ORDERS FOR PAPERS AND PARLIAMENTARY COMMITTEES: AN UPDATE FROM THE NEW SOUTH WALES LEGISLATIVE COUNCIL

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INTRODUCTION

The 24 sitting days during the first half of 2018 have seen a number of significant developments in the role of the New South Wales (NSW) Legislative Council as an effective House of Review. 20 years after the High Court decision in *Egan v Willis*[2] and the Court of Appeal decision in *Egan v Chadwick*,[3] for the first time the Legislative Council has seriously grappled with the question of its powers to require the production of a class of documents which have been classified by the executive government as "cabinet information." A series of business cases on significant capital projects have ultimately been produced and the House has asserted its position in relation to its powers to require the production of such documents. At the same time, two new parliamentary committees designed to enhance legislative scrutiny have been trialled, and two new "super committees" concerned with Public Accountability and Public Works have been established. Finally a private members bill introduced by a Member of the Legislative Council, including provision for a joint statutory committee on modern slavery, has been enacted.

ORDERS FOR PAPERS AND "CABINET INFORMATION"

In 1998 the High Court of Australia confirmed the power of the NSW Legislative Council to order the production of state papers, because such a power was reasonably necessary for the House to fulfil its functions of making laws and holding the executive government to account.[4] In 1999 the NSW Court of Appeal confirmed that this power extends to requiring the production of state papers notwithstanding the making by the executive government of claims of public interest immunity or legal professional privilege. What the 1998 decision in *Egan v Chadwick* left in the view of some observers unsettled, however, was the situation with regards to "cabinet documents," with the three judges making different statements on this point, which may be summarised as follows:

(a) Spigelman CJ held that:
   (i) a distinction has been made between documents which disclose the actual deliberations within Cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet;
   (ii) it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with the doctrine of collective ministerial responsibility by revealing the "actual deliberations of Cabinet"; and
   (iii) however, the production of documents prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to Cabinet.

[2] [1998] HCA 71.
[3] [1999] NSWCA 176.
[4] For an account of the parliamentary proceedings leading up to two so called Egan cases, see David Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick. Part Three of the Legislative Council's History Project*, September 2017.

(b) Meagher JA took the view that the immunity of Cabinet documents from production was "complete", arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government, but without exploring the distinction between different types of Cabinet documents drawn by Spigelman CJ;

(c) Priestley JA noted that:
   (i) a court has "the power to compel production to itself even of Cabinet documents";
   (ii) the "function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity"; and
   (iii) "… notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy."[5]

Over the 20 years since the Egan cases there have been over 300 orders for the production of documents complied with by successive NSW Governments. From time to time members have suspected that certain important documents otherwise captured by the terms of an order have not been produced, on the grounds they are deemed by the executive government to be "cabinet documents" or "cabinet information." In a very small number of cases this has been made explicit, mostly it has been supposition. On a couple of occasions in that time one or more members have been interested in testing the issue but they have never garnered enough support to pursue the matter. In other instances, whilst disappointed for instance that "business cases" or other consultant reports known to exist have not been produced, members have found enough information of interest in the other documents produced.[6] However, all that changed in early 2018.

Sydney Stadiums

On 15 March 2018, the House ordered, under standing order 52, that the Government produce documents relating to the Government's Sydney stadiums redevelopment strategy (which includes proposals announced in November 2017 to demolish and rebuild Allianz Stadium and to reconfigure ANZ Stadium at Olympic Park.) The motion was agreed to on the voices without a division being called. Documents returned included public documents as well as documents over which claims of privilege were made.[7]

[5] This is the summary adopted in the resolution of the house of 21 June 2018, discussed below: Legislative Council, *Minutes of Proceedings*, 21/6/2018, p 2796.

[6] For a detailed discussion of the question "Are only *true* cabinet documents being withheld from the Legislative Council?" see Sharon Ohnesorge & Beverly Duffy, "Evading Scrutiny: Orders for papers and Access to Cabinet Information by the New South Wales Legislative Council, (2018) 29 PLR 118.

[7] A dispute regarding the claims of privilege over several of the documents was lodged by the Leader of the Opposition, the Hon Adam Searle. Under standing order 52, an Independent Legal Arbiter, the Hon Keith Mason AC QC was appointed to evaluate and report on the claims of privilege. The arbiter did not uphold the claims of privilege over most of the disputed documents. Of particular relevance to the question of the status of cabinet

The return did not include the business cases for redevelopment of the two Sydney stadiums, even though in March 2018 Infrastructure NSW had published summaries of these business cases on its website. In response to queries from members regarding the business cases and other documents, the Government confirmed that it had enquired into whether the relevant agencies or ministers "hold any additional documents that are lawfully required to be provided in accordance within the terms of the resolution" and advised that "no agency or minister's office named in the resolution has identified any additional documents for production."[8]

Powerhouse Museum

On 12 April 2018, the House again used its powers under standing order 52 to order documents, this time relating to the proposed relocation of the Powerhouse Museum from Ultimo near the Sydney CBD to Parramatta. (This was a project announced during the 2015 NSW election campaign and since that time the Government has been preparing detailed business cases and planning its implementation.) The terms of this resolution were narrow in scope, requesting only the draft and final business case for the project. The motion was passed by one vote (19-18) on division.

On the due date for the return, the Government did not produce the business cases. Instead, it provided correspondence from each of the agencies named in the order stating that they held no documents covered by the terms of the resolution. This was despite a "summarised business case" being published by Infrastructure NSW on its website.

The Leader of the Government in the Legislative Council, the Hon Don Harwin, argued that the Government had complied with the order and indicated (though did not confirm) that the documents were Cabinet documents. He stated:

> " … the power of the House to compel the production of documents does not extend to Cabinet information. Accordingly, even if otherwise covered by the terms of an order, Cabinet documents are neither identified nor produced in response to an order."[9]

Furthermore, he argued the Government is not required to state the reason for non-production, citing a precedent set by the previous government in responding to an order for papers in 2005 relating to grey nurse sharks. He referred to the Government's position on the decision of the Court of Appeal in *Egan v Chadwick* and also cited the practice of the previous and current governments not to provide, or even acknowledge the existence of, Cabinet documents.

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documents, at the request of the Government, the Clerk sought confirmation from the Independent Legal Arbiter about the status of a document provided by Venues NSW. The agency had subsequently argued that it should not be made public as it "was a document prepared for the consideration of the Expenditure Review Committee of Cabinet" and was therefore claimed to have "a powerful public interest against its further disclosure". The arbiter responded in correspondence dated 31 May 2018, stating "This document was not claimed to reveal internal deliberations of Cabinet as per Spigelman's analysis in Chadwick. Nor did it disclose same in my evaluation. I intended and intend that it be covered by my general reasons rejecting PII [public interest immunity] privilege as claimed in this return."

[8] Correspondence, Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet, 16 May 2018, p. 1.
[9] *Hansard*, Legislative Council, 1/5/2018, p 14.

Tune report on out-of-home care

On 17 May 2018, the House ordered the Government to produce the Tune Report on the out-of-home care system. (This report by former senior public servant Mr David Tune examining the out-of-home care system for vulnerable and at risk children and young people had been provided to the Government in 2016.) The resolution was agreed to on division (20-19).

On the due date for the return, once again, no documents were received. Correspondence from the Department of Premier and Cabinet stated that no agencies held documents covered by the terms of the resolution which were "lawfully required to be provided".

In debate in the House, the Opposition questioned the Government's compliance with the order, including inquiring into whether the document was truly a Cabinet document and, if so, whether the Government had waived Cabinet confidentiality by reportedly offering to make a copy of the report available to one crossbench member of the House.[10]

Censure of the Leader of the Government

On 5 June 2018, the Leader of the Opposition in the Legislative Council moved that the House note the failure of the Government to comply with the previous three orders for papers. The motion again ordered that the Powerhouse Museum business case and Tune Report be produced, as well as explicitly ordering the production of the Sydney Stadiums business cases, by 9.30 am the next day. The motion also censured the Leader of the Government and ordered that, if the resolution was not complied with, the Leader of the Government be required to attend in his place at the Table at the start of the next sitting day and provide an explanation. The motion was debated throughout the day and eventually agreed to later that evening, on division (21-20).

At the start of the next sitting day, the President tabled correspondence received that morning from the Department of Premier and Cabinet advising that there were "no further documents for production" and attaching advice from the Crown Solicitor to this effect. It was widely anticipated that standing orders would be suspended that morning to enable a motion to be moved holding the Leader of the Government to be in contempt of the House for failing to comply with the orders, and for his suspension from the House in order to compel compliance. However, when the Leader of the Government was then called on to address the House in compliance with the order of the House of the previous day as to his reasons for continued non-compliance, he stated that the documents would be provided by the Department of Premier and Cabinet (DPC) by 5.00 pm on Friday 8 June 2018.

Business cases and consultant report produced and subsequent resolution of the House

On Friday 8 June 2018, the documents were produced. The draft and final Tune Reports were provided in full and made public. Redacted copies of the Sydney Stadiums and Powerhouse Museum draft and final business cases were made public and unredacted copies were provided on a confidential basis and made available to members only. Correspondence accompanying these documents noted:

[10] *Hansard*, Legislative Council, 17/5/2018, p 28; 22/5/2018, p 17; 5/6/2018, p 34.

> "all of the documents referred to in the resolution are Cabinet documents, and that the Legislative Council has no power to require such documents to be produced. On this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production."

Despite the correspondence advising the documents had been produced on a voluntary basis, they were received under Standing Order 52 and treated as documents produced under compulsion in response to the orders of the House.

On 21 June 2018, the House agreed to a motion noting the Government's previous non-compliance with orders for papers, the actions that had subsequently occurred and rejecting the claim that the documents had been provided voluntarily. The motion noted that the documents had been provided and received under Standing Order 52 as that is the only established mechanism by which the Clerk may receive documents directly from the DPC. The motion also rejected the Government's use of the *Government Information (Public Access) Act 2009* definition of "Cabinet information", noting that the Government's reliance on such a definition "is likely to have led to a much broader class of documents being withheld from production to this House". The motion further stated that the House does have the power to require the production of Cabinet documents such as those produced on this occasion (ie business cases for capital projects and consultant reports on areas of government administration) and that the test to be applied in determining whether a document falls within this category is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick. This motion was agreed to on division (21-20).

FIVE NEW PARLIAMENTARY COMMITTEES

Trial committees to enhance legislative scrutiny

In 2018 the Legislative Council established two trial committees – a Regulation Committee and a Selection of Bills Committee.

Both committees were established in response to recommendations from a 2016 select committee inquiry into the Legislative Council Committee System, which found that while the Council's committee system was working well, the Legislative Council should play a greater role in scrutinising bills and delegated legislation.[11]

The select committee recommended the establishment, on a trial basis, of a Selection of Bills Committee to ensure more draft legislation is referred to committees for detailed consideration, and a Regulation Committee to focus on delegated legislation.

The recommendations were agreed to by the House on the last sitting day in 2017, with both trial committees commencing on the first sitting day in 2018 and concluding on the last sitting day in November 2018.[12] Both committees are to table a report evaluating their trial.

[11] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), p vi.
[12] *Hansard,* Legislative Council, 23 November 2017, p 2221-2225.

Regulation Committee

History of regulation review in New South Wales

All bills introduced in the NSW Parliament must be considered by the joint statutory Legislation Review Committee. The committee, administered by the Legislative Assembly, is required to report to both Houses as to whether any bill:

(i) trespasses unduly on personal rights and liberties, or

(ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

(iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

(iv) inappropriately delegates legislative powers, or

(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[13]

The committee must also consider all regulations subject to disallowance by resolution of either or both Houses of Parliament.[14]

From 1960 to 1987 all regulations were reviewed by a Legislative Council committee. In 1987 a Legislative Assembly select committee recommended that this role be undertaken by a joint parliamentary committee. The bill to enact this recommendation and establish a joint Regulation Review Committee was met with resistance in the Council from members of the Opposition and crossbench. The Hon Max Willis argued that the Council committee had 'been doing its job just a little too effectively and [was] causing some embarrassment to the government'.[15] He suggested that 'it might be convenient to bury its role in a new committee totally dominated by the lower house and the government control that involves'.[16] Nevertheless, the bill passed the Council, and the joint Regulation Review Committee was established in 1987. It remained in operation until 2003 when its role was subsumed by the current Legislation Review Committee.

The creation of the Legislation Review Committee stemmed from a 2001 recommendation from the Standing Committee on Law and Justice that a joint legislation review committee be established to work alongside the joint Regulation Review Committee.[17] The Law and Justice Committee recommended that a joint committee should undertake this role as it is 'important that the protection of rights and liberties be the responsibility of the whole Parliament'.[18] The Government supported the establishment of a joint committee but argued it was unnecessary to have separate committees to review legislation and regulations and combined both functions into the present Legislation Review Committee.

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[13] *Legislation Review Act 1987*, s 8A.
[14] *Legislation Review Act 1987*, s 9.
[15] *Hansard*, NSW Legislative Council, 23 November 1987, p 16799 (Max Willis).
[16] *Hansard*, NSW Legislative Council, 23 November 1987, p 16799 (Max Willis).
[17] Standing Committee on Law and Justice, NSW Legislative Council, *A NSW Bill of Rights* (2001), p 132.
[18] Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), p 132.

During the early years of the committee, concerns were raised that the joint functions of scrutinising bills and regulations was proving ineffective. This was raised in a 2003-2004 report by the committee itself,[19] which recommended that it appoint a sub-committee to deal with regulations. The matter was again raised in 2006 by the then Legislative Council Opposition Whip, who noted that the committee's function relating to regulations was gradually diminishing.[20] The importance of reviewing regulations was also raised by the Hon Elizabeth Kirkby during C25, the commemoration of the 25th anniversary of the modern committee system in the Legislative Council:

> the devil lies in the regulations. So unless the regulations are being fully policed, you will never know whether that legislation is going to work. If it is necessary to strengthen the[Legislation] Review Committee, perhaps that is something that should be done.[21]

Remit of the Legislative Council Regulation Committee

In the 2016 select committee inquiry into the Legislative Council Committee System, stakeholders referred to the current joint Legislation Review Committee and submitted that combining the regulation and bill review functions within the one committee was ineffective and that the scrutiny of regulations was gradually diminishing.[22]

In recommending the establishment of a Regulation Committee, the select committee proposed that rather than replicating the work of the joint Legislation Review Committee, which reviews *all* disallowable regulations, the new committee would take an innovative approach to its role by focusing on the substantive policy issues regarding a small number of regulations of interest as well as trends relating to delegated legislation.[23]

This is reflected in the resolution appointing the committee, which states that the committee may inquire into and report on:

(a) any regulation, including the policy or substantive content of a regulation, and

(b) trends or issues that relate to regulations.[24]

This remit reflects an increasing perception in the academic literature that the 'old divide' between technical scrutiny of regulations – checking for violations of civil liberties and rule of law principles (as performed by the joint Legislation Review Committee) – and reporting on the policy or substantive content of a regulations, is no longer valid. As Aronson argues:

> As substantive legislation is increasingly to be found not in primary acts but in subordinate legislation, one must question how much meaning will remain in the standard scrutiny criterion that certain matter is not appropriate for subordinate legislation. The whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that will fundamentally change the law, or which

[19] Legislative Review Committee, Joint parliamentary committee, *Operation, Issues and Future Directions: September 2003-June 2004 (2004),* p 11.
[20] *Hansard*, NSW Legislative Council, 5 April 2006, p 22060 (Don Harwin).
[21] Hon Elizabeth Kirkby, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 52.
[22] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), p 4.
[23] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), p 4.
[24] Resolution appointing the Regulation Committee, paragraph 2.

> are lengthy and complex, or which are designed to effect radical attitudinal or relationship changes.[25]

Inquiry activities

Since its establishment the committee has conducted one inquiry, into the examination of the impact and implementation of the Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018. This statutory instrument is not disallowable.

The inquiry was initiated by the committee. However, the committee does not have a self-referencing power, therefore it resolved that the Chair move a motion in the House to refer the Order to the committee for inquiry and report. The Chair's motion was agreed to by the House.

The committee held one half-day hearing and received five submissions over an 11-day period. The unanimous report contained two recommendations regarding the need for improved stakeholder consultation. Committee members expressed positive feedback regarding the value of the inquiry process and the committee's role in scrutinising regulations.

Selection of Bills Committee

During the select committee inquiry into the Legislative Council Committee System there was broad consensus that the Council's committees should also play a greater role in the substantive review of bills. This is distinct from the technical review of all bills introduced in the NSW Parliament as to whether they trespass unduly on personal rights and liberties, which is undertaken by the joint statutory Legislation Review Committee administered by the Legislative Assembly.[26]

The select committee recommended that a trial Selection of Bills Committee be appointed to consider all bills introduced into the Council or received from the Assembly in order to recommend to the House which bills should be referred to a committee and the duration of each inquiry. The select committee suggested that the referral of approximately 10 bills per year might be an appropriate goal.[27]

The Legislative Council Selection of Bills committee is based to a large extent on a Senate committee of the same name which has been operating since 1990 and which was also set up with the same objective: to increase the scrutiny of bills by the House and therefore enhance the quality of legislation enacted.

The committee meets each Tuesday of a sitting week to consider whether to recommend that particular bills be referred to a standing committee, and if so:

- which committee to which the bill is to be sent
- the stage in the consideration of the bill at which it should be referred, and
- the inquiry reporting date.

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[25] Mark Aronson, 'Subordinate legislation: lively scrutiny or politics in seclusion', *Australasian Parliamentary Review*, Spring 2011, Vol 26 (2) p 11.
[26] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), pp 1-2.
[27] Ibid., p 3.

Following the tabling of the committee's report on a Tuesday afternoon, the Chair (the Government Whip) or other member moves a motion without notice for the House to implement the committee's recommendations. On a number of occasions this motion has been the subject of debate, and the moving of amendments. These debates have been indicative of the level of interest members have in the process and their commitment to see the trial succeed and process develop.

Inquiry activities

Since its establishment the Selection of Bills Committee has referred the provisions[28] of one bill, the Forestry Legislation Amendment Bill 2018, to a committee for inquiry and report.

The provisions of the bill were referred to the Standing Committee on State Development with a two week reporting date.

The State Development committee received 52 submissions, one supplementary submission and conducted one hearing. The committee recommended that the Legislative Council proceed to debate the bill, and that the NSW Government address certain concerns raised during the inquiry during the second reading debate in the Council. During the second reading debate on the bill a number of members commented on the usefulness of the committee's inquiry in assisting members in their detailed consideration of the bill.[29]

"Super committees" dealing with public accounts and capital works

On 15 March 2018 the Legislative Council resolved to establish two new standing committees – a Public Accountability Committee and a Public Works Committee. The motions were each moved by the Hon Robert Brown, of the Shooters, Fishers and Farmers Party, and agreed to on division (21:18). The media immediately described these committees as "super committees."

The role of the Public Accountability Committee is to inquire into and examine the public accountability, financial management, regulatory impact and service delivery of government departments, statutory bodies or corporations. The committee is modelled on the Legislative Assembly Public Accounts Committee, and – like its lower House counterpart – may examine consolidated financial statements and general government sector financial statements, financial reports of statutory bodies and Auditor General's reports to Parliament. The terms of reference replicate the statutory functions of the Legislative Assembly Public Accounts Committee.

The role of the Public Works Committee is to inquire into and report on any public works to be executed (including works that are continuations, completions, repairs, reconstructions, extensions or new works) where the estimated cost of completing such works exceeds $10 million.

Both committees have a non-government majority and a non-government chair, and a wide reaching self-referencing power to inquire into and report on the expenditure, performance or effectiveness of any government department, statutory body or corporation. The resolutions appointing the committees also include a requirement to inquire into future arrangements for ongoing scrutiny by the Legislative Council of the matters covered by their remit.

[28] The provisions of the bill were referred to the committee as the bill had only been introduced to the Legislative Assembly at the time of referral.
[29] *Hansard*, Legislative Council, 19/6/2018, pp 92, 95, 98.

Public Accountability Committee

A Public Accounts Committee has existed in New South Wales since 1902. The current committee is a statutory committee of the Legislative Assembly formed under the *Public Finance and Audit Act 1983*.

The membership of the committee has always been restricted to members of the Assembly, which has been a significant point of contention. In 1981 the Joint Committee on the Public Accounts and Financial Accounts of Statutory Authorities recommended that the Public Accounts Committee should be a joint committee comprising five members of the Assembly and three members of the Council; however, this recommendation was not implemented when the new *Public Finance and Audit Act* was introduced. In the second reading debate the Leader of the Government in the Council, the Hon Paul Landa, asserted that it was not appropriate for Council members to sit on the committee due to the limited role of the Upper House in considering money bills and financial matters.

This view was challenged in 2001 by the Hon Doug Moppett, who suggested that the reason the Public Accounts Committee was restricted to members of the Legislative Assembly was 'based on the mistaken view that the budget papers presented each year are the province of the lower House only.'[30] Mr Moppett moved a motion in the Council seeking the concurrence of the Assembly to appoint three Council members to the committee, arguing:

> … if we are to scrutinise public administration more effectively – particularly from a financial point of view – it is vital to expand the composition of the Public Accounts Committee to include members of the Legislative Council. That is not a revolutionary brainwave that I had one night; the idea has grown steadily in areas of responsible administration ... it is all very well to have fond aspirations and pious hopes and to dwell in the land of easy platitudes, but ultimately, if we are to face the reality of governance, we must be responsible for funding programs and reporting in an informed, clear and transparent manner to the people whom we represent and who contribute to the public coffers.[31]

Mr Moppett's motion was agreed to on division. However, the order of the day for consideration of the Council's message remained on the Assembly's Business Paper until the end of the parliamentary session, and then lapsed at prorogation.

The matter was not raised again until the motion to appoint the Legislative Council's Public Accountability Committee was moved on 15 March 2018. During debate on the motion, Revd the Hon Fred Nile referred to the earlier attempts to appoint Council members to the Public Accounts Committee and stated:

> Government opponents of the motion pointed to budgetary matters being the traditional purview of the lower House, as were reports of the Auditor-General, which at the time were tabled only in the Legislative Assembly. Today, the Auditor-General's reports are tabled in both Houses, but there is no ready mechanism for their review by the Legislative Council.

[30] *Hansard*, Legislative Council, 26 September 2001, p 17172.
[31] *Hansard,* Legislative Council, 26 September 2001, p 17172.

> The establishment of the Public Accountability Committee will finally address this oversight and ensure proper accountability, which as members know is a key role of an upper house of review and which this House carries out thoroughly and zealously.[32]

Government members opposed the motion, arguing that the proposed committee was unnecessary as it duplicated the jurisdiction and functions of the Council's existing committees,[33] particularly the portfolio committees and trial Regulation Committee[34] and had not been recommended by the Select Committee on the Legislative Council Committee System. The motion was agreed to on division (21:18).

Inquiry activities

The first inquiry adopted by the Public Accountability Committee is to consider future arrangements for the ongoing scrutiny of public accounts by the Legislative Council. It is anticipated that the self-referenced inquiry will consider matters such as whether the Public Accountability Committee should be reappointed in the next parliament (and if so whether it's existing remit and functions are adequate), or whether there should be joint membership of the statutory Public Accounts Committee.

The committee has also commenced self-referenced inquiries into the impact of the CBD and South East Light Rail project on the community within the vicinity of the light rail route, including compensation and support for affected local businesses, and into the costs of the WestConnex project. Both are highly contentious, high-profile projects that have been the subject of considerable media attention.

Further developments

Before the Public Accountability Committee had even held its first hearing to consider future arrangements for the ongoing scrutiny of public accounts by the Legislative Council, the opportunity to consider the establishment of a joint Public Accounts Committee presented itself on 6 June 2018 when the Government Sector Finance Bill 2018 and cognate Government Sector Finance Legislation (Repeal and Amendment) Bill 2018 came before the House.

The bills reform the existing legislative framework for public sector financial management in New South Wales, including the *Public Finance and Audit Act 1983* under which the Legislative Assembly's Public Accounts Committee is appointed.

In the committee stage, The Greens moved four amendments to the Government Sector Finance Legislation (Repeal and Amendment) Bill to reconstitute the Public Accounts Committee as a joint committee, comprising four members from each House. Speakers in support of the motion again argued that the Legislative Council, as a House of Review, should be represented on the Public Accounts Committee to participate in its important oversight work. Speakers opposed to the amendments argued against pre-empting the findings of the Upper House committee's current inquiry. The Hon Matthew Mason-Cox, however, urged members to

[32] *Hansard,* Legislative Council, 15 March 2018, p 14.
[33] *Hansard,* Legislative Council, 15 March 2018, pp 15-19.
[34] The Regulation Committee was established on 23 November 2017 on a trial basis to commence on the first sitting day in 2018 and conclude on the last sitting day in November 2018. The committee may inquire and report on: (a) any regulation, including the policy or substantive content of a regulation, and (b) trends or issues that relate to regulations.

seize the opportunity provided by the bill before the House to address this long standing issue of contention:

> The reality is that we are in a position now to do what needs to be done to hold the Government and the Executive to account through the appropriate mechanisms of a public accounts committee that is jointly between the two Houses. I note, in particular, the nature of a public committee inquiry. It would probably be a few months before we could complete an inquiry, and I noted with the Treasurer that then the Government would have six months to respond to the recommendation of the committee and we would end up with some sort of resolution of this issue after Parliament has been prorogued and we would be into the next Parliament before we get to it.
>
> By the nature of these things, we get a chance perhaps once every 10 years or so to revisit these issues. I am not confident that any new administration is going to look again at revolutionising the relationship between the Houses, let alone coming back and having a look at amending the Public Finance and Audit Act. The reality is that we have an opportunity now to put in place what should have been put in place 40 years ago and what was in place 40 years ago in one form or another. I urge members to take this opportunity tonight and I certainly believe it is a strong matter of conscience personally—and I put that on the record. We started today with a very important change in this place in terms of the practice of this House and the way this House operates. This is another important change.[35]

The amendments were agreed to on division (18:17). The bill, as amended, is currently in the Legislative Assembly awaiting consideration.

Public Works Committee

Part 2 of the *Public Works and Procurement Act 1912* requires the appointment of a joint standing committee on public works. Section 7(1) of the Act states:

> In every Parliament, a committee of members of the Legislative Council and Legislative Assembly, to be called the "Parliamentary Standing Committee on Public Works", shall be elected in manner hereinafter provided. Three of the persons so to be elected shall be members of the Legislative Council, and four shall be members of the Legislative Assembly.

Even though the appointment of a joint Public Works Committee is mandated under the Act, such a committee has not been active since the first session of the 29th Parliament commencing on 25 November 1930.[36]

The motion to appoint a Legislative Council Public Works Committee was also moved on 15 March 2018 and agreed to on division (21:18). The committee is modelled on the joint statutory committee, with the terms of reference adopting much of the language of the 1912 Act.

In opposing the motion the Leader of the Government in the Council, the Hon Don Harwin, cited the same rationale used during the Government's objection to the Public Accountability

[35] *Hansard*, Legislative Council, 5/6/2018, p 117.
[36] It should be noted that in previous parliaments the Legislative Assembly has, by resolution, appointed a Standing Committee on Public Works, however that is a different to the joint standing committee required under the *Public Works and Procurement Act 1912*.

Committee, declaring: 'A portfolio committee can do right now everything that is being suggested for the proposed public works committee.'[37]

Crossbench member, Dr Mehreen Faruqi, supported the motion on the basis of increasing concerns about the transparency of government decisions regarding major infrastructure projects:

> … unprecedented amounts of public money are being used for infrastructure projects. But as the level of expenditure has risen, so has public concern – and rightly so, because there is a chronic culture of secrecy… All information is hidden from the public – the business cases and the massive cost blowouts – and the environmental impact statements are often flawed. Inflated benefits are often found to be skewed towards predetermined, favoured alternatives… It is evident that the problems associated with the current crop of public works projects in New South Wales are not just road bumps, but point to systemic and colossal failures in the planning and carrying-out of infrastructure projects … we need this committee finally to undo this culture of secrecy, cover-ups and billions of taxpayer dollars squandered.[38]

Inquiry activities

The Council's Public Works Committee adopted its first two inquiries, both self-referenced, on 10 April 2018. The first inquiry, into Sydney stadiums, will examine a highly controversial government policy to knock down and rebuild Allianz stadium at Moore Park and refurbish the ANZ Stadium at Sydney Olympic Park.

The second inquiry mirrors the Public Accountability Committee's inquiry by considering future arrangements for the ongoing scrutiny of public works by the Legislative Council. Similar to the Public Accountability Committee's inquiry, it is expected that one of the issues the committee will consider will be whether the Public Works Committee should be re-appointed in the next Parliament (and if so whether the existing remit and functions of the committee are adequate), or whether the joint statutory Public Works Committee set out under the *Public Works and Procurement Act* should be appointed.

A new statutory joint standing committee on Modern Slavery

On 9 November 2016 the Legislative Council established a Select Committee into Human Trafficking in New South Wales, chaired by the Hon Paul Green MLC from the Christian Democratic Party.

The key recommendations of the committee's report, tabled in October 2017, were to establish a national Modern Slavery Act, similar to 2015 United Kingdom legislation, and for independent Anti-Slavery Commissioners to be appointed both nationally and in NSW to facilitate a coordinated approach between levels of government.[39]

In March 2018 the Committee Chair, Mr Green, introduced the Modern Slavery Bill 2018 into the Legislative Council. The bill made provisions with respect to slavery, slavery-like practices and human trafficking and established an Anti-Slavery Commissioner.

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[37] *Hansard,* Legislative Council, 15 March 2018, pp 15-19.
[38] *Hansard,* Legislative Council, 15 March 2018, p 28.
[39] Select Committee on Human Trafficking in New South Wales, *Human Trafficking in New South Wales* (2016), p ix.

Before being passed the bill was amended in the Legislative Council to establish a joint parliamentary committee to monitor and review the functions of the Anti-Slavery Commissioner.

As there is no member of the Christian Democratic Party in the Legislative Assembly, in a highly unusual move, the Premier, The Hon Gladys Berejiklian MP, agreed to take carriage of the bill in that House on behalf of Mr Green. The bill passed the Assembly in June 2018 with a number of amendments, including changing the remit of the committee to a broader remit to inquire into and report on 'matters relating to modern slavery'.

The legislation provides that the Modern Slavery Committee will consist of four members of each House, have a non-government Chair, operate under the Standing Orders of the Legislative Council and be administered by the Department of the Legislative Council.

The bill was assented to on 28 June 2018, and is only the second private members' bill to have passed both Houses since the beginning of the 56th Parliament in 2015.

CONCLUSION

A great deal has happened in the NSW Legislative Council in 24 sitting days or eight sitting weeks. The House has, or at least a majority of members in the House have, asserted the power of the House to require the production classes of documents previously withheld by governments on the grounds they were "cabinet information." As a consequence, and having followed a cautious and carefully mapped path, the House has been provided with business cases on two significant capital works projects, as a well as a consultant report on a significant area of government administration. Further, the House has now expressed a view about the test to be applied in determining whether or not a document is required to be produced where the question of cabinet-in-confidence arises. Five new committees have been established. Two committees have been established on a trial basis to enhance legislative scrutiny, and two "super committees" have been established to enhance public accountability and the parliamentary scrutiny of public works. It will be interesting to see what ongoing committees are established in those spaces in the new Parliament following the 2019 NSW general election. And finally, a new committee on Modern Slavery has been established, involving a new model (at least for NSW) of how a statutory joint committee could be constituted. It has been an eventful period. The Legislative Council, already an assertive House of Review, will never be the same as it was a few short months ago.

30 COMPLIANCE WITH ORDERS FOR PAPERS

Mr Searle moved, according to notice:

1. That this House notes that, on 5 June 2018, this House:

    (a) censured the Leader of the Government as the representative of the Government in the Legislative Council for the Government's failure to comply with orders for the production of documents under standing order 52 dated 15 March 2018, 12 April 2018 and 17 May 2018,

    (b) ordered that, under standing order 52, there be laid upon the table of the House by 9.30 am on 6 June 2018 certain of those documents not previously provided to the resolutions dated 15 March 2018, 12 April 2018 and 17 May 2018, and

    (c) ordered that, should the Leader of the Government fail to table the documents by 9.30 am on 6 June 2018, the Leader of the Government was to attend in his place at the Table at the conclusion of prayers to explain his reasons for continued non-compliance.

2. That this House notes that on 6 June 2018:

    (a) the Leader of the Government failed to table documents in compliance with the resolution of 5 June 2018,

    (b) the Clerk tabled correspondence from the Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet in relation to the order of 5 June 2018, which stated that "after considering advice from the Crown Solicitor, a copy of which is enclosed, I advise that there are no further documents for production", and

    (c) on the President calling on the Leader of the Government to explain his reasons for continued non-compliance, in accordance with the resolution of 5 June 2018, the Leader of the Government stated that "further to the earlier advice of Ms Karen Smith, the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday".

3. That this House notes that, on 8 June 2018, the Clerk received:

    (a) correspondence from the Secretary, Department of Premier and Cabinet, noting that:
        (i) "all of the documents referred to in the resolution are Cabinet documents",
        (ii) "the Legislative Council has no power to require such documents to be produced",
        (iii) "on this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production",

    (b) redacted documents relating to Sydney Stadiums and unredacted documents relating to the Tune Report on the out-of-home-care system, and

    (c) a submission identifying documents relating to Sydney Stadiums and the Powerhouse Museum relocation business case which have been "provided on a confidential basis for inspection by members of the Legislative Council only."

4. That this House notes that on 12 June 2018, the Clerk published redacted documents relating to the Powerhouse Museum relocation business case, received on 8 June 2018, which had been treated as confidential until separated by representatives of the Department of Planning and Environment.

5. That this House notes that:

    (a) the only established mechanism by which the Department of Premier and Cabinet may lodge documents with the Clerk directly, or by which ministers and government agencies may make a claim of privilege, is under standing order 52, in response to an order for the production of documents,

    (b) in response to the House ordering the Leader of the Government to stand in his place at the Table to explain his reasons for non-compliance with the order of 5 June 2018, the Leader of the Government advised the House that "the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday", and

    (c) the correspondence and documents provided by the Department of Premier and Cabinet and received by the Clerk on 8 June 2018 and 12 June 2018 were administered by the Clerk in accordance with, and under the authority of, the provisions of standing order 52, including by treating the documents "provided on a confidential basis" in the same manner as documents subject to a claim of privilege.

6. That this House rejects the statement made by the Secretary of the Department of Premier and Cabinet on behalf of the Government that the documents provided on 8 June 2018 and 12 June 2018 were provided voluntarily.

7. That this House notes with concern the following statements made by the Government regarding the power of the Legislative Council to order the production of documents:

    (a) on 1 May 2018, in response to a question without notice regarding the non-production to the House of the full business case in relation to the Powerhouse Museum, the Leader of the Government informed the House of the Government's position that "no Cabinet information will be produced or referred to in responding to a resolution made under standing order 52",

    (b) on 5 June 2018 during debate on the motion to censure the Leader of the Government, the Leader of the Government stated:
        (i) "I represent the Government's view as it relates to the order for production of Cabinet documents",
        (ii) "The majority judgement in Egan v Chadwick did decide the matter: the law is settled and it is well established",
        (iii) that the Government's view is based on "the very clear position at law that the Legislative Council cannot compel the [Government] to hand over Cabinet documents", and

    (c) in correspondence received by the Clerk on 8 June 2018, the Secretary of the Department of Premier and Cabinet stated that "the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production".

8. That this House notes that in the judgements of Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in Egan v Chadwick (1999), in relation to Cabinet documents:

    (a) Spigelman CJ held that:

        (i) a distinction has been made between documents which disclose the actual deliberations within cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet,
        (ii) it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with the doctrine of collective ministerial responsibility by revealing the "actual deliberations of Cabinet",
        (iii) however, the production of documents prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to Cabinet,

    (b) Meagher JA took the view that the immunity of cabinet documents from production was "complete", arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government, but without exploring the distinction between different types of Cabinet documents drawn by Spigelman CJ, and

    (c) Priestley JA noted that:
        (i) a court has "the power to compel production to itself even of Cabinet documents",
        (ii) the "function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity", and
        (iii) "… notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy".

9. That this House notes that:

    (a) the Government apparently relies on the broad definition of "Cabinet information" adopted in the Government Information (Public Access) Act 2009,

    (b) the Legislative Council rejects the proposition that the test in the Government Information (Public Access) Act 2009 of what constitutes Cabinet information is applicable to Parliament,

    (c) the Government's apparent reliance on the definition in the Government Information (Public Access) Act 2009 is likely to have led to a much broader class of documents being withheld from production to this House than that articulated by the majority of the NSW Court of Appeal in the judgments of Spigelman CJ and Priestly JA in Egan v Chadwick, the provision of which is necessary for the Legislative Council to fulfil its constitutional role, and

(d) the true principle from Egan v Chadwick concerning the power of the House to order the production of Cabinet documents is, at a minimum, that articulated by Spigelman CJ, and that the Government has failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ.

10. That this House asserts that it has the power to require the production of Cabinet documents such as those produced on 8 June 2018 and 12 June 2018 and that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick.

Debate ensued.

Question put.

The House divided.

Ayes 21

Mr Borsak	Mrs Houssos	Mr Secord
Mr Brown	Mr Mason-Cox	Ms Sharpe
Mr Buckingham	Mr Mookhey	Mr Shoebridge
Mr Donnelly *	Mr Moselmane *	Mr Veitch
Dr Faruqi	Mr Pearson	Ms Voltz
Mr Field	Mr Primrose	Ms Walker
Mr Graham	Mr Searle	Mr Wong

* Tellers

Noes 20

Mr Amato	Mr Franklin	Mr Martin
Mr Blair	Mr Green	Mrs Mitchell
Mr Clarke	Mr Harwin	Revd Mr Nile
Mr Colless	Mr Khan	Dr Phelps
Ms Cusack	Mr MacDonald	Mrs Taylor
Mr Fang *	Mrs Maclaren-Jones *	Ms Ward
Mr Farlow	Mr Mallard	

* Tellers

Question resolved in the affirmative.