me questions relating to non-policy areas and related matters of

process in response to the Government's submission and any evidence received to date. I will endeavour to answer those questions as best I can within the scope I have just outlined, but I reiterate that in the terms of that scope I can only answer questions of fact in relation to existing processes and not my personal opinion.

I made that statement to explain why I may not be able to answer all of the committee's questions today and may need to suggest that the committee refers questions to others. I'll also advise if I consider the question to be a matter for the parliament or indeed a matter for the committee itself to seek expert advice on, but I will be happy to answer any other question that I can in relation to facts on process, or I may need to take some questions on notice if I don't have the information to date today or I can't access it through my staff. Thanks again for the opportunity.

CHAIR - The committee understands the nature of the limitation regarding policy. If you believe a question is going into a policy area, you can indicate that. Some questions may be around the edges but we'll make determinations as we go.

In your role, how do you see the role of the Executive in getting information to the government to then develop policy or outcomes and decisions that may be subject to requests for documents? We are interested that process. There are some jurisdictions where we understand cabinet information and that sort of thing is publicly released after a fairly short time. It seems the models are different in different states. There have been many claims made by different bodies that information being made public in a relatively short period - still within the life of a current government, for example - could limit the frank and fearless advice being given to ministers. In your view, how does the process work and how do you see that aspect?

Ms GALE - In Tasmania, that process is generally done through Cabinet processes. Government policy is formed through that notion of responsible government, in which the Executive government has access to advice. Ministers have individual responsibility for their own policy areas but Cabinet takes collective responsibility for government policy overall. Any documents, or any other information that is provided to Cabinet, is guided by the government of the day's policy, which is usually defined through the Cabinet Handbook and has been defined in that way for a very long time in Tasmania, so I refer you to the Cabinet Handbook. I have a few copies here if anybody doesn't have immediate access to that.

The Cabinet Handbook goes through security of and access to Cabinet information; it goes through the processes and it provides guidelines to agencies as to what kind of information needs to be provided to Cabinet et cetera.

CHAIR - In the information provided into that Cabinet process which is guided by the Cabinet Handbook, do you believe there would be limitations on the frank and fearless nature of that advice if any part of it were released in a subsequent process?

Ms GALE - There's been quite a bit of legal debate and opinion about this. I refer you to the Government's submission, which speaks about the *Commonwealth v Northern Land Council* case, in particular. The construct of Cabinet currently allows for the frank and fearless exchange of views and advice. Cabinet is collectively responsible for the performance of the government and each minister acts jointly with and on behalf of Cabinet colleagues in their capacity as ministers. That collective responsibility, which is a longstanding notion of Executive government, is supported by the strict confidentiality afforded to Cabinet documents and discussions within the Cabinet room.

Some of the legal opinion that has formed part of discussions in other jurisdictions indicates that - and this is my lay interpretation of that, certainly not a legal interpretation - it is in the public interest for deliberations of Cabinet to remain confidential and, were this not observed, it's likely to mute free and vigorous exchange of views. What that means is that Cabinet is a forum in which ministers, while working their way towards a collective position, are able to discuss proposals and a variety of options and views with complete freedom. The openness and frankness of discussions in the Cabinet room are protected by the strict observance of this confidentiality.

CHAIR - I want to raise a couple of points. You said that deliberations should remain confidential. That is a broadly held view. Coming back to the role the public service fulfils in producing documents that go to Cabinet to inform Cabinet discussions and, thus, Cabinet decisions, that is the part I am interested in from your perspective. It is not so much the discussions in Cabinet because that's the elected members, the government of the day, choosing whether to follow or modify the advice or take a decision that is a variation. I would like you to explore with me and the committee what you believe Cabinet documents are. Once they're handed over to that process, the responsibility ends at that point, doesn't it?

Ms GALE - There is a definition of Cabinet documents in the Cabinet Handbook and I read that for your benefit. This is not an exhaustive list and it indicates that in the Cabinet Handbook. Cabinet documents may include: Cabinet minutes; a document recording a Cabinet decision; Cabinet agendas; other records of Cabinet discussions; records of discussions or deliberations between ministers, secretaries of departments and other senior officials and/or ministry or staff, which would tend to reveal the deliberations of Cabinet if disclosed; or any other record relating to the deliberational decision of the Cabinet. This includes any information submitted to or proposed to be submitted to Cabinet for its deliberation. That's the current definition of Cabinet documents and it's not exhaustive.

I could also give you an indication of another jurisdiction's definition if that would be helpful to you, and this is from Victoria. They have definitions of Cabinet information and Cabinet documents -

> 7.2. Cabinet-in-Confidence (CIC) classification
>
> Based on exemptions under the *Freedom of Information Act 1982*, a document is CIC if it is:
>
> - an official Record of any deliberation or decision of Cabinet
> - a document that has been prepared by a Minister or on their behalf or by an agency for the purpose of submission for consideration by Cabinet
> - a document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet
> - a document that is a draft of, or contains extracts from a document referred to above
> - a document which refers to any deliberation or decision of Cabinet, other than a document by which a decision of Cabinet was officially published.

Then it goes on to say -

> Typical examples of Cabinet documents include:
>
> - Cabinet/Committee agendas/briefs/minutes
> - submissions prepared for consideration by Cabinet or a Cabinet Committee, even if the submission was, in the end, withdrawn prior to consideration
> - submission attachments that were not already in the public domain at the time of the proposed Cabinet/Committee consideration
> - agency-internal consultation and collaboration documents, memos, briefs and comments, including coordination comments
> - correspondence containing or disclosing Cabinet/Committee information
> - documents relating to the development or progress of legislation through Cabinet to Parliament, e.g. Drafting Instructions for the Chief Parliamentary Counsel, Cabinet Drafts of Bills or draft Second Reading Speeches

Mr DEAN - Is it in any documentation or decision, deliberation of the executive-in-cabinet - are those documents marked in any way? Are they marked as a Cabinet deliberation or Cabinet decision or Cabinet position?

Ms GALE - Yes, they are.

Mr DEAN - They are stamped and marked?

Ms GALE - They are watermarked. Cabinet papers are watermarked.

CHAIR - What are they watermarked with? What is the word?

Ms GALE - It is not a word. It is a number for security and tracking purposes.

Mr DEAN - And that identifies it is a Cabinet discussion, deliberation, position taken?

Ms GALE - That is for Cabinet papers, not for submissions.

Mr DEAN - I asked the question because of issues that happened in a committee I was on.

Ms GALE - Generally speaking, other documents may be marked 'Cabinet-in-confidence'.

Mr WILLIE - You said that was for Cabinet documents. The submissions attached may be treated differently?

Ms GALE - They are not watermarked because they come from a range of sources. That doesn't restrict the nature of their security or their position in the definition of Cabinet documents in the handbook.

Ms WEBB - Are they identified at the time they become Cabinet documents, identified as such somewhere in your records or in the records that are kept?

Ms GALE - The attachments are noted on the Cabinet papers listed.

Ms WEBB - So any attachment noted would be regarded as part of the Cabinet papers?

Ms GALE - Yes.

Mr WILLIE - Is that the way to track it if there is a right to information request for that advice to Cabinet? Would they look at the Cabinet documents and whether there has been reference to it?

Ms GALE - Correct.

CHAIR - In some respects the lists are quite exhaustive and somewhat circuitous because it seems to refer back to the ones we have had legal advice on. The member for Windermere will remember that. It was the Public Accounts Committee where the committee sought legal advice on the matter that said documents should only attract the privilege where they actually revealed the actual deliberations, not decisions, of Cabinet. Often decisions of Cabinet are published next day in the media in terms of the outcome of the decision. The deliberations, who voted for what and who said what and that sort of thing, are recognised.

There is a broad net of documents that could be caught up. Anything that has even came to that discussion, let alone every piece of paper that comes into a Cabinet deliberative meeting could influence the deliberation. That is the whole purpose of them - we heard from other witnesses that in the Joh Bjelke-Petersen days huge trolleys of documents were wheeled through the Cabinet room to give them privilege. There are extremes on both sides.

It seems there is still a grey area around what is a document that reveals the deliberations of Cabinet as opposed to provides information to Cabinet.

Ms GALE - I can't comment on other legal advice. All I can respond to is the definition that is currently there and indicating that it is not exhaustive and by way of demonstration, what happens in another jurisdiction.

I guess the most important thing really is that it is documents and discussions that lead to that deliberation within the Cabinet room.

CHAIR - I think the first point said it was that it reveals the deliberations of the Cabinet.

Ms GALE - I think that was in the Victorian example, which is quite specific.

Mr DEAN - Just to follow up, it is a decision or a deliberation taken in the Cabinet room. Any information taken out of that Cabinet room by a minister and discussed with another minister in writing, or whatever, couldn't be considered to be a Cabinet deliberation or decision. That would not be watermarked, I would not think.

Ms GALE - I cannot really comment; that is a speculative question. Under the current definition, if any of those documents had been prepared and part of Cabinet papers, the answer to that would be treated as -

Mr DEAN - Can I ask this question then? What is considered to be the Cabinet room?

Ms GALE - I just used that term when I was - a Cabinet room is wherever the Cabinet meeting is held.

Mr DEAN - Sitting in the Cabinet room, where all of the ministers are, and so on, that -

Ms GALE - Occasionally, as you would be aware, there are regional Cabinet meetings so it would be anywhere where Cabinet has sat.

Ms WEBB - So when there is a convening of Cabinet, that is regarded -

Ms GALE - Yes.

Mr DEAN - What I am getting to is that it is a formal process of the meeting of the Cabinet, so a meeting of four or five of the ministers in a group could never be considered a Cabinet meeting? That is the point I am getting to - it is a proper formal process.

Ms GALE - A formal process, yes.

Ms WEBB - Just to clarify, because it seems to extend to things that are attached, so things that have been provided for information, that go along the points of deliberation that will be happening. If those reports or submissions that might be attached have been prepared, if they have been prepared specifically for Cabinet for that purpose, that would be a clear line there.

If they have been prepared in other circumstances for other purposes and attached as part of an information package within the Cabinet documents but existed, and maybe continue to exist, for another purpose for information elsewhere, say to the agency or the department, do they then become confidential as Cabinet document attachments, then via that Cabinet process? Or, given that they may not have been prepared specifically for Cabinet's deliberations, can they exist elsewhere as not Cabinet documents?

Ms GALE - The definition in the Cabinet Handbook, the one that agencies would use in relation to that, indicates that this includes any information submitted, or proposed to be submitted, to Cabinet for its deliberation.

Ms WEBB - It does not speak to whether that information was originally produced for the purpose of Cabinet deliberation?

Ms GALE - No, it does not speak to that.

CHAIR - For example, an independent engineering report on a new bridge` that has been commissioned by the department to look at whatever it is that is going to be considered, even though it is prepared to give information to guide the process about whether this is the way it should be built, whatever, once it gets attached to this pack, you are saying it would attract privilege because of that?

Ms GALE - If it is submitted, or proposed to be submitted, to Cabinet for its deliberation, if it is part of that deliberative process, that is what the difference is.

Ms WEBB - If it has been produced at an earlier date for a department or agency, in anticipation of potentially having to provide that as information at a later time to Cabinet, does that department or agency then have to maintain some sort of confidentiality around every bit of information, report or advice that you have received in anticipation that it may one day get to Cabinet as advice to Cabinet and therefore become privileged through that?

Ms GALE - It is very difficult for me to answer questions that are speculative, and I really can't. However, I would say generally that in the process, as agencies are preparing information for Cabinet deliberations, they would be aware of what information they may need to seek, but that wouldn't preclude other information being sought as well. It is very difficult for me to speculate on an example such as that. You would probably need to have specifics, but even then it is not a matter for me - it is a matter for the minister, the Cabinet and the relevant head of agency. The responsibility for Cabinet confidentiality sits with ministers and heads of agencies, so they would need to make those decisions based on what they are preparing for Cabinet.

Ms WEBB - I will try to make it so it can't be regarded as speculative. If a review were done by an external consultant for the information of a department and, for example, those documents were called for by a parliamentary committee or other parliamentary process, at that time when it has just been commissioned and provided to a department, Cabinet privilege wouldn't be on it because it hasn't gone to Cabinet, but at a later date, if, as part of information provided to Cabinet, that report or review became attached to the documentation provided to Cabinet, it then gets that privilege. At that point, if it was called for by a parliamentary committee or other process, it wouldn't be available to be produced - is that the case?

Mr GALE - I am not trying to be difficult but that is speculative. I will reiterate that the definition says -

CHAIR - What page is the definition on, Jenny?

Ms GALE - Page 7. This includes any information submitted to or proposed to be submitted to Cabinet for its deliberation. I wouldn't have the knowledge of any particular agency and what it proposes to send to Cabinet. I simply can't answer that question.

Ms WEBB - That comes back to my first question; we have to assume that every bit of advice, information, report or review done for an agency has to be considered, potentially, as possibly being proposed to be put to Cabinet. It is interesting.

CHAIR - Would you mind distributing it? I must have an out-of-date copy that I got off the website only recently.

Ms GALE - I'm not sure if I have enough for everybody - yes, I have.

CHAIR - I printed it off, but mine doesn't seem to be the same version. It took me about half an hour off digging to find it.

Ms GALE - It should be just on the DPAC website.

CHAIR - It was difficult to find.

Ms GALE - It's not meant to be difficult to find. We'll have a look at that.

Ms WEBB - I found it, it is pretty easy to find.

Ms GALE - Page 7, definition 1.4.11.

CHAIR - It is a different version this one. This is on your website at the moment, I only printed it off a week ago.

Ms GALE - Thank you for pointing that out. I thought it was up to date so we will pursue that.

CHAIR - It seems the definition section is not in it.

I will go to 1.10. Under types of Cabinet submission, it says -

> There are currently two types of Cabinet submission, a Minute and a Briefing:
>
> - A Minute is a submission containing recommendations for consideration and decision by Cabinet. It should provide a detailed analysis of the issues involved and an analysis of the options from which the recommendations emerge. Detailed information about Cabinet Minutes is provided at Section 3; and
>
> - A Briefing is the form of a submission used to provide information which does not require Cabinet to make any decision other than to note the information. Briefings are used for appointments, returning bills for final approval, and presenting Committee Minutes or other information for endorsement. The format of Briefings is tailored to the type of information being presented. Detailed information about Cabinet Briefings is provided in Section 4.

The way I read that, the Cabinet minutes are directly informing the consideration and decision of Cabinet.

Ms GALE - On that meeting day. Briefings may, however, be a precursor to a further minute coming to Cabinet on that same subject matter. The minute is for the decision on that day; briefings are for any other form of briefing and some of them are covered there, but there are other forms of briefing which may be on particular matters that Cabinet may be wanting to form a policy on, for example, so there may be papers that would come forward as a precursor to that.

CHAIR - You are saying it captures both, even though they don't inform the deliberations and consideration?

Ms GALE - They inform deliberations, they don't necessarily inform decisions. Whilst I'm not able to give you a specific example, obviously, because of Cabinet-in-confidence, it may be that a briefing comes forward that then engages a discussion that may lead to a request for further information, or other consultation to be undertaken, or a range of things that then may form the writing of a final Cabinet minute.

If we are talking about government policy, it is often complex and lots of considerations need to be taken into account. That doesn't always just go to any Cabinet in the one minute. It sometimes takes quite some time to formulate policies.

CHAIR - Jenny, this was in April 2018. This was updated in April in 2018?

Ms GALE - Generally speaking, as part of the machinery of government processes, and this goes back for long periods, the Department of Premier and Cabinet would prepare for incoming governments. DPAC looks at all the machinery of government documents and matters that we would prepare for a briefing for an incoming government and make sure that all those were up to date. We would look at and reflect on any matters that had arisen in the previous three to four years, and we would consider making amendments to that range of documents and so on. We would normally start preparing that when the Government is in caretaker mode and we would have that package ready for an incoming government.

CHAIR - The copy I have is from July 2014, so it was obviously done before the last election. This one has been done in the process of the most recent election.

Ms GALE - They're not done after the election, they're done in that process.

CHAIR - No, in the process around it, I said. I didn't say 'after', I said 'in the process of'. The version of July 2014 does not have that definition. The definition has been inserted in this most recent edition.

Ms GALE - Generally, as we're preparing those documents, we not only reflect on the matters that have been, in terms of the machinery of government, over those previous three or four years. We also look to other jurisdictions to see what they are doing. In this case, for the definition we have drawn on the fact that they were defined in other jurisdictions and we have other additions to our processes. For example, at the beginning of 2018 or in that caretaker period, we looked closely at what similar jurisdictions do - the Northern Territory and the ACT.

We have also introduced, for presentation to the current Government, a long-range forecast agenda for Cabinet, which is a new addition as well. There will be minor additions. There may be some deletions, depending on what was in the previous version of the Cabinet Handbook. We do that for all machinery of government processes and documents.

Mr WILLIE - Just to pick up on the member for Windermere's comments with the previous witness, this committee has been formed because a number of parliamentary inquiries have had trouble getting information from Executive. I am interested in the process. The committee requests the information; the secretariat would write to the relevant minister. The ministerial staff, I assume, would then refer it to the relevant department. How is the judgment made on whether the request will be complied with or not?

Ms GALE - It's a matter for the minister.

Mr WILLIE - There is no advice to the minister from the relevant department?

Ms GALE - I can't comment on what each minister would do under those circumstances, but what the minister chooses to do is a matter for the minister.

Mr WILLIE - So, there is no established consistent process; it is all dependent on the minister.

Ms GALE - The request is being made to the minister. The minister is a member of Executive government so it's up to the minister to determine.

Mr WILLIE - So, there is no process for the department to check whether it was a Cabinet document, whether there would be public interest immunity or anything like that?

Ms GALE - I can't speculate on whether a minister would choose to seek such advice or not.

Ms WEBB - I think Josh is just trying to clarify whether there is a prescribed process whereby that would happen as a matter of course. I think what you are answering is 'No, there isn't; it's up to the minister.

Ms GALE - It is up to the minister. The minister is a member of Executive government. If any request is made of the minister, it's up to the minister how that minister would deal with it. It's not a matter for me. There is no process as such.

Mr WILLIE - I was interested in the process and whether ministers would seek advice from their relevant department or the Cabinet unit within DPAC.

Ms GALE - I can't say whether they would or they wouldn't.

Mr WILLIE - Okay.

Ms GALE - It's up to the minister.

CHAIR - Jenny, we were focused on the definition of whatever document it is. What I was trying to get a better understanding of was the concerns have been raised on the ability for the public sector to give frank and fearless advice should a document be released. Some have called it a 'chilling effect'.

I mentioned that in some other jurisdictions Cabinet documents can be released quite soon after decisions are made in varying forms. Obviously, some information does go out, including some of the information we've talked about that fits in within your description of a Cabinet document.

In your experience in your the role and the work you are involved in, do you think there are genuine concerns about the ability to give frank and fearless advice? I am sure every public servant does their absolute best job in making sure they have accurate, contemporary, full information to assist the Government. That is their job. I am sure they all do that admirably. Do you think having the potential for any of those documents, aside from actual minutes that reveal the deliberations released publicly, would limit or constrain them in any way?

Ms GALE - I refer back to the other legal commentary in relation to this where then it is that indicates it could have a dampening effect on frank and fearless advice. On the deliberations of Cabinet, it was in the *Commonwealth v the Northern Land Council*.

I suppose that in any discussion concerning the conduct of the Tasmanian State Service, we also need to take into account the State Service Code of Conduct and the State Service Principles which provide the core framework for decision-making in public service conduct that all State

Service employees must comply with. The State Service Principles include a requirement that the State Service is responsive to the government in providing honest, comprehensive, accurate, and timely advice and in implementing the government's policies and programs. A range of other issues are addressed within the code of conduct and so on that I might go back with.

Notwithstanding that, it needs to be recognised that provision of frank and fearless advice is undertaken in the context of the current statutory framework and the respected conventions of Cabinet confidentiality which is paramount in being able to provide that advice.

CHAIR - You have referenced the *Commonwealth v Northern Land Council*. That is in the government submission. I will read it because I think it is relevant -

> … it has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which is made.

That is what that section of the *Commonwealth v Northern Land Council High Court* stated. What I am talking about is that is the deliberation of Cabinet. That is the elected members sitting around the table making a decision.

What I am interested in is this alleged chilling or dampening effect on the giving of frank and fearless advice when clearly, as you have said there, the state public sector act requires public servants to provide full, detailed, accurate, timely advice to the minister. Does the potential release of some information provided to the process, as part of their job, once they have done their job, does it stymie or constrain those public servants in giving that advice?

Ms GALE - Under the current system, which has Cabinet confidentiality, public servants give that frank and fearless advice, knowing that it remains confidential.

I guess the question you are asking me is: were that not to be the case, what do I think that public servants would respond to in terms of giving that frank and fearless advice? They are required to do that through the State Service Code of Conduct and principles. In my personal view on that as a public servant, it might potentially influence the nature of the advice that I gave. Again, it is a speculative question. It is really difficult to answer because the nature of the advice that a public servant gives ranges by its very nature. It is probably not possible to generalise. I am interested in other peoples' commentary on it.

This whole system of responsible government talks about accountability. Maybe if I come at it from that perspective. I will refer to a definition of responsible government that comes from Professor Gabrielle Appleby in her book *Australian Public Law* -

> Responsible government describes the means by which the Executive Government is held accountable to Parliament. The Government is responsible to Parliament in two ways; firstly, ministers of the Government are individually responsible for their decisions and for the performance of their department. Members of the Parliament hold ministers to account through the processes of Parliament, in particular through asking questions of ministers in the Parliament and through parliamentary committees that scrutinise draft legislation and government actions.

She goes on to talk about a notion of the entire ministry retaining the confidence of parliament to remain in government and other important mechanisms to help facilitate the accountability of the government to the parliament.

In that respect, ministers are responsible to the parliament, whereas the Tasmanian State Service is not. The system of responsible government requires that the State Service first and foremost serves the government of the day with its first duty to the minister and that ministers are accountable to the parliament for all that occurs within departments. Within that context, Cabinet confidentiality is a concept that is highly respected within the State Service. Were that confidentiality not to be there in terms of that advice potentially being made public, I think we would need to rethink that method of accountability. Again, it is not public servants who are accountable to the public, it is the minister. We are accountable to the minister, we advise the minister, and -

CHAIR - That is the point I was making, Jenny. Once the public servant's job is done, in that they have provided that advice or collated the documentation needed to support a particular recommendation that may go to Cabinet, their work is done. It is then the minister's responsibility to prosecute the case in Cabinet and for the collective responsibility around the decision-making, and then the government to take it from there. Doesn't the responsibility end at that point, in terms of the accountability? They have done their job.

If documentation, advice, information, a consultant's report, whatever it is that comes as the package to give effect to the recommendation made, that is done to the best of the person's ability. They cannot control whether the minister accepts or rejects or modifies the outcome. Surely that is the end of the process for those public servants involved in that process? As you said, and I absolutely agree, they are not responsible to the parliament, and the Executive government is responsible to the parliament. We have heard from other witnesses that this should not constrain the public service because their job is their job. Once they have done their job, they should rightly sit back and say, 'We have done a good job'. What the minister and the government of the day have done with that, it is the Executive government's responsibility, not the public servants. This is why I cannot understand why it would be such an issue for them.

Ms GALE - I guess I cannot answer that because individuals are different and behave in different ways, so -

CHAIR - But individuals all have to act under the same legal requirements that you have stated in the State Service Act.

Ms GALE - That is right, they are required to but, again, I reiterate that those requirements in the State Service Code of Conduct have been framed in the context of the current statutory framework, which is in terms of the responsible government and the confidentiality of Cabinet, and so on. Again, we are talking about a scenario that is very difficult for me to give an answer to. I will not speculate, but I guess were that framework to change, it might be time to review the remainder of the framework, if you understand what I am saying. I just think that, that is a question that -

CHAIR - I am not sure what you mean by 'the remainder of the framework'.

Ms GALE - Well, the State Service Code of Conduct and the principles, everything that is to do with the workings of the public servant and the decision-making, which is part of that notion of responsible.

CHAIR - How might that need to change? How would their role change?

Ms GALE - I guess I am saying that if you are suggesting that if, for example, Cabinet confidentiality changed, we are getting to the point of whether -

CHAIR - No, I am talking about the documentation. Some of the information - not the deliberation, let us get away from that part - the supporting documentation, consultant reports and other items of information that go to Cabinet to inform a decision, not the deliberations. How might their responsibilities need to change under the code of conduct if they were to become public at a later time?

Ms GALE - Again, that would be speculative. The point that I was trying to make was if that notion of confidentiality were to change, so if processes were to change, because it is all part of, if you like, the whole process, then it might mean that there would need to be a reflection on all of that process.

I am not saying one way or the other whether it would change or not; it is often the case with policy and so on that when one aspect of it changes, it would be wise to reflect on the rest of it. There may be subsequent or consequential changes as well.

I am not saying one way or another that it would or it would not, but currently, at the moment, the State Service Code of Conduct and the State Service principles apply, but they apply within the context of the current statutory framework, and those respective conventions of Cabinet confidentiality and so on.

Mr WILLIE - Just on that, with the State Service Act in its current form, what accountability is there around that with every piece of advice going to government? It would be very difficult to hold that up against every decision made by a public servant, wouldn't it?

Ms GALE - As I said before, responsibility for that lies with the head of agency and the minister and, of course, there is the code of conduct that can be utilised if there was a pattern of behaviour, or any behaviour, that came to light that was against that State Service Code of Conduct.

Mr WILLIE - If the confidentiality of Cabinet changed, there could potentially be a cultural shift in the public service?

Ms GALE - I cannot comment on that.

CHAIR - I just want to take you to a part of the submission from the Government, signed by the Premier, in a section called 'Other considerations'. It talks about the work of parliamentary committees being one of the most powerful mechanisms to scrutinise the actions of the Executive ministers and the public sector generally - that's if we can get access to the information we're seeking, of course -

> The Government may be held to account through Question Time. Independent statutory officers such as the Ombudsman, general debate, judicial review in the

> Integrity Commission, Right to Information requests and laws that maintain legislative review mechanisms.
>
> …
>
> It is also submitted that any changes to the existing conventions and process that may not only create additional complexity and inefficiencies but also lead to unforeseen consequences and critically further administrative costs which cannot be estimated at this time. I also note this lack of certainty is somewhat exacerbated in the very broad terms of reference of the committee.
>
> Given that the resources available to the work of the committees is finite, these potential additional costs may further undermine the public interest in pursuing what are arguably unnecessary and uncertain procedural changes.

I find that quite a staggering comment in terms of the breadth of the terms of reference and the terms of reference are very narrow, just looking a process that's been implemented in four other jurisdictions in various forms, that we are aware of. If you could, I would like you to explain the additional complexities and inefficiencies and other consequences that may flow from implementing a standing order that seems to be working fairly well in two other jurisdictions; not so well in one. We have yet to fully flesh out the Western Australian model.

Ms GALE - It is my understanding that the Government submission was relating to what could possibly - it is difficult to estimate which gets to the question which can't be estimated at this time because there's no knowledge of what a potential process is. The Government was indicating in its submission that it didn't see the need to change the process and -

CHAIR - But there is no process at the moment; that's the problem. When there's a refusal to produce the document, there is no process.

Ms GALE - I meant the process of accountability of government. I wasn't referring to a process for documents, but the accountability processes.

CHAIR - Okay, sorry.

Ms GALE - Some of the information we are aware of, for example, in New South Wales, the costs et cetera under its current arbiter arrangements in terms of production of documents are quite significant. This is not just the financial cost, but also the cost in administration, which I think you referred to there. There is a letter from the Acting Secretary of the Department of Premier and Cabinet to the Clerk of Parliaments in the Legislative Council which gets to that very point. If you think about the economies of scale between Tasmania and New South Wales because we're a much smaller state, it's likely that any cost currently being observed in other jurisdictions, apart from ones at a similar size to us, would be significantly greater in a smaller jurisdiction.

CHAIR - What's that letter you are referring to?

Ms GALE - This letter which I can table because it's public is about the costs and so on of a particular request under the current system. I will read parts of it as it's a public document.

CHAIR - If you could table that, it would be fine too, but if you want to read the section that you want to speak to, please do.

Ms GALE - This is about the further resolution of the Legislative Council under standing order 52 made relating to documents from the office of the former minister for Finance.

I am advised that over 40 000 documents were required to be reviewed in order to determine whether they were relevant to the resolution and/or attracted claims of privilege. The volume of work involved in responding to this resolution and to the earlier resolution on a previous date required the department to engage external assistance, in this case it incurred legal costs through the Crown Solicitor's Office. I am now quoting -

> As well as assisting the department to review documents for relevance and cabinet information, the Crown Solicitor's Office has prepared a submission in support of the department's claims that privilege should be attached to a number of the documents.

This gets to the workload. I won't read it all -

> The Acting Secretary's letter noted in particular the difficulties and expense faced by agencies in responding to resolutions that do not specify any subject matter and/or require the review of thousands of records in a short period of time.

It goes on to talk about time constraints -

> … advised that the external costs to date of the department in responding to both the first and second resolution from one request are in the order of $380 000. These costs are in addition to the in-house costs of the department and those of other agencies consulted during the renew process, which have not been quantified.

It is on the basis of experience elsewhere that those comments were made.

CHAIR - We also spoke to the Clerks in the ACT who have a similar - but not the same - model to the Victorians. The costs were much less significant because there have been a lot fewer requests. It all comes down to the number of requests.

Ms GALE - That was for one request.

CHAIR - We visited New South Wales and saw the extent of some of this. We went to the Clerk's office and saw where some of the papers are stored.

Ms WEBB - Out of interest, do you know if the privilege was upheld or not by the independent arbiter for that one request?

Ms GALE - I am not aware of that.

CHAIR - I think with most of those big ones, some were upheld and some were not. They have different systems in different jurisdictions. That is the cost issue, but do you want to comment further on the additional complexity and inefficiencies?

Ms GALE - I think when it gets to workload issues, there is not always just a dollar cost.

CHAIR - That is one jurisdiction; the ACT haven't had the same challenge.

Ms GALE - I don't have any information from the ACT.

Mr WILLIE - Because its documents have not been as extensive, he said.

Ms GALE - It would depend on the request that was made, I would assume.

Mr WILLIE - I was interested in the cost and the accountability of members requesting the documents - but it's probably not a question for Jenny - on whether they had to report to parliament because we know that in New South Wales documents were being requested and not being looked at.

Mr DEAN - Over the period you have been there, how many requests made for documentation from the Executive have created issues or have been seen as Cabinet-in-confidence?

Ms GALE - I don't have that information. Because the requests go to individual ministers and their agencies may be more aware of that than I am, I don't have that knowledge.

Mr DEAN - It is not recorded at all within DPAC?

Ms GALE - No, because it's a matter for each minister.

Ms WEBB - Can I revisit one thing because I wasn't quite clear about it? Chair, you spoke about a previous version of the Cabinet Handbook which didn't have a definition of Cabinet documents and then this most recent version does have a definition of 'Cabinet documents'. Secretary, you spoke about the fact that as they are updated across the time that a new government is coming in: How are decisions about those updates made? Do you make those decisions within the State Service about the updates? I am trying to find out, for example, the decision to include a definition of 'Cabinet documents' this time around - where did that originate?

Ms GALE - I can't be that specific, it's my office that does that. Normally what we would do is consult quite widely. We would provide various drafts, as is normally the case with developing government policy. We would look at the documents to see whether they would still be current for an incoming government of any description because during that caretaker period we are not aware of what the nature of the government will be. We look at it from a best-practice point of view; we look at it from an other-jurisdictional point of view; we often consult with our colleagues in other agencies to see if they have anything they think needs to be changed. Ultimately though, it's a government policy and so it would be approved by the incoming government of the day once the drafts have been provided. Those updates are usually relatively few in number, I guess, but can be quite significant in terms of process. As I said previously, this year we introduced a long-range Cabinet forecast agenda that adds another step to the process. From my perspective, we got that idea from another jurisdiction that found some advantages - although it adds another layer - in that it assisted ministers and agencies to look at what might be coming up and therefore work collaboratively to make sure that the best possible information goes through to the government for decision-making.

The public service takes really seriously its responsibility for providing information to the government of the day. We are constantly seeking ways that we can improve our processes to do that. Generally speaking, when we're looking at machinery of government documents, whether it's the Cabinet Handbook or other incoming government briefings, we prepare those with that in mind. In a way, we would be benchmarking what we do with what other jurisdictions do to see whether things fit, or might fit, the Tasmanian context, and we make the changes in a draft form accordingly.

Ms WEBB - The inclusion of the definition was done in preparing the draft for the incoming government, looking at other jurisdictions. You mentioned the ACT and the Northern Territory as perhaps comparable jurisdictions earlier?

Ms GALE - In terms of size, yes.

Ms WEBB - Would that definition reflect where you've looked at those comparable-sized jurisdictions?

Ms GALE - I can't answer that question specifically. I did refer to Victoria and its definition. I think generally our view is that in order to assist agencies to better advise Cabinet and also to assist with questions about security of documents, which we've referred here today, adding that definition is an enhancement to what was previously in the Cabinet Handbook because, while not exhaustive, it gave a clearer indication of what Cabinet documents are.

Because of our system of government, and it is the same in other jurisdictions, where we have individual agencies making individual decisions about things, whether that's in Cabinet documents or whether it's in RTI through legislation and so on, consistency is always better than inconsistency. Where we can improve what we're doing in that way, we will look to ways of doing that. That process will take place the next time as well. It's part of that ongoing machinery of government improvements we try to make.

Ms WEBB - Prior to having that definition in this updated version of the handbook, what would have been the go-to reference point for a definition of what a Cabinet document was prior to April last year?

Ms GALE - I guess it would be custom and practice mostly. It is potentially influenced by decisions that might be made elsewhere, but largely it would be through custom and practice. I think the definition reflects custom and practice.

Ms WEBB - So, there was no documented definition in any other circumstance prior to this being included?

Ms GALE - I would have to research that.

Ms WEBB - Okay.

Mr DEAN - Just on this point, DPAC puts together the Cabinet Handbook and looks at changes with new governments coming in and so on. Does Cabinet then look at that document and vet it?

Ms GALE - Because it's a government policy, the final approval for the Cabinet Handbook sits with the Premier. I can't comment on whether the Cabinet -

Mr DEAN - No, of course not, but they have the right to change it, obviously, and to delete, add to or whatever?

CHAIR - Or ignore the advice of the new version.

Mr DEAN - Yes. Is that right? I don't think it is a difficult question.

Ms GALE - The final decision sits with the Premier. I am not able to say whether it went to Cabinet or didn't go to Cabinet.

Mr DEAN - No, but the final decision sits with them on this document?

Ms GALE - It's a government policy and the final decision on all government policy sits with the government of the day.

Ms WEBB - Just to be very clear: perhaps Ivan was asking whether a draft might come back with changes or requests for a different version, which becomes the final version approved by the government of the day. Can it be changed after the draft?

Ms GALE - That's the same process used with -

Ms WEBB - Or a new inclusion could be requested to be put in.

Ms GALE - Every government policy is done in the same way.

Ms WEBB - Just clarifying.

CHAIR - Just to clarify something earlier. Jenny, you talked about the cost. In referring to the New South Wales model, you talked about needing to engage the Crown Solicitor. Don't you have the Crown Solicitor on salary to use all the time for all sorts of advice?

Ms GALE - The Crown Solicitor's Office is part of the legal advice. But periodically there's a need for outsourcing depending on the workload. I am making assumptions based on New South Wales. It indicated that it sought that information but the cost was $380 000, I think, in external legal fees. I would only be making assumptions on why they were sought, but it may be a workload issue. So if the advice required needed to be done very quickly, which I think the letter indicated that it was, due to the other considerations being undertaken by the Office of the Crown Solicitor or the equivalent in other states and territories, there is from time to time a need to engage external advice back through the Office of the Crown Solicitor.

CHAIR - So that happens currently at times when you get a really complex issue or something that the government is dealing with?

Ms GALE - I don't think complexity is the issue because necessarily -

CHAIR - More workload?

Ms GALE - It is more to do with time pressure and potentially workflow.

CHAIR - At times things can happen quickly. You can have an imminent security threat or something natural that requires urgent attention which takes a lot of resources from any government. Is it often that the government has to go to see external legal support if the Crown Solicitor is snowed under?

Ms GALE - I can't comment on that. That would be a question for the Office of the Crown Solicitor, but I am aware that from time to time governments do need to do that. It's not just in terms of legal advice; it's in terms of other activities as well. As you indicate quite rightly, Chair, when something happens that needs all hands on deck, business as usual needs to continue so that might be done through other arrangements within government, or sometimes it may need to be sourced externally.

CHAIR - Okay. Thank you for your appearance today. Thank you for your appearance and for the information provided. You might want to check the website.

Ms GALE - We will do that. Thanks for the heads up. I thought that the current version was there.

CHAIR - I couldn't find it if it was.

Ms GALE - We will make sure that we see to that.

THE WITNESS WITHDREW.

PUBLIC

THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON THE PRODUCTION OF DOCUMENTS MET IN COMMITTEE ROOM 1, PARLIAMENT HOUSE, HOBART, ON FRIDAY 1 NOVEMBER 2019.

Mr NIGEL PRATT, CLERK, **Ms ANNE TURNER**, ADVISORY OFFICER TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS, AND **Mr ANDREW HAWKES**, ADVISORY OFFICER TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS, LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA WERE CALLED AND EXAMINED VIA VIDEO CONFERENCE

CHAIR - Hello, how are you?

Mr PRATT - It's good morning here, but it's good afternoon to you.

CHAIR - Nice to see you again.

Mr PRATT - It's good to see you too. Mr Dean, I see you're there. I am not familiar with others.

CHAIR - We will start if that's all right, Nigel. Are you right to go?

Mr PRATT - Can I introduce my people for the benefit of Hansard?

I have Anne Turner here and Andrew Hawkes. They're both committee secretaries; we call them advisory officers in Western Australia. They were both involved - are you still there? We can still see you.

CHAIR - We can hear you, yes.

Mr PRATT - We can't see you, nor can we hear you. We can see us.

(Have now hung up and trying to call back)

Mr PRATT - Both Andrew and Anne were very much involved in the production and drafting of report 62. I have them here because, I suppose, they've done a deep dive into this particular area.

CHAIR - Thanks, Nigel. Around our table we have Meg Webb, the newest member; Josh Willie; and you know Ivan Dean, and our secretary, Allie.

Mr PRATT - Hi Allie.

CHAIR - Yes, Allie's still here. This is being recorded for *Hansard*. There is a terrible feedback. IT is trying to deal with that.

It is also being broadcast; I hope it is not too painful for people who might be watching on our website. Just let us know if there is a problem with the sound on your end.

Mr PRATT - Yes, we can hear you.

CHAIR - Thanks very much for appearing, Nigel. We have been looking around the country at different models for supporting the production of documents. We know that New South Wales, Victoria and the ACT have models that are similar but with some minor differences. In Western Australia, it is quite different in the way the process was set up to refer matters to the Auditor-General. It would be helpful for us if you were to go through how it was established. What drove that establishment and the benefits or problems with the current arrangement? If you were starting from scratch, what might be a more effective measure if it's not working, in terms of the full breadth of privilege claims that may come when documents are requested?

Mr PRATT - I suppose the origin of all of this was from the WA Inc. royal commission and the subsequent commission on government, which looked in depth into the whole system of government in Western Australia. I suppose the observation made in those royal commissions was the power of the executive over the parliament. The fact that party discipline had resulted in members, I suppose, who have an obligation to bring the government to account, and perhaps those members who supported the government weren't effective in doing that.

One of the issues was: how do we deal with ministers of the Crown who refuse to provide information to the parliament? The outcome in Western Australia's case was amended in 2006, the Financial Management Act (sections 81 and 82) was combined with the Auditor-General's Act which was an act that came out in the same year, in 2006, in section 24.

That's a rough outline of how we came to the place we are now. Originally, I think it was a recommendation of the Estimates committee, wasn't it?

Ms TURNER - It was. Just going back a bit, if I may, back to the 1980s and then to 1987 when the market crashed. That was the context. We need to go back to the 1980s. We had, as Nigel said, WA Inc.; we had government dealing with big business, large corporations that eventually, after the 1987 stock market crashed, became insolvent. There are some quite interesting figures in the cost of that and they range from $600 million up to $877 million. They are scholarly comments on what the actual cost to state was. Avery significant amount of money was lost.

As a result of that, the first royal commission came along in 1992 and then we had the Commission on Government - COG - in 1995. What also came out of that was our first Freedom of Information Act, in 1992, and we also got the modern day parliamentary committee system, the system we are running with now. I have been here 20 years and I came into that system.

You will recall that the bailout of Rothwell's was $115 million, so these were quite substantial sums of money. When the financial management bill came to the former Estimates committee, neither Andrew nor myself were on that committee at the time. When it came to that former committee, that particular committee made a recommendation that the Auditor-General assess whether the decision by the minister not to give certain information was both reasonable and appropriate, That is the context. That particular amendment came out of a committee system in 2006. That is the historical background to that.

Mr PRATT - That is the historical background and the next question you had, Chair -

CHAIR - How is it working? When there is an order for a document or documents, how does the system work? Can the Auditor-General adequately assess all claims of privilege or does he only claim commercial-in-confidence privilege and assess those claims?

Mr PRATT - I think the origin was expected to be the difficulties with commercial-in-confidence, withholding documents on that basis. As Anne said, that arose from the financial dealings government had in the 1980s and the difficulty parliament had in getting any information out of government about those financial dealings. Originally, the idea was that this was going to be about commercial-in-confidence, but when the financial management legislation was drafted, it wasn't drafted to restrict it to those claims. It was a much broader provision relating to pretty much anything to do with the operation or financial management of a department or an agency, which is a broad definition.

Ms TURNER - If I may, Nigel is quite right. It started out its life as commercial-in-confidence but then it morphed into something much greater than that. At the time, Colin Murphy, who was the former auditor-general, said he was concerned he was going to get lots of these notices through but that didn't happen.

CHAIR - Have there been circumstances in Western Australia when documents have been sought, either by a committee or a member on the Floor, and the government of the day refused to provide them, or are you not seeing that happen?

Mr PRATT - What we are seeing happen is, under the act, the minister is required to provide their reasons to the Auditor-General as to why those documents have been withheld within 14 days. There are some statistics, and I will ask Anne to try to find something. There have been three occasions when the Auditor-General has not been able to form an opinion at all as to whether the actions of a minister in withholding information from parliament has been appropriate because the Auditor-General hasn't been provided with the documentation they need to make that assessment.

One example of that was the Perth stadium. There was a request for documents to do with the financial arrangements, the contractual arrangements, for that infrastructure project, which was very expensive, and the minister refused to provide the documents to the Auditor-General for the Auditor-General to assess whether it was reasonable and appropriate for the minister to withhold that information. The government essentially prevented the Auditor-General from carrying out his statutory functions at that time.

CHAIR - What happened at that point?

Mr PRATT - There is no penalty in the act for that sort of situation. The issue was made public and the government still didn't provide any information, so that is where it lay. They are two issues you have in Western Australia with the capacity of the parliament to obtain that information. That information is either provided by government because there is a legal requirement to do it - for example, the tabling of annual reports - or by law there are freedom of information requirements or something like that, or, alternatively, political or public pressure is brought to bear and the government makes an assessment that it is more damaging not to reveal the information than to reveal it.

CHAIR - Having gone down the path of suspected members -

[recording dropped out]

CHAIR - Did you get the question? I was talking about political pressure. Was there any desire to introduce a standing order to deal with this issue more directly, like the New South Wales Parliament has, for example?

Mr PRATT - We have not gone down that path.

Meeting abandoned due to audio issues.