Legislative Council Select Committee

PRODUCTION OF DOCUMENTS

SUBMISSION

Background

The system of representative parliamentary government which presently exists in Tasmania is based upon the traditions and conventions developed in the United Kingdom over many centuries and is the direct result of the colonisation of Tasmania (then Van Diemen's Land) by British military, and later, civil authorities.

The first British settlement on the island established at Risdon Cove in 1803 was under the command of Lieutenant David Collins who was authorised to impose a form of martial law upon the settlers. By 1825, Lieutenant General Ralph Darling had been appointed Governor of Van Diemen's Land and both an "Executive Council " and a "Legislative Council" (the members of each of which were appointed by the Monarch) had been established.

By a proclamation of King William IV (in the form of Letters Patent) dated 4 March 1831 (now commonly referred to as the "*Charter of Justice*") the Supreme Court of Van Diemen's Land was established.

Accordingly, by 1835 all three of the departments of civil government - the Legislature (in the form of an appointed Legislative Council) the Executive Government (in the form of a Governor and an appointed Executive Council) and the Judiciary (in the form of the Supreme Court of Van Diemen's Land) had been established.

However, it was to be another twenty years before the transportation of convicts to what was by then called Tasmania, ceased and a bicameral (i.e. two House) elected Parliament was established pursuant to an Imperial Act now known as the *Australian Constitutions Act 1850*.

Responsible Government

The so-called "Westminster model" of parliamentary government is usually described a being a system of "responsible government". In this context the term "responsible" does not mean "sensible" or "prudent". Rather, it describes what is perhaps the defining feature the Westminster model of government - that those in charge of the day to day management of the affairs of government are answerable (that is to say, are "responsible") to the elected Parliament (and thereby, to the electors) for their own actions and for the actions of those whom they administer. Accountability is ensured by the constitutional requirement that those who are in charge of the administration of the government - the sworn Ministers of the Crown - must also be Members of one or other of the Houses of the Parliament.[1] And by long-standing custom or "convention", it is the Member of the House of Assembly who can satisfy the chief executive officer - the Governor - that he or she commands the support of a majority of the Members of that House, who receives from the Governor a commission to form government and to "advise" the Governor as to whom, among the other Members of the Parliament, the Governor should appoint to be Ministers of the Crown.

These arrangements may be contrasted with the "Republican model" of government in which the chief executive officer is elected (either directly or by the Legislature and is usually called "President" or "Chancellor") and those responsible for the administration of the various departments of government (sometimes called Minister or, in the United States "Secretary") are *forbidden* from being Members of the Legislature.

Under the Republican model there exists a more or less strict "separation of powers" in that a person who holds an office in one branch of government, may not also concurrently hold an office in either of the other two branches of government.[2] So, a member of the Legislature may not also concurrently be a Minister or Secretary in the government, or a Judge. Likewise, Judges may not concurrently be members of the Legislature or concurrently hold office as a Minister or Secretary, and so on.

[1] See *Constitution Act 1934*, s 8B

[2] In the United States of America, for example, neither the President nor any member of his administration (generally called "Secretaries") may be a member of the Congress. See the Constitution of the United States of America, Article 1, section 6 clause 2

Under the Westminster model, almost invariably,[3] a Judge may not concurrently be a Member of the Parliament or (as a result) hold office as a Minister of the Crown. However, as previously mentioned, only Members of the Parliament are capable of being appointed as Ministers of the Crown. Therefore, by definition, all Ministers of the Crown are Members of the Parliament and are, consequently, liable to answer questions from other Members concerning the administration of the government in accordance with the procedures and Standing Orders of the House of which they are a Member.

One of the criticisms of the Westminster model is that because the persons who are capable of being appointed to administer the departments of government (Ministers) must be Members of the Parliament, the choices (and possibly, the talent) available may be quite limited; whereas, under the Republican model, the President or Chancellor is able to appoint any person whom he or she considers to be the most capable of doing the job.

An important difference between the two models of government may therefore seen as being that under the Republican model, those administering the government can only be made answerable to the Legislature by being summoned to appear before (usually) committees of one or other Houses of the Legislature. But, under the Westminster model, those responsible for administering the government must face regular, if not daily, questioning from other Members of the House of which they are Members in addition to being liable to appear before committees of the Houses.

This very difference, and indeed, the term "responsible government" highlights something that is very often overlooked when considering the role and functions of the Parliament of Tasmania.

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[3] In Tasmania, s 32(3) of the *Constitution Act 1934* provides that no Judge of the Supreme Court shall be capable of being elected to, or of holding, a seat in either House of the Parliament. This is also the position in every other Australian State and also under the Commonwealth Constitution. However, prior to 2005, the most senior judge in the United Kingdom - the Lord Chancellor - was concurrently also the presiding Member of the House of Lords and a Minister in the government.

The Functions of the Parliament

No doubt, everyone would agree that it is the function of the Parliament to make laws for the better government of the State and its people.[4] Many fewer would readily volunteer that it is also the function of the Parliament to conduct such inquiries as it sees fit in order to ascertain what, if any, new or modified laws could or should be made and to inquire into the administration, execution and compliance by the government of the day, with the laws which the Parliament has already made.

It takes only a moment's reflection to realise that the function of making laws and the function of conducting inquiries are completely complementary and of precisely equal importance if the Parliament is to operate effectively on behalf of the people. For unless the Parliament knows whether the government is administering existing laws properly, is expending public monies efficiently and for the purposes for which the Parliament appropriated those funds and is otherwise acting honestly and fairly in the conduct of public affairs, the Parliament cannot know whether existing laws are in need of amendment or whether new and better laws may be required.

Moreover, if the Parliament is unable to discover the truth about these matters then those who elected the Parliament - and who also elected the government - the people of Tasmania, are likewise unable to know the truth and so, cast an informed vote.

Of course the matters about which the Parliament may properly make inquires are not limited to the acts or omissions of government. In considering the state of the law and the desirability of any changes in the law, no logical limit can be placed upon the subject-matter into which the Parliament may have reason to inquire. It is for this reason that the Parliament of the United Kingdom has often been called "*the Grand Inquest of the Nation*". In 1837 the Chief Justice of England, Lord Coleridge said of the House of Commons[5]:

> "That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: It is unnecessary to attempt to do so now: I would be content to state that they may inquire into everything which it

[4] Although, surprisingly, the *Constitution Act 1934* (unlike every other State Constitution Act) does not contain any provision which expressly authorises the Parliament of Tasmania to make laws.
[5] *Howard v Gossett* (1837) Ad & E 1112 at 1185

> concerns the public weal for them to know; and they themselves, I think are entrusted with the determination of what falls within that category.
>
> Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary, and, where attendance is required, or refused, in either stage, of summons or arrest, there need be no specific disclosure of the subject matter of inquiry, because that might often defeat the purpose of the examination."

In my respectful submission, those words remain equally applicable to both House of the Parliament of Tasmania.

Public Interest Immunity

For at least the last three hundred years executive governments and the parliaments to which they are responsible under the Westminster model of parliamentary government have been arguing about the extent of the power of the Parliament to obtain information from the government.

It is fair to say that with only a few exceptions, the argument remains largely unresolved at the political level.

The position in New South Wales was effectively decided by the New South Wales Court of Appeal in the case of *Egan v Chadwick*[6]. In that case the Court held (by majority) that the Legislative Council of the State of New South Wales (and by inference, the Legislative Assembly) had the power to compel the production to it of any document in the possession of the government with the exception of "cabinet documents" and (unanimously) any documents which, in legal proceedings, would attract a claim for legal professional privilege.[7]

However, the decision in *Egan v Chadwick* must be understood in the light of the fact that the New South Wales Parliament (like the Tasmanian Parliament) is not invested with all of the inherent powers of the Parliament of the United Kingdom. So much was decided in 1858 by the Privy Council in *Fenton v Hampton.*[8]

In that case the respondent Hampton was the Comptroller-General of Convicts for Van Diemen's Land. A Select Committee of the Legislative Council of Van Diemen's Land (which at the relevant time remained a single chamber) was set up to inquire into alleged abuses in the Convict Department and had summonsed Hampton to appear before it. Hampton failed to appear before the Select Committee and also refused to appear before the bar of the Legislative Council to explain his failure to appear before the Select Committee. Thereupon the Council resolved that Hampton was guilty of contempt and the Speaker of the Council (Fenton) issued his warrant for Hampton to be arrested and held in the custody of the Serjeant-at-Arms during the pleasure of the Council. The warrant was duly executed and following his subsequent release from custody, Hampton commenced an action

6 (1999) 46 NSWLR 563

7 In a powerful dissenting judgment priestly JA concluded that "no legal right to absolute secrecy is given to any group of men and women in government as part of a truly representative democracy."

8 (1858) 11 Moo PC 347;14 ER 727

for trespass against both Fenton and the Serjeant-at-Arms. Both the Supreme Court of Van Diemen's Land (Fleming C.J.) and on appeal, the Privy Council, held that the Legislative Council of Van Diemen's Land had no inherent power to punish a contempt "*committed out of its doors*". Speaking for the Privy Council Lord Chief Baron Pollock said;

> "[I]f the Legislative Council of Van Diemen's Land cannot claim the power they have exercised on the occasion before us, as inherently belonging to the Supreme legislative authority which they undoubtedly possess, they cannot claim it under [the Australian Constitutions Act (No.2)] as part of the Common Law of England (including the *Lex et consuetudo Parliamenti*), transferred to the Colony by 9 Geo. IV., c. 83, sect. 24. The `*Lex et consuetudo Parliamenti*' apply exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a Colony by the introduction of the Common Law there."

Following the decision in *Fenton v Hampton* in February 1858, and, no doubt because of it, the Tasmanian Parliament passed the *Parliamentary Privilege Act 1858* which remains in force to this day. That Act received the Royal Assent on 29 October 1858 and, among other things, empowered each House of what was by then a bicameral Parliament, to order the attendance of witnesses and the production of documents and to punish contempts whether committed within or outside the Parliament – see s1 of the Act.

By contrast, no legislation authorising the Parliament of New South Wales to "send for papers" has ever been enacted in that State.

Parliamentarians would no doubt argue that if legislation similar to the *Parliamentary Privilege Act 1858* (Tas) had been enacted in New South Wales, the decision in *Egan v Chadwick* would have been different. As a corollary they would also argue that the reasoning adopted in *Egan v Chadwick* has no direct application in Tasmania because the Tasmanian Parliament possesses an express power to call for the production of documents; that power having been conferred by section 1 of the *Parliamentary Privilege Act 1858*.

Nevertheless, in Tasmania, the question remains: ***Does the power of a House of Parliament, including a committee of such a House, to require the production of documents*** (or to use the words of the *Parliamentary Privilege Act 1858*, to "*send for papers*") ***include documents which have traditionally been asserted as being immune from production on the ground that the publication of their contents would be contrary to the public interest?***

It will be remembered that the *Parliamentary Privilege Act 1958* (Tas) was enacted to overcome a decision which had held that the (then single chamber) Tasmanian Parliament did not have the same *inherent* powers as the Parliament of the United Kingdom and to give to the Tasmanian Parliament the power to (among other things) require the production of documents. That is, the purpose of the Act was to give to the Tasmanian Parliament by statute the same inherent powers of the Parliament of the United Kingdom with respect to the production of documents and the punishment of contempts.

In Queensland, South Australia, Victoria and Western Australia this was unnecessary because in each of those States, their respective Constitution Acts include a provision similar to s 49 of the Commonwealth *Constitution* which provides as follows:

> "The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House , shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and its members and committees, at the establishment of the Commonwealth."

The effect of such provisions is to confer upon the Parliaments of each of those jurisdictions all of the powers, privileges and immunities (including the inherent powers and privileges and immunities) of the House of Commons.

"Public Interest Immunity" and the law

The question of whether or not there are limits on the kind or classes of documents which the executive government is bound to produce for inspection does not only arise in the case of requests made by one or other of the Houses of the Parliament or their committees. The same question not infrequently also arises in civil litigation in which the Crown or some emanation of the Crown (such as a Crown corporation or GBE) is a party.

There is a large number of decided cases in which courts have made determinations about whether claims by governments in civil litigation to be entitled to resist giving inspection of documents on the ground of "public interest immunity" were justified. (See for example:

Commonwealth v CFMEU[9], *NTEIU v Commonwealth*[10] and *Secretary, Department of Infrastructure v Asher.*[11])

It used to be the law that if such a claim was asserted by the government against an opponent in civil litigation that that claim was regarded as conclusive and the courts would not look behind it. However, that position changed in the United Kingdom in 1968 after the decision in *Conway v Rimmer*[12] and in Australia in 1978 after *Sankey v Whitlam*[13] was decided.

Since then, courts in both countries have proceeded upon the basis that they have the power to require the production to them of those documents which are said to be immune from production, for the purpose of determining whether it is, or is not, contrary to the public interest that that information be disclosed publicly or perhaps only to the opposing party and on any, and if so, what terms as to confidentiality.

Not unexpectedly, the courts have developed principles which are thought to be applicable when they are called upon to make such determinations. It was in precisely that context that the High Court of Australia was called upon to decide a claim for public interest immunity in *Commonwealth v Northern Land Council.*[14] In a rare unanimous judgment the High Court said (some references and citations omitted):

> 6. [I]t has never been doubted that it is in the public interest that the 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 may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential (See U.K., Parliament, Report of the Committee of Privy Counsellors on Ministerial Memoirs ("the Radcliffe Committee"). Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a

9 (2000) 171 ALR 379
10 (2001) 111 FCR 583
11 [2007] VSCA 272
12 [1968] AC 910
13 (1978) 142 CLR 1
14 (1993) 176 CLR 604

premature, ill-informed or misdirected nature and to divert the process from its proper course (See *Conway v. Rimmer* (1968) AC, per Lord Reid at p 952; *Sankey v. Whitlam* (1978) 142 CLR, per Mason J. at pp 97-98; U.K., Parliament, Departmental Committee on Section 2 of the Official Secrets Act 1911 ("the Franks Committee"), (1972), Cmnd.5104, vol.1, p.33). The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.

7. The classification of claims for public interest immunity in relation to documents into "class" claims and "contents" claims has been described as "rough but accepted" (See *Burmah Oil Co. Ltd. v. Bank of England* (1980) AC, per Lord Wilberforce at p 1111). It serves to differentiate those documents the disclosure of which would be injurious to the public interest, whatever the contents, from those documents which ought not to be disclosed because of the particular contents. Both upon principle and authority, it is hardly contestable that documents recording the deliberations of Cabinet fall within a class of documents in respect of which there are strong considerations of public policy militating against disclosure regardless of their contents (See *Lanyon Pty. Ltd. v. The Commonwealth* (1974) 129 CLR 650; *Sankey v. Whitlam* (1978) 142 CLR, at pp 39, 57, 97, 102, 108; *Conway v. Rimmer* (1968) AC, at pp 952, 973, 987, 993; *Air Canada v. Secretary of State for Trade* (1983) 2 AC 394, at p 432). <u>But, whatever the position may have been in the past, the immunity from disclosure of documents falling within such a class is not absolute. The claim of public interest immunity must nonetheless be weighed against the competing public interest of the proper administration of justice, which may be impaired by the denial to a court of access to relevant and otherwise admissible evidence.</u> As Gibbs ACJ. said in *Sankey v. Whitlam* (1978) 142 CLR, at p 43; see also per Stephen J. at pp 63-64 and Mason J. at pp 98-99):

> "I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection - the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned. If a strong case has been made out for the production of the documents, and the court concludes

> that their disclosure would not really be detrimental to the public interest, an order for production will be made." (underlining added)

Accordingly, it may now be said with some confidence that the law in Australia is that in civil litigation, the Crown (and its emanations) no longer enjoys *absolute* immunity from the production of documents on *any* ground, including on the ground of "public interest immunity" even where documents record or reveal the deliberations of Cabinet. Where it is claimed that it would be contrary to the public interest for the Crown to be required to produce particular documents or classes of documents to an opponent, the Court will order that those documents be produced to the Court to enable the Court to determine whether or not the interests of justice require that the documents be produced unconditionally or subject to some restriction such as production in confidence or to the opponent's legal advisers only and not to the opponent personally or in some modified form or not at all.

"Public Interest Immunity" and the Parliament

The principles that have been established by the courts in relation to the production of documents in civil litigation are not legally binding or enforceable as between the Parliament and the Crown because, generally speaking, the Courts are unable to adjudicate upon matters involving the "*proceedings of the Parliament*"[15]

Nevertheless, it is not immediately apparent why similar principles should not also apply in the case of requests by the Parliament for the production of documents which are in the custody or control of the Executive.

An obvious distinction between a Court and the Parliament (or a committee of one or other of the Houses) is that a Court acts as an independent arbitrator between the government and whomever is the Government's opponent in the litigation, whereas as between the Executive and the Parliament there is no umpire – except, perhaps, ultimately, the electors.

Thus, when the Parliament calls upon the Executive to produce documents, the usual course is that the Executive will either comply in

[15] See *Bill of Rights 1689*, s 9

whole or in part, sometimes declining to produce some documents on one or more of a variety of grounds. In the past those grounds have included the quite misconceived claim that the documents fall within an exception under the *Right To Information Act 2009*[16] or are "commercial-in-confidence" or are legally privileged. But as things presently stand, it does not really matter on what "ground" the Executive claims to be entitled to refuse to produce the requested documents because there is no independent third party available to assess the merit of the supposed ground of immunity and the Parliament is unable to do so because it cannot view the documents!

In those circumstances, the matter inevitably results in a battle of political wills. The Parliament (usually the Legislative Council because, almost by definition, the Executive has control of a majority of the votes in the House of Assembly) may have available to it a range of procedural sanctions - such as declining to deal with "Government Bills" until the documents are produced - or censure motions or theoretically, the power to imprison for contempt; but these have rarely been used.

The Executive, on the other hand, will usually have made a judgment about how politically damaging it believes it is (or has become) to be seen to continue to refuse to produce the requested documents and will act accordingly. It may offer a private briefing to some Members or offer to produce the documents on condition that they or their contents are not to be published (or decline to do so on the ground that Opposition Members cannot be trusted).

The result is usually a relatively short political stand-off which ends with either the Parliament backing down or the Executive producing the documents, perhaps in some modified form.

On one view, this is a very unsatisfactory state of affairs.

If it is often or even sometimes, in the interests of justice in civil litigation that the Executive must produce documents which reveal the legal advice that it has obtained or even the deliberations of Cabinet, how can it possibly be that sometimes it is not also in the interests of a free and strong democracy, that the elected representatives of the

[16] The *Right to Information Act 2009* regulates the right of "persons" (i.e. citizens or voters) to obtain information held by the Executive. It has no application at all to requests made by the Parliament pursuant to the powers conferred by the Parliamentary Privilege Act 1858i.

people should be able to know what the Executive has done or is proposing to do in their name?

How can it be that some of the elected representatives of the people are entitled to refuse to tell the other elected representatives of the people what they have done or propose to do?

How can the Ministers of the Crown possibly be made "responsible" to the Parliament in any meaningful way if those same Ministers refuse to tell the Parliament what they have done or propose to do?

How can the Parliament carry out its function of holding the government and its Ministers to account in such circumstances?

On another view, things are just as they should be.

After all is said and done, disputes between the Parliament and the Executive are, by their very nature political and not legal. It is therefore only right and proper that such disputes should be resolved by the political process itself and not by some legal or quasi-legal rules or principles that have been worked out by the Courts for another purpose. If the government proves to be too secretive for the electors then - so the argument goes - the people will not re-elect them.

The "New South Wales Solution"

Perhaps curiously, only New South Wales has developed a procedure for the orderly resolution of disputes between the Legislative Council and the Government concerning the production of documents.[17]

That procedure is set out in Legislative Council Standing Order No 52.[18]

Any Member of the Legislative Council may give notice of motion for an order for "state papers"[19] If the motion is passed it is transmitted to

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[17] Curiously, because in that State alone there is legal authority in favour of the proposition that there is a class of documents the members of which are absolutely immune from production to the Parliament - see *Egan v Chadwick*. On the other hand, it may have been that the continued possibility of further litigation on this issue led the parties to reach agreement on what became Standing Order No. 52, the making of which required the agreement and co-operation of the then government of New South Wales. See *Constitution Act 1902* (NSW) s 15

[18] The Standing Rules and Orders of the Legislative Council of New South Wales are available at: https://www.parliament.nsw.gov.au/lc/rules/Documents/Standing%20orders%20May%202004.pdf

[19] i.e., documents which are legally in the possession, custody or control of a Minister of the Crown

the Government which will prepare a return to the order. The return is provided to the Clerk of the Legislative Council and, unless privilege[20] has been claimed, id tabled and made public. If privilege has been claimed in respect of some or all documents they are nevertheless available for inspection by Members of the Legislative Council only and any Member may dispute the validity of the claim of privilege in respect of any document. In that event the claim of privilege is referred to an independent arbiter (who is a retired Supreme Court Judge) who will assess the claim and advise the Council accordingly. It is then a matter for the Legislative Council as a whole to finally determine the validity of the claim.

If nothing else, this procedure avoids political stand-offs of the kind described above. To date, there does not appear to be any instance in which a Member of the New South Wales Legislative Council who has been given access to a document that is claimed to be privileged has disclosed the contents of that document while that claim remained unresolved. That may well be because all Members appreciate that such a breach of the Standing Order would (at the very least) be likely to jeopardise the continued operation of the Standing order itself.

Dated the 17th of July 2019

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[20] It appears that a claim to privilege may only be based on the ground that *either* the document is subject to legal professional privilege AND that its publication would not be in the public interest *or* that the document reveals the deliberations of Cabinet AND that its publication would not be in the public interest.