

Submission to the legislative Council Select Committee on the Production of Documents.

The legislative Council on Tuesday, 21 May resolved that a select committee be appointed to enquire into and report upon:

The options for an agreed process to resolve disputes that arise regarding the production of papers, documents and records between the government and the legend of councillors committees including joint committees were members of the Legislative Council have membership.

There are considerations where obviously a document sought by a committee may be a document that is determined by the government to be covered by Executive Privilege.

On the other hand the overuse of executive privilege removes from the people of Tasmania the capacity to have their elected representatives understand what should have been, or has been done, in their name.

The progress nationally has been one where slow but consistent progress towards accountability has now been seen as the norm rather than the exception. Telling people the truth is generally better in a democracy than telling them a falsehood.

Now there will be some parts of the process of government that cannot provide information, that is, for commercial reasons such as the confidentiality of the tender process, that such information is not released.

However this does preclude, that once the decision is made in relation to the successful supplier of services to the government, that the full details of the contract should not be made publicly available.

The issue here is that public money is being spent to purchase goods and services and the public have a right to know what the terms and conditions of the contract really are.

There are other times when there are documents, generated by the public sector, or an instruction by a minister to someone in the public sector, whether it be a normal department or a state owned company or instrumentality, which should not be classified using executive privilege.

The reason for this is that if there has been a decision of the Cabinet, and that decision results in an instruction by the Minister of State or the portfolio Minister, then such a decision/letter of advice should not be in any way privileged.

It is simply an instruction of the Government.

Redacting parts of documents:

When documents are released and are heavily redacted so as to make them totally meaningless the resulting service to the taxpayer or citizen of the state is not fulfilled by the Parliament.

Redacted documents are nothing more than a process of hiding accountability for actions that may have been badly executed, show poor judgement, or indeed show poor advice in the first instance.

Redacted documents are also a device used by the public sector to escape scrutiny. Redacted documents should not be supplied under any circumstances to a Parliamentary committee, and if they are not able to be supplied in a public fashion they should be supplied in-camera.

The best option would be to adopt a process similar to that used by the legislative Council in the Parliament of Victoria which seems to work exceedingly well.

It is both focused and balanced and has from what I am able to ascertain good support within the system of government in Victoria.

I therefore recommend the following as a proposed change to the standing orders of both the Legislative Council and the House of Assembly in the Parliament of Tasmania:

PRODUCTION OF DOCUMENTS

1.01 Order for the production of documents

- (1) The Council or the House may order documents to be tabled in the Legislative Council or the House of Assembly.
- (2) The Clerk of the Legislative Council or the Clerk of the House of Assembly, is to communicate to the Secretary, Department of Premier and Cabinet, all orders for documents made by the Council or the House.
- (3) An order for the production of documents must specify the date by when the documents must be provided.

1.02 Tabling of documents provided in accordance with an order for the production of documents

- (1) Documents provided in response to an order under Standing Order 1.01 will be delivered to the Clerk of the Legislative Council or the Clerk of the House of Assembly.
- (2) Upon receipt, such documents will be laid on the Table by the Clerk at the earliest opportunity.
- (3) A return under this Standing Order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (4) If the Council or the House is not sitting on the date specified in the resolution of the Council or House under Standing Order 1.01(3), the documents may be lodged with the Clerk, and unless Executive privilege is claimed, are deemed to have been presented to the Council or House and published by authority of the Council or the House.

(5) Documents lodged under Standing Order 11.02(4) must be laid on the Table by the Clerk on the next sitting day of the Council.

1.03 Documents claiming Executive privilege

(1) Where a document is claimed to be covered by Executive privilege —

(a) 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 Executive privilege; and

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council or the House and —

(i) made available only to the mover of the motion for the order; and

(ii) must not be published or copied without an order of the Council.

(2) The mover of the motion for the order may notify the Clerk, in writing, disputing the validity of the claim of Executive privilege in relation to a particular document or documents. On receipt of such notification, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

1.04 Appointment of independent legal arbiter

An independent legal arbiter required in accordance with Standing Order 11.03(2) is to be appointed by the President or the Speaker, and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

1.05 Report of independent legal arbiter

A report from an independent legal arbiter appointed under Standing Order 11.04 is to be lodged with the Clerk and —

- (a) made available only to members of the Council or members of the House; and
- (b) must not be published or copied without an order of the Council or the House.

1.06 Clerk to maintain register

The Clerk will maintain a register showing the name of any person examining documents tabled under this Standing Order.

Thus in summary the attention to detail in regard to the claims for Executive Privilege becomes able to be tested, and such claims are tested by an independent legal arbiter appointed by the Parliament.

Therefore this provides context in which the Government of the day has to make administrative decisions by the Secretary of the Department of Premier and Cabinet, who will be the single point of focus for the orders issued by the Parliament for the production of documents.

This proposed change to the standing orders of both the Legislative Council and the House of Assembly will clarify the requirements that the Parliament lays down absolutely, while at the same time safeguarding the issue of Executive Privilege.

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