Submission to the
Legislative Council Select Committee
Production of Documents

Richard Herr OAM

I write to support the right of Legislative Council as a house of Parliament to have full access to whatever documents are necessary for the Legislative Council, including its Committees, to carry out its responsibilities to the people of Tasmania effectively. These responsibilities range from legislating and overseeing executive actions and agencies to guaranteeing transparency and enforcing Government accountability. While the Parliament's right to order documents is absolute, there are circumstances where exercising this right may be imprudent and/or disruptive to good governance. The challenge for this inquiry is to find a path that allows the Parliament to maintain its rights even as it exercises restraint to avoid undue obstruction to the reasonable discharge of Executive powers.

The central proposition of this submission is that any option for resolving a dispute over the production of documents must rest on the presumption that the onus of proof against producing documents ordered by the Parliament rests entirely on the Executive. It is the Executive arm of government which must demonstrate why it is attempting to refuse parliamentary transparency and accountability; in short resisting its constitutional obligation to be responsible to Parliament. It is not adequate to have a reason to prefer not to hand over documents. The Executive must have a compelling reason – one that is persuasive to the Parliament. There is a concomitant obligation on the Parliament to being willing to be prudently sensitive in its orders for the production of documents.

There are some key principles that underpin this assessment which need to be made explicit even if they might appear common knowledge. Unfortunately, assumptions of common knowledge are often a basis for common misunderstanding especially when the rationale for common practice has been lost to uncommon experience (at least to the majority of the common people). The foundation principles for this submission are those essential to the operation of the Westminster system of Responsible Government. Oddly, although these are the basis for the Tasmanian system of governance, they are not stated in the Constitution Act 1934. The main tenets of the Westminster system are:

- The Parliament is supreme.
- The Ministry (Government) is responsible to the Parliament.
- The non-elected Executive (bureaucracy) are responsible to the Parliament through the Ministry.
- The proceedings of Parliament are absolutely privileged (not reviewable by the courts).

Perhaps the central issue for understanding disputes regarding the production of documents under the Westminster system is that the Executive is subordinate to the Parliament. Unlike the American system, there is no presumption that the legislative and executive arms of government are co-equal. Constitutionally, Parliament is supreme and the Executive (Ministry) is subordinate. Perhaps the only area where this asymmetrical relationship may be ambiguous is with regard to the sovereign who has two separate constitutional "hats". There

is the Queen-in-Council who acts only on advice as head of the Executive and then there is the Queen-in-Parliament who has prerogative powers not subject to direction from the Executive (albeit normally willing to listen to Executive views).

Thus, constitutionally, any dispute over the production of documents does not rest on whether the Government can refuse but whether the Legislative Council should order production of the desired documents. A hypothetical question illustrates this point. Under what constitutional principle could a corrupt Government claim Executive privilege/public interest immunity for protection against parliamentary oversight into public fraud or of a level of incompetence that amounted to much the same? In fact, this hypothetical is not so hypothetical. It has already been litigated in the *Egan v Willis* [(1998) 195 CLR 424] and *Egan v Chadwick* [(1999) 46 NSWLR 563] cases. Courts found the Parliament was supreme and the Government had to respect its Westminster responsibility to Parliament.

This is where legislative prudence comes into the mix. Parliament may have an absolute right to information, but it may be imprudent to demand it absolutely. There are all types of privileged relationships that are protected because these respect civil liberties or are necessary for good order in the community. Lawyer-client, doctor-patient, journalist-source, priest-penitent are some that come to mind readily. These are controversial at times as currently with the AFP raids on the ABC or the Church's seal of the confessional and child abuse. The Government's claim to some sort of Executive privilege may be desirable and conducive for good governance but it is not a right that it can claim against Parliament absolutely.

Although Governments play lip service to responsibility for all their acts – political and administrative – to Parliament, there is usually a tacit but strongly felt "but" to qualify this acknowledgment. No matter how strongly felt, however, there is no denying that the starting point for resolving disputes over the production of documents rests in the Executive's attempt to defend the qualification rather than in explaining the Parliament's right to the document. The nature of the defence will depend in significant part on the documents sought. The Westminster model makes a clear distinction between administrative and policy information. This is because, unlike the American model, public servants cannot be held directly accountable to the legislature.

Westminster bureaucratic accountability and responsibility to Parliament is exercised through the Minister. The bureaucracy's neutrality is protected by limiting the exposure of bureaucrats to Parliament. Nevertheless, rules which protect public servants from direct accountability to Parliament implicitly reinforce the doctrine of ministerial accountability. The Osmotherly rules, for example, maintain that Ministers should never require an official to withhold information from a parliamentary committee. These guidelines were devised in 1980 by a senior public servant to guide officials in giving evidence to parliamentary committees. Basically, these rules assert that Government Departments and agencies, at a minimum, "should take care to ensure that no information is withheld which would not be exempted if a parallel request were made under the Freedom of Information Act." These rules are by Government and for Government and, as such, have never been formally accepted by Parliament. The report states, "It cannot be a breach of the principle of ministerial

responsibility for an official to give a truthful answer to a select committee question. No official should seek to protect his or her minister by refusing to do so."

I mention the Osmotherly rules not because they are the best expression of the principles for meeting Parliament's demand for administrative information. Rather it is because, even at establishing a minimalist standard, the strictures of responsible Government recognise that Parliament is supreme and that the Executive – elected and unelected – is responsible to it. It is particularly worth re-emphasising that these Rules assert both that Ministers should not prevent officials from producing documents and that officials should not protect the minister by refusing information.

Of course, in the end, Ministers carry the full burden for providing information to Parliament and its committees whether on policy or its execution. The obligation is absolute, but it can be qualified by circumstance. Options to resolving disputes over the production of documents will depend on the circumstances as both sides see these. Usually, it is the content that is at issue, but timing and the public environment are also genuine considerations. It should be noted that Freedom of Information legislation usually does set out a range of restrictions on public access. Such statutes are not binding on the Parliament even though they do illustrate the areas where good governance might justify some restraint on access. Sometimes other avenues for Parliament to acquire information as, for example, through Auditor-General reports or on the floor of the chamber through Questions can serve to reduce tensions over information. However, as found in *Egan v Chadwick* it is up to the Parliament, not the court, to do this balancing.

As a brief aside, I would note that in the *Egan v Chadwick* decision, the New South Wales Court of Appeal expressed the view that cabinet documents ought to remain confidential as ministerial responsibility is a central tenet of the Westminster system of Responsible Government. While I agree that this is correct as normative advice to the Parliament, it is not a constitutional guarantee of absolute Executive privilege for such documents. A Government that was preparing to violate the constitution or pervert the rule of law could not hide behind cabinet paper confidentiality to prevent parliamentary scrutiny. This is not an entirely hypothetical scenario. Australia even came close itself to posing this challenge in 1975.

Finding a Minister in contempt or, even more drastically, withholding supply against an entire Government are the Parliament's "nuclear options" for enforcing responsible Government on a reluctant Executive. These are weapons of last resort, however, and so are very rarely used. Nevertheless, as the NSW cases showed, the contempt power particularly is not sealed away behind a legislative cupboard secured by a rusty lock and a lost key. In practice, it is not that the full power of the Parliament cannot be used but rather it is preferable for public confidence as well as good order that the nuclear options not be threatened too freely or deployed too readily.

Generally, Parliaments have relied on the risk of political embarrassment in the media and public odium at the ballot as their primary levers against a Minister or Government resisting Parliament's demands for transparency and accountability. Sadly, in an era of growing hyper-partisanship across Western democracies, these options seem less reliable for promoting non-confrontational compliance with legislative requests for documents from Governments.

The media often prefer to present confrontations between Parliament and Government in partisan terms rather than defending the institutional pillars of Westminster democracy.

This submission does not seek to assess the range of possible general disputes' resolution mechanisms, but I would support the consensus against pursuing some statutory solutions to strengthen the hand of the Legislative Council. This is normally an impractical option simply because it would require both houses to consent to any bill intended to force compliance legally. Expanding the opportunities for judicial review to delve deeper in the proceedings of Parliament is broadly undesirable and using it against public servants would create serious challenges to the entire Westminster system of relations between Ministers and the bureaucracy. I believe a simpler and more "parliamentary" solution is to entrench changes in Standing Orders as has been done already by the Legislative Councils of NSW [S.O. 52] and Victorian [S.O. Chapter 11].

The objective in both cases has been to find an appropriate "work-around" the Government's need to maintain reasonable confidentiality with regard to Executive activities while ensuring the calls for judicious caution from the Parliament do not create precedents that could morph into some unacceptable claim for absolute Executive privilege. The Parliament has to cooperate with the Government to build the confidence to encourage the Government to willingly share the information the Parliament wants. It seems to me that the experience and practice of the two largest Legislative Councils in Australia provide the guidance that will work effectively for the smallest.