



ELLA HADDAD MP
MEMBER FOR CLARK

Ms Julie Thompson
Committee Secretary
Legislative Council
Via email: pod@parliament.tas.gov.au

Dear Secretary

On behalf of the Tasmanian Labor Party, please find enclosed a submission for the Legislative Council Select Committee inquiry into the Production of Documents.

Kind regards

A handwritten signature in black ink, appearing to read "E Haddad", with a stylized flourish at the end.

Ella Haddad MP
Shadow Attorney-General
Member for Clark

26 July 2019

Legislative Council Select Committee – Production of Documents

Context

The Select Committee has been formed in response to the blatant disrespect the Hodgman Liberal Government has shown to the Legislative Council's committee process.

The Government has refused to produce documents reasonably requested of it. Specifically, the Treasurer Peter Gutwein refused to provide the Public Accounts Committee with an un-redacted copy of a letter relating to the sale of the Tamar Valley Power Station. The former Minister for Health Michael Ferguson refused to provide the Acute Health Services Sub-Committee with a report commissioned by the Department of Health and Human Services relating to demand in Tasmania's health system.

Both Ministers falsely claimed that Right to Information determinations prevented the provision of the documents. The Government and Legislative Council would be well aware the *Right to Information Act* places no limitations of the Legislative Council's power to order the production of documents.

When this argument was disputed by the respective Committees, both Ministers claimed the documents were protected because they were 'Cabinet information'. Notwithstanding the Legislative Council's authority to order whatever documents it pleases, it is extremely difficult to see how the KPMG report—commissioned by the Department, paid for by the public and presumably not used exclusively for a Cabinet submission—could be justifiably withheld on this basis. The same would seem to apply to a letter written from one Minister to another.

But the fact the documents were withheld is hardly surprising from a Government that has demonstrated such brazen disregard for the principles of openness and transparency. This is a Government the Editor of the *Mercury* described as having a 'natural aversion to openness', that claimed it had a mandate for over 200 policies it kept hidden from the Tasmanian people before the last election, that refused for months to disclose key statistics about the housing crisis, and that for many years has under-resourced the Ombudsman's office.

Issues

It is clear there is a strong public interest in the maintenance of the convention of Cabinet confidentiality. Any erosion of this convention would stifle internal debate and diminish the quality of Government decision-making.

It is also clear a document's mere association with Cabinet is not in itself a sufficient basis for preventing its public release, let alone its provision to a Parliamentary Committee. The fact a document is claimed by the Government or a minister to be 'Cabinet information' does not automatically make that claim true.

Ensuring only 'true' Cabinet information is kept confidential—or in reverse, that public information is made available to the public—is clearly in the public interest. It is also essential for the Legislative Council to perform its role as a house of review.

So what should be done where a Government's assessment of a document's status conflicts with that of a Parliamentary Committee?

Options

1. *The Government commits to release the disputed documents and to adopt a more cooperative approach in future.*

In an ideal world the Tasmanian Government would be willing to fulfil reasonable requests for information, and would recognise this is necessary to allow the Legislative Council to fulfil its responsibility to the Tasmanian people. For the reasons detailed above, this appears to be an unrealistic solution at the present time.

2. *The Legislative Council could draw on its current powers to force a resolution of the dispute.*

Various powers are conferred on the Legislative Council by the *Parliamentary Privilege Act 1858* and the Standing Orders. These might assist it to resolve disputes over the production of documents. When considered in the context of similar legislation in other jurisdictions, or simply in relation to current disputes over the production of documents, it might be the case that the *Parliamentary Privilege Act* and the Standing Orders could be updated or modernised.

Chapter 12 of the *Brief Guide to Senate Procedures* outlines a number of remedies available to the Australian Senate should a minister refuse to produce a requested document:

The refusal of a minister to comply with an order of the Senate may ultimately be dealt with as a contempt of the Senate, with penalties applied in accordance with the *Parliamentary Privileges Act 1987*. On most occasions, however, ministerial refusals to produce information are resolved through political means, according to the circumstances of the case.

As the *Brief Guide* explains, these 'political means' might include:

- motions to postpone consideration of particular bills, including until after the requested information has been produced
- censure motions
- motions restricting the ability of ministers to handle government business
- motions depriving ministers of procedural advantages they enjoy under the standing orders
- motions to extend question time or other elements in the routine of business
- orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received *in camera*, not published for a specified period etc.)
- orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents
- further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance
- motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non-production.

Many similar 'political means' are available to members of the Legislative Council. A key advantage of drawing upon the Legislative Council's existing powers is that it does not require the agreement of the Government of the day. This approach affirms the independence, powers and responsibilities of the Legislative Council in our system of Government. Alternative approaches have the potential to be viewed as outsourcing the Legislative Council's powers and responsibilities to a third party or body.

Drawing on the existing powers of the Legislative Council arguably provides more flexibility and is more conducive to negotiation and cooperation than systems where documents are referred to an adversarial arbitration process.

However, if the Government is willing to accept the political consequences of refusing to produce a disputed document, the powers of the Legislative Council do not necessarily force it to do so. The approach might therefore be least effective in relation to the most important documents.

It should also be noted a number of the above measures were employed by the Legislative Council in its dispute with the Treasurer over the release of the Tamar Valley Power Station letter.

3. An independent arbiter could be appointed to resolve disputes.

In New South Wales, disputes over document production can be referred to an independent arbiter.

The Standing Order establishing this process specifies the arbiter must be a Queen's Counsel, Senior Counsel or retired Supreme Court Judge. They are appointed by the President of the Legislative Council.

In this process, the Legislative Council of New South Wales can order documents to be tabled by the Clerk. The Clerk then liaises with the Government, which is required to provide the requested documents and an indexed list of all documents being provided. The Government is entitled to claim the documents are privileged.

Should a Member of the Legislative Council dispute the claim of privilege, they are able to request the dispute be referred to the arbiter. The arbiter's report is strictly advisory, and they have no legal power to force the publication of a tabled document. This remains the responsibility of the Legislative Council.

There are a number of potential problems with this process:

- The Government might simply refuse to supply the documents for tabling in the first place, as occurred in Victoria in 2007 following the introduction of a similar procedure.

- Where requests are made for a category of documents, rather than a specific document, the Legislative Council will have no way of knowing if any relevant documents have not been provided.
- If the Government does not accept the need for arbitration, it might simply refuse to accept the validity of the entire process. This also occurred in Victoria in 2007.

The process therefore still relies on the good faith of the Government. If the process is designed to resolve situations where the Legislative Council believes the Government is not acting in good faith, questions remain about the likely efficacy of the New South Wales model.

On the other hand, an arbitration process could:

- Allow the Government to establish the validity of its privilege claims, as occurred in the ACT in May 2009.
- Increase the political pressure on a Government that refuses to release a public document.

If an arbitration process is recognised as being complementary to the Legislative Council's current powers, rather than a replacement of them, the proposal might have merit.

Conclusion

In light of recent examples where the Hodgman Liberal Government has refused to substantiate its privilege claims over certain documents, the Tasmanian Labor Party is open to considering ways in which both the Legislative Council and the Parliament as a whole might increase its capacity to properly scrutinise the Government. While noting there are a number of issues with independent arbitration processes, the Tasmanian Labor Party will work in good faith with the Legislative Council on any solutions it puts forward in future.