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# **PARLIAMENT OF TASMANIA**

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## **LEGISLATIVE COUNCIL**

### **GOVERNMENT ADMINISTRATION COMMITTEE "A"**

### **SPECIAL REPORT**

### **ON**

### **FAILURE TO PROVIDE DOCUMENTS**

**Members of the Committee**

Hon Ruth Forrest MLC (Chair)

Hon Kerry Finch MLC

Hon Josh Willie MLC

Hon Mike Gaffney MLC

Hon Sarah Lovell MLC

Hon Rob Valentine MLC

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# INTRODUCTION

1. At a meeting of the Legislative Council Government Administration Committee “A” on Thursday 28 June 2017, it was resolved that a Sub-Committee be established to inquire into and report upon the resourcing of Tasmania’s major hospitals to deliver acute health services, including mental health services, to the people of Tasmania, with particular reference to:

- (1) Current and projected state demand for acute health services;*
- (2) Factors impacting on the capacity of each hospital to meet the current and projected demand in the provision of acute health services;*
- (3) The adequacy and efficacy of current state and commonwealth funding arrangements;*
- (4) The level of engagement with the private sector in the delivery of acute health services;*
- (5) The impact, extent of and factors contributing to adverse patient outcomes in the delivery of acute health services; and*
- (6) Any other matters incidental thereto.*

2. The Membership of the Sub-Committee is:

- Hon Rob Valentine MLC (Inquiry Chair);
- Hon Ruth Forrest MLC; and
- Hon Kerry Finch MLC.

3. To date the Sub-Committee has tabled two Interim Reports. The first Report was tabled in the Legislative Council on 20 December 2017 and the second on 16 November 2018.
4. The Reports respond to the broad range of evidence received during the inquiry process to date.
5. The Sub-Committee has appreciated the participation of the Minister and his Departmental staff throughout the inquiry.
6. The Committee reviewed the second Interim Report of the Sub-Committee noting that further information had been requested from the Minister and

had not yet been received. The Committee accepted that the outstanding information sought was relevant information that was necessary to enable a Final Report to be prepared.

7. At the time of reporting, a final letter had been sent by the Sub-Committee to the Minister to request all outstanding information from questions taken by the Minister on notice. The Committee is hopeful that a response to these outstanding questions will be received by early March 2019 to enable it to complete its Final Report.
8. In addition to the reconciliation of any outstanding information, the Sub-Committee resolved to prepare a special Report for the purpose of informing the Legislative Council of a significant procedural concern with the provision of an important document that is in dispute.
9. The dispute concerns the provision of a KPMG Report that was commissioned by the Department of Health and Human Services and the grounds upon which the Minister has declined to provide the document to the Committee.
10. Negotiations have been ongoing for a substantial period of time to enable the release of the document to the Committee. The Chair was pleased to report to the Committee in late 2018 that as a result of a telephone discussion with the Minister, the document would be released to the Committee on an in-camera basis. The terms upon which the document was to be released were accepted by the Committee.
11. Subsequent to this agreement, the Minister wrote to the Committee on 17 December 2018 and advised that he would not be providing the document as it was an internal document for the Government.
12. Based upon past history with the Government in relation to the provision of documentation to parliamentary committees, the Sub-Committee decided not to issue a summons for the provision of the Report. This was because it did not believe this would resolve the issue and would lead to unreasonable delays in concluding the inquiry.
13. The Sub-Committee instead resolved to report these difficulties to the Legislative Council for further consideration.

14. It is hoped that a sensible solution to these ongoing difficulties can be resolved with the Government.

A handwritten signature in black ink, appearing to read 'R. Forrest'.

Signed this 21 day of February 2019

Hon Ruth Forrest MLC, Committee Chair

## APPENDIX A



2019

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### Parliament of Tasmania

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#### LEGISLATIVE COUNCIL GOVERNMENT ADMINISTRATION COMMITTEE "A"

## SPECIAL REPORT

ON

## FAILURE TO PROVIDE DOCUMENTS

#### Members of the Sub-Committee Inquiry:

Hon Kerry Finch MLC

Hon Ruth Forrest MLC

Hon Rob Valentine MLC (Inquiry Chair)

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# BACKGROUND

## Failure of the Minister for Health to provide a Report to the Sub-Committee inquiring into acute health services in Tasmania (2018)

1. A Sub-Committee of Legislative Council Government Administration Committee "A" (the Sub-Committee) is currently inquiring into acute health services in Tasmania.
2. The Sub-Committee has pursued a copy of a KPMG report commissioned by the former Tasmanian Health Service since the Minister appeared before the Sub-Committee on 22 October 2018.
3. Evidence received by the Sub-Committee regarding the KPMG Report indicated the information contained within this Report was relevant and important to the work of the Sub-Committee.
4. The Hon Michael Ferguson, Minister for Health referred to the Report in a public hearing of the Committee on 22 October 2018:

**CHAIR** - *Can we get a copy of the KPMG report for our evidence?*

**Mr FERGUSON** - *My understanding is that is internal for the Government.*

**CHAIR** - *It is important for us to have as much information as we can. We do not want to be going down paths where we are making statements covered in a report like that and we have no understanding of what that is. Is it possible for us to get a copy of that report?*

**Mr FERGUSON** - *That is my understanding, yes.*

**CHAIR** - *I would like to think you could provide that to us and we will have to discuss as a committee what we do as a result of not having that report provided.*

**Ms FORREST** - *If we made a formal request, would that make a difference?*

**Mr FERGUSON** - *I do not know today. I am happy to receive your request. I am sure you understand the Government needs to be able to commission advice and for that to be able to be obtained so governments - and in this case, the Governing Council - are able to make robust decisions. If it were the case that advice was released, it is a discouragement to obtain future advice because public servants and consultants are encouraged to give advice on a frank and fearless basis.*



**CHAIR** - I understand that entirely, but the important thing - and it was in our interim report - is that all parties work together to get the right outcome, which is what was stated. It is difficult for all parties to work together and to try to take the politics out of it if we do not have all the information available to us. That is the difficulty I see. When setting this inquiry up ... it was important we did not have political party representation, that the committee was totally independent. The whole point of this inquiry is that we could have a good, warts-and-all look at the problem and the issues surrounding the health system in Tasmania, and the acute health services. It makes it difficult for us to make proper recommendations and findings if we do not have all that information.

I ask you to consider that. We will send an official request and then go from there.

**Mr FERGUSON** - I respect and understand your position and your natural curiosity about a range of reports spoken about in the press. I also ask you to respect and understand that my earlier comment is an important one. It is the same with Cabinet documents. You would have a natural interest and curiosity in the advice to Cabinet. As always is the case, whether public servants provide departmental advice or, at times, consultants provide advice, it is important it be frank and fearless, and it is not usually frank and fearless if people feel it is going to be canvassed in public or scrutinised or debated with a different audience from which was intended.

...

**Ms FORREST** - As I understand it, the KPMG report and our RDME report were both commissioned by the Tasmanian Health Service, for the THS to be advised about the financial requirements and the healthcare demand. If that is the case, it is not really an internal document of government, it is a THS document that really, in my view, should be provided to the committee, and we will make the request. It is essential that, as a committee of the parliament, we also have access to that sort of information. I think that is pretty clear: there does not seem to be any argument about the commissioning of those reports, or am I wrong on that?

**Mr FERGUSON** - No, I am not arguing about that at all; that is not the issue for me.<sup>1</sup>

5. A number of requests were subsequently made by the Sub-Committee to receive the KPMG Report.

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<sup>1</sup> Minister for Health, *Transcript of Evidence*, 22 October 218, pp. 1-3.

6. The Sub-Committee sent a letter to the Minister for Health, dated 22 October 2018, formally requesting that the KPMG Report be provided to the Sub-Committee by close of business 29 October 2018. No response was received.
7. The Sub-Committee sent a letter to the Minister for Health, dated 30 October 2018, expressing disappointment that no response had been received to the letter dated 22 October 2018 and requesting that the Report be provided by Thursday 1 November 2018, or reasons be given as to why the previous request had not been met. The Sub-Committee noted in this correspondence that no claim of Cabinet-in-Confidence had been made in relation to the Report.
8. The Minister responded in a letter dated 2 November 2018 as follows:

*With regard to the KPMG report, I have previously addressed this matter with you in person. I am advised that it was already subject to a Right to Information request in August, with a response provided to the applicant the following month.*

*Under the assessment, a delegated Right to Information officer of the Department of Health, appointed by an instrument of delegation in accordance with s24 of the Right to Information Act 2009, determined that the information was exempt from release.*

*That is an independent assessment at arm's length from Executive Government. Noting that assessment, the report will not be released. I would note that it is very important that Government can receive frank and fearless advice and this is a cornerstone of our system of government.*

*However, I note the subcommittee's interest in health funding in Tasmania and you will note my continued effort to be constructive with your Inquiry, including multiple attendances at the subcommittee table, as well as several responses to letters and multiple submissions.*

*To further support that, in place of providing confidential advice for government, I am prepared to authorise an in-camera briefing session from Departmental officers to inform the subcommittee on these matters.*

*If this is acceptable to the subcommittee, this will be more informative, as the KPMG report only covers the period up to 2015-16, data which are now two years old, with a briefing able to provide more contemporary data and forward projections as we discussed at my recent presentation.<sup>2</sup>*

9. The Sub-Committee sent a letter to the Minister for Health, dated 6 November 2018 accepting the offer made to provide in-camera evidence to

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<sup>2</sup> Letter from the Minister for Health to the Sub-Committee inquiring into acute health services in Tasmania, dated 2 November 2018.

the Sub-Committee on the content of the KPMG Report, including the provision of more contemporary data and forward projections. The Sub-Committee expressed its view that the *Right to Information Act 2009* does not apply to Parliamentary proceedings, and therefore requested reasons be given in an open hearing by the Minister and the Secretary of the Department as to why the KPMG Report would not be released to the Sub-Committee, prior to proceeding to in-camera evidence about the contents of the KPMG Report.

10. Other than reference to the Right to Information assessment for the release of the KPMG Report and reference to the principle that governments need to receive frank and fearless advice, no further reasons have been given by the Minister in his refusal to provide the Report to the Sub-Committee.
11. The Minister responded in a letter dated 13 November 2018 expressing concern at the continuation of the Inquiry after the release of the Second Interim Report. The Minister maintained the offer to provide an in-camera department briefing on the health budget as a substitute for the KPMG budget advice and as a concluding engagement with the Sub-Committee. A copy of letter is attached in Appendix A.
12. The Sub-Committee sent a letter to the Minister for Health, dated 14 November 2018 confirming arrangements for a public hearing with the Minister for Health and departmental officials on Friday 16 November at 10.30 am in Launceston.
13. The Sub-Committee requested the KPMG Report, or reasons for not providing it, in the public hearing on 16 November 2018:

***CHAIR** - Minister, we would really like a copy of that report. It is of interest to the committee, as you can appreciate. Are you saying you are not prepared to release that report?*

***Mr FERGUSON** - I am saying that. That is nothing new, with respect, Chair. I am not prepared to provide you with a report I am not empowered to give to you.*

*The KPMG report was commissioned. It is internal budget management advice. Obtaining external advice has been longstanding practice in Health and other agencies for decades. It is the case in the private sector. Somebody became aware of the report and attempted to RTI it, but it was assessed under RTI as not for disclosure.*

*As I explained at my previous hearing in providing evidence, governments need to be able to take advice. I am sure that members of the Legislative Council would want to think that government does take advice; so, when you seek advice you need to know it is going to be proper advice - frank and fearless. When you start releasing advice you have been provided with, it actually compromises your*

*ability to get advice in future. It will change the behaviour of the person providing advice if they think, 'This might be released; I might not be quite so frank and fearless'. That is the principle I am adhering to. I do not mind saying to you - and the secretary would be a better proponent of this than me - that I am happy to share with you some thoughts on my interpretation of the KPMG report, but not if we are going to go through this process of you continually asking me to come forward and give evidence at your committee, asking for things you know I'm not prepared to provide you with and then still saying to me that you want the report.*

**CHAIR** - *It is our understanding is that RTI is not something that prevents a report being provided to the committee. Obviously, there is a difference of opinion there.*

**Mr FERGUSON** - *If I were you I would perhaps say the same thing, but I am in executive government and I have responsibilities to abide by. Documents produced to help assist the preparation of budgets are never released. I'm trying to do this respectfully.*

**CHAIR** - *I appreciate that.*

**Mr FERGUSON** - *I understand the position each of you is in.*

**Ms FORREST** - *Minister, can I just clarify this? You are relying on the RTI assessment of it as a reason not to provide it to the committee. Is that what you are saying?*

**Mr FERGUSON** - *I have referred to that, but it would not be my point that is the only reason, no.*

*We are not prepared to release the report because the RTI process is entirely separate to my reasons and articulation, because that is an independent process. I also make the determination that I am not prepared to hand over reports provided to Government for budget preparation purposes.*

**Ms FORREST** - *You understand that parliamentary committees have a power to request such documents?*

**Mr FERGUSON** - *Sure.*

**Ms FORREST** - *To not provide it would require more reasons - in my view and the view of others with more legal brains who have looked at this - other than you do not want to release because it might be an issue for a future provisional advice. That has not stacked up in other jurisdictions. For us to accept that, the committee would really require a much more robust reason for its not being provided.*

**Mr FERGUSON** - *Again I understand why you would say that but I am under no obligation to provide a report that has been solicited by government to help it prepare for budget preparation. I respect the House of the Legislative Council; I respect its interest in this matter. But I am not prepared to release a report even though there are things about that report that I am not offended or troubled by. There is a principle I am adhering to here. I want to protect the ability of government to obtain advice and ensure that advice is frank and fearless.*

*The reference to the RTI is relevant insofar as it helps explain why there is not a public interest served under the independent assessment of it, but I appreciate that is -*

**Ms FORREST** - *That is members of the public not parliamentary committees. They are two completely different processes.*

**Mr FERGUSON** - *I was about to say that I appreciate that is a public interest test.<sup>3</sup>*

14. The Sub-Committee sent a letter to the Minister for Health, dated 3 December 2018, requesting a copy of the KPMG report be provided to the Sub-Committee in-camera by 10 December 2018.
15. The Minister provided verbal assurance to the Chair on 7 December 2018 that the KPMG report would be provided to the Sub-Committee in-camera. The Sub-Committee Chair subsequently informed the Secretariat and Sub-Committee Members by email of this commitment.
16. On 17 December 2018 a response to a question taken on notice was received from the Minister to the Sub-Committee declining to provide the KPMG report. The Sub-Committee was surprised by the response, given the verbal undertaking to the Chair that the report would be provided in-camera.
17. The Committee resolved that the Secretary contact the Minister's office to seek clarification in relation to his change in position concerning the release of the document. No response was received from the Minister's office despite subsequent contact by the Secretary.

**Parliamentary Standing Committee of Public Accounts request for information from the Treasurer during the course of its inquiry into the financial position and performance of Government owned energy entities in Tasmania (2017)**

18. The Sub-Committee is concerned that a similar situation has again arisen to that which occurred during the 2017 Public Accounts Committee Inquiry into the financial position and performance of Government owned energy entities in Tasmania.

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<sup>3</sup> Transcript of Evidence, 16 November 2018, pp. 1-3.

19. The Committee had been pursuing a full copy of a letter titled "The Sale of the Tamar Valley Power Station"(the Letter) dated 9 April 2015 from the Treasurer to the Minister for Energy since the Treasurer appeared before the Committee on 30 August 2016.
20. Mr Scott Bacon, MP referred to the Letter during the Treasurer's appearance before the Committee and a request for a copy of the Letter was made in a question on notice to the Treasurer dated 2 September 2016.
21. The Treasurer's response of 14 September 2016 stated: This letter has been released, under a Right to Information Request, and appropriate Report information has been withheld based on an assessment under the Right to Information Act 2009.
22. A redacted copy of the Letter was attached to the response.
23. Following advice from the Clerk of the Council, the Committee forwarded a request, dated 10 November 2016 to the Treasurer, seeking that the Letter be released in safe-custody to the Clerk of the Council, to enable the Committee to view the Letter.
24. The Treasurer responded on 9 December 2016 stating :

*As requested by the Committee, I have again considered your request in the context of established precedent and convention however I do not consider it appropriate to release the whole Tamar Valley Letter to the Committee for similar public interest grounds to the RTI decision ...That is, the Tamar Valley Letter includes 'cabinet information' and the Departmental advice attached to that letter is a 'working document' including 'internal deliberative information'; both of which require confidentiality to be maintained.*
25. In his response of 27 February 2017 the Treasurer again refused release of the full Letter.
26. At its meeting of 15 March 2017 the Committee resolved to summon the Treasurer to appear before the Committee and to produce a full copy of the letter.
27. The Treasurer appeared before the Committee at 10am on 30 March 2017. The Treasurer did not produce a full, un-redacted copy of the Letter. The Treasurer made comment which put on the record his reasoning for not complying with the summons.

# FINDINGS

The Sub-Committee finds –

1. That the Minister for Health has not made a valid claim in relation to the decision to refuse to provide a copy of the KPMG Report to the Sub-Committee in accordance with its numerous requests.
2. That the Minister for Health incorrectly relied upon the provisions of the *Right to Information Act 2009* as being relevant to the question of whether, or to what extent, he is required to comply with a request from the Sub-Committee for the production of documents. The Minister also relied on the principle of the need for frank and fearless advice to support his refusal.

# RECOMMENDATION

1. The Sub-Committee recommends that the Legislative Council consider an effective mechanism to deal with the issue of ongoing disputes arising between the Government and Committees of the Parliament of Tasmania in relation to the production of papers and records (documents).



# APPENDIX A: Copy of Letter dated 13 November 2018 from the Minister for Health

Minister for Health  
Minister for Police, Fire and Emergency Management  
Minister for Science and Technology  
Leader of the House



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Hon Rob Valentine MLC  
Chair  
Legislative Council Government Administration Sub-Committee A Inquiry into Acute Health Services in Tasmania  
**Email to Committee Secretary:** [jenny.mannering@parliament.tas.gov.au](mailto:jenny.mannering@parliament.tas.gov.au)

Dear Chair

Thank you for your letter dated 6 November 2018.

I note from the recent Matter of Public Importance debate in the Legislative Council that the subcommittee intends to possibly produce another 'interim report' and assumedly continue working into next year.

It would be unusual for a sessional committee subcommittee inquiry to appear to continue into perpetuity without a clear final reporting date, especially given the stated intention of the Committee in its 2017 report that it would table a comprehensive and Final Report this year.

Whilst the future of the sessional committee's subcommittee Inquiry and any decision to produce multiple reports, is a matter for the members of the subcommittee, I would query its continuation.

The Terms of Reference state that the committee be "*established to inquire into and report upon the resourcing of Tasmania's major hospitals to deliver acute health services*".

Since your subcommittee inquiry commenced, we have seen a State Election campaign with a significant focus on health, and a State Budget faithfully reflecting the roll-out of the Government's \$757 million six year plan.

Not only has our plan been openly shared with Tasmanians and put to voters before the election, it was and is subject to usual budget scrutiny through the Estimates processes, as well as parliamentary scrutiny through question times in each place.

Noting this, whilst my offer to provide an in-camera departmental briefing on the health budget remains open to you as a substitute to the KPMG budget advice, that will be our concluding engagement with your subcommittee.

As a Government, we will focus on getting on with the job of improving Tasmania's health system without distraction, implementing our plan as Tasmanians would rightly expect of us.

Regarding your subcommittee inquiry. Over the past year and a half, the Government has participated extensively in your inquiry, including two personal appearances from me, three Ministerial submissions, facilitation of site visits to hospitals, and responses to numerous questions in writing. Furthermore, I attended a 10 hour estimates session with each of your subcommittee members earlier this year along with senior department officials.

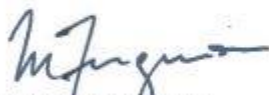
These efforts to cooperate and assist your inquiry stand in stark comparison to record of the former Government, which refused to participate in the 2011 Legislative Council Inquiry into its \$500 million cut to the health budget. To be frank, those were very different circumstances. Ours is a government that invests in health, not cuts it.

This wide range of evidence provided by the Government will no doubt be a substantial contribution to the work of the Inquiry. I trust that the material will help inform any future reports.

Lastly, Departmental advice is being prepared with regard to your remaining questions you have put by letter and a response will be provided in due course.

This letter may be taken as a public submission.

Yours sincerely



Michael Ferguson MP  
**Minister for Health**

13 November 2018