The Hon Ruth Forrest MLC
Chair
Parliamentary Standing Committee on
Public Accounts
Parliament of Tasmania

31 March 2023

Dear Ms Forrest

Inquiry into the Tasmanian Government's use of provisions of the *Financial Management Act 2016* (Tas) to fund election commitments in 2021 – Public Hearing

Thank you for your invitation to make a submission to this Inquiry. I do so in my capacity as a lecturer in public and constitutional law at the University of Tasmania. My views do not necessarily represent those of the University.

I will comment on matters of constitutional principle raised by this Inquiry. I note that the Tasmanian Integrity Commission released a research report on *Grant Commitments in Election Campaigns* in April 2022. I endorse the findings and recommendations of that report and comment no further on the integrity aspects of the grant commitments.

Parliamentary Control over Executive Expenditure

Parliamentary control over government expenditure is a fundamental constitutional principle.[1] In accordance with the requirements of responsible government, the Executive is accountable to Parliament in relation to government expenditure, and must therefore obtain the consent of Parliament in relation to such expenditure.[2] This means that the 'primary representative institution has the authority to control the economic activities of the body politic' .[3] However, constitutional law experts warn of a 'modern reality' where Australian Parliaments are 'gradually losing control over the expenditure of public funds',[4] bringing with it the 'erosion of a fundamental principle.'[5]

A concerning aspect of this 'modern reality' is that:

> …obtaining the details of executive funding processes and final agreements can be a difficult task for Parliament and more difficult for members of the public. Executive action is therefore often subject to less public and parliamentary scrutiny. Lack of transparency (and therefore accountability) either directly to the public or to Parliament decreases the democratic legitimacy of executive action.[6]

[1] Geoffrey Lindell, The *Combet Case,* and the Appropriation of Taxpayers' Funds for Political Advertising - An Erosion of Fundamental Principles, *The Australian Journal of Public Administration*, vol 66, no.3, 307-328 at 309.
[2] Gabrielle Appleby, There Must be Limits: The Commonwealth Spending Power, *Federal Law Review*, (2009), Vol. 37, 93-132 at 98.
[3] Ibid, 201.
[4] Lindell op. cit. at 309.
[5] Lindell op. cit. at 314.
[6] Appleby op. cit. at 98, references omitted.

Parliament cannot hold a government 'responsible' if a situation is created whereby 'parliament, let alone the general public, is unaware of the extent and details of executive spending'.[7]

Based on this constitutional context I now turn to the subject of this Inquiry.

The Financial Management Act 2016

The *Financial Management Act 2016* (Tas) (the Act) - which permits Government spending without prior Parliamentary authorisation - raises concerns regarding the reduced transparency and parliamentary accountability that constitutional law scholars have warned about.

Most relevant is s 21 which provides that:

> The Treasurer may, in any financial year, issue and apply from the Public Account, for expenditure, the need for which could not, in the opinion of the Treasurer, reasonably have been foreseen and which is necessary for efficient financial administration.

Section 21(3) provides that if money is spent for a purpose not provided for in an existing Appropriation Act, the Treasurer must obtain the written approval of the Governor. While it is not directly relevant to this Inquiry, it is worth noting that s 30 of the Act allows the Treasurer to authorise emergency expenditure, including for purposes not provided for in existing Appropriation Acts. However, unlike authorisations under s 21, s 30 requires both the approval of the Auditor General and the Governor.

It is common practice in Australia for Parliaments to ensure that governments have access to funds in an emergency. Professor Gabrielle Appleby explains that '[t]his process grants a set amount of funding to the finance minister for use as 'emergency' additional funding, whether that is because the amounts allocated to a particular purpose were insufficient because of an error or understatement, or because the additional expenditure was unforeseen at the time of the passage of the appropriation legislation'.[8]

However, as Appleby further explains, while '[t]here has to be some allowance for unexpected and necessary unforeseen urgent spending', … this does not justify the undermining of accountability and legitimacy which result from unsupervised executive control of spending'.[9]

Thus, while section 21 serves a legitimate purpose, the Act must provide clear and appropriate limits on the exercise of the powers under that section as well as a mechanism to ensure transparency and accountability to Parliament.

Clear and Appropriate Statutory Limits

Consistent with the principle of responsible government, the purposes for which any money is spent by a government must be as 'intended by parliament'.[10] One of the difficulties posed by section 21 of the Act is that it is very broadly worded:

[7] Appleby at 103.
[8] Appleby op. cit. at 100, references omitted.
[9] Ibid. 102-103.
[10] Ibid, 122, and Lindell op. cit. 315.

> [t]he Treasurer may, in any financial year, issue and apply from the Public Account, for expenditure, the need for which could not, in the opinion of the Treasurer, reasonably have been foreseen and which is necessary for efficient financial administration. (Emphasis added)

Other jurisdictions, enacting similar provisions, use much narrower wording. Not only do they not include the words 'in the opinion of the Treasurer' – with its suggestion that satisfaction of the test is measured by the Treasurer's subjective views – but many include a requirement as to the 'urgency' of any 'advance' spending. In other words, there must be a clear reason as to why spending cannot be delayed until Parliamentary approval is obtained. For example, s 10 of the Commonwealth *Appropriation Act* (no. 1) 2021-2022 (no. 67 of 2021) provides that the finance minister 'must be satisfied that there is an urgent need for expenditure'.

The Northern Territory's Direction on the Treasurer's Advance also has a restricted scope. It provides that:

> To be eligible for a Treasurer's Advance, expenses must either be:
>
> a. extraordinary and one-off in nature
>
> b. or [relate to] a major unforeseen or natural disaster event.[11]

It would be good practice and consistent with constitutional principle if the *Financial Management Act 2016* (Tas) was amended to bring it more closely into line with these provisions. As Professor Lindell has argued, the onus is on Parliament to clearly define the limitations on expenditure if it wishes to reassert its role in relation to oversight of government spending.[12] Unfortunately, as Lindell explains, absent strong public awareness and pressure, it is unlikely that the major parties will reform the law in this direction.[13]

In addition to narrowing the scope of the provision, it is also important that any authorisation of 'advance' spending is done in a transparent manner.

Transparent Authorisation of Spending

The purposes of Government spending have to be *ascertainable* by both *parliamentarians* and a *reasonably well-informed citizen*.[14] 'This is necessary to ensure that Parliament is in fact approving the purposes of appropriations. It is also fundamental to the transparent operation of Parliament as a representative body'.[15]

This Inquiry has shown that it is difficult for the public and Parliament to obtain timely information about the use of s 21 of the Act by the Tasmanian Government. As I understand it, detailed information about the s 21(3) spending in June 2021 became known only as a result of investigative journalism (including by information obtained through an RTI request) in April 2022, and this was followed by questions in a Parliamentary Estimates Committee in November 2022. I also understand that a detailed list of these grants was not provided by the Government until after media and parliamentary questions in June 2022.

---

[11] See https://treasury.nt.gov.au/dtf/financial-management-group/treasurers-directions.
[12] Lindell op. cit. 319.
[13] Ibid. 320.
[14] Appleby op. cit.122, italics in the original.
[15] Ibid.

This Inquiry will determine if there was sufficient evidence to support the use of s 21 of the Act in relation to the mid-2021 grants. However, the considerable length of time between the date the spending was authorised and the release of detailed information about the payments is unsatisfactory from the perspective of transparency and accountability to Parliament and undermines the principle of responsible government.

Transparency would be greatly enhanced if the Treasurer made public their intention to authorise the spending of money in relation to a fresh policy under s 21 (and indeed under s 30) of the Act. This could be done by the timely posting of relevant information on the Departmental website. The Act could be amended to include such a requirement or, pending such an amendment, the Treasurer could, with immediate effect, simply adopt this approach.

Greater transparency would also be achieved by requiring and publicising a report of the Auditor General on the authorisation of any spending on a new policy under either s 21 or s 30. I expand on this point below in the context of concerns about reliance on the Governor to provide an independent 'check' on spending.

The Governor Cannot act as a 'Check' on Executive Spending.

When the Treasurer authorises advance spending for a 'new purpose' (i.e., one not yet approved by Parliament) section 21 (3) of the Act provides that:

> Subsection (1) does not authorise expenditure for a purpose other than a purpose mentioned in an Appropriation Act then in force, *unless the Governor has, in writing, approved that expenditure.* (Emphasis added).

The problem with this, as a matter of constitutional principle, is that a Governor, who is appointed on the advice of the Government as the King's representative, has no 'electoral mandate'.[16] Therefore, the Governor's approval of Executive spending under section 21(3) cannot remedy the absence of parliamentary approval. That is clear.

However, section 21 (3) also appears to have another purpose, which is to provide for the Governor to act as an independent check on the Treasurer, with a view to preventing spending outside of the lawful limits of s 21 (i.e., spending which could not 'reasonably have been foreseen and which is necessary for efficient financial administration').

Section 21 (3) provides a misleading sense of assurance. This is because it is not possible, either constitutionally or practically, for a Governor to act as an independent check on the Executive arm of government.

In accordance with the Westminster principle of responsible government the Governor must act on ministerial advice.[17] This is so, even where a statute confers power on a Governor.[18] Exceptions to the requirement that the Governor act only on advice – i.e., the Governor's Reserve Powers - are confined

[16] See Aroney, Gerangelos, Murray and Stellios, *The Constitution of the Commonwealth of Australia, History, Principle and Interpretation*, Cambridge University Press, 2015, at 425.
[17] Ibid.
[18] Ibid 487.

to an extremely narrow set of circumstances, that do not include matters such as approving spending under the *Financial Management Act 2016* (Tas).

It is inconceivable that a Governor, who is constitutionally required to act on the 'advice' of the Minister (i.e., who must follow that advice) is also capable of *independently* satisfying themselves that the statutory conditions in s 21 have been met and then independently approving or refusing approval of this spending. This is because the Governor cannot be both 1) required to follow and 2) capable of refusing to do what is asked.

Even if it were possible for the Governor to act independently in these circumstances, the practical circumstances in which the Governor's approval is sought dictate against the possibility of such an outcome. The Governor's approval is sought by the Minister behind closed doors, with the only information available being that provided by the Minister. The Governor has no capacity to investigate, ask questions from other sources, or in any other way to form a balanced and independent view of the matter.

Tellingly, in similar circumstances even judges - who **are** constitutionally independent from the executive arm of government - mostly affirm such requests. Justice McHugh in *Grollo v Palmer* (1995) 184 CLR 348 pointed out that requests for authorisation of telecommunication interception warrants were routinely endorsed by judges. Over a five-year period only 0.5 % of warrant applications were refused or withdrawn.[19]

Since s 21 (3) of the Act cannot do what, on its face, it purports to do. It provides a misleading sense of assurance and should be removed. A particular concern is that members of the Tasmanian community who are not familiar with the principles of responsible government may be misled into believing that the Governor is able to prevent inappropriate use of s 21 and s 30. In other words, the reference to the Governor's approval may create the illusion of independent oversight.

If Parliament wishes to provide for an independent check on the Treasurer's authorisation of spending on new policies under s 21 this should be done through a transparent and independent mechanism. Commonwealth law requires the Australian National Audit Office to undertake independent assurance reviews of such authorisations. These, as well as the details of the authorised 'advance' spending, are regularly published on the Treasurer's departmental website.[20] Section 30 of the Act already requires the Auditor General's input in relation to the authorisation of emergency spending. A similar provision could be included in relation to spending under s 21. Alternatively, sections 21 and 30 could - with appropriate adjustments, including removal of references to the Governor – be merged. This would create a single provision empowering the Treasurer's authorisation of 'advance' spending with clear statutory limits, independent oversight, and transparency.

Conclusion

Parliamentary oversight and authorisation of Executive spending is a fundamental principle of responsible government. While it is necessary to give the Executive some capacity to make urgent and unforeseen payments without prior Parliamentary approval, s 21 of the *Financial Management Act2016*

[19] Ibid paragraph 34.
[20] See https://www.finance.gov.au/publications/advance-finance-minister/advance-finance-minister-list-afms.

(Tas) is too widely cast. A closer adherence to constitutional principle, and alignment with better practice in other jurisdictions, suggests amendment of s 21(3) is necessary.

Unlike similar provisions in other jurisdictions, s 21 of the Act does not require that the purpose for which money is spent is demonstrated to be 'urgent'. Furthermore, the Tasmanian Act gives a misleading impression that the Governor acts as an independent 'check' on any improper spending. This could be remedied by removing references in s 21 (and s 30) to the Governor's approval and relying instead on approval by the Auditor General. Finally, this Inquiry has shown that under the existing Act it can take many years, as well as the work of investigative journalists, before Parliament is informed of the detail of such spending. A statutory mechanism should be put in place to ensure more timely disclosure of relevant information.

Please do not hesitate to contact me if I can be of any further assistance.

Yours sincerely

Anja Hilkemeijer

Lecturer
School of Law
University of Tasmania