

## CHAPTER 17

### DOCUMENTS

Tabled documents, historically referred to as ‘papers’, include the annual reports of government agencies, other government agency reports, delegated legislation, committee reports and petitions. Documents may be ‘tabled’ by the President, ministers, committee chairs, members and the Clerk, and they are presented in accordance with various standing orders, statutes, and orders of the House, as well as on the initiative of the government.

#### WHAT IS A ‘DOCUMENT’?

A ‘document’ is more than simply a printed manuscript. Section 21 of the *Interpretation Act 1987* defines a document as any record of information, including:

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.

There are a number of examples of non-written documents, such as compact discs, being tabled in the Council.<sup>1</sup> The Senate and House of Representatives also permit the tabling of non-written documents, although only printed documents can be included in the House of Representatives’ Parliamentary paper series.<sup>2</sup>

The terms ‘document’ and ‘paper’ are synonymous and are used interchangeably. There are also various phrases used to describe the formal presentation of a document to the House, including ‘to table a document’, ‘to present a document’ and to ‘lay a document before the House’, which mean essentially the same thing and are used interchangeably.

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1 See, for example, *LC Minutes* (15/11/2005) 1716.

2 Evans H (ed), *Odgers’ Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 436; Harris IC (ed), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p 585.

## TABLING OF DOCUMENTS IN THE HOUSE

### Documents tabled by the President

The President is authorised to table documents when there is no other business before the House (SO 54(1)). The President routinely tables certain documents under various statutes, including, for example, reports by the Ombudsman, the Independent Commission Against Corruption, Police Integrity Commission and Auditor-General. In most cases the relevant legislation provides that these reports are to be tabled within a prescribed time.<sup>3</sup>

Other documents tabled by the President include: the 'Register of Disclosures by Members of the Legislative Council' under the *Constitution (Disclosures by Members) Regulation 1983*, annual reports of the Parliamentary Ethics Adviser, the reports of any committee of which the President is the Chair, such as the Procedure Committee, and the annual reports of the Department of the Legislative Council and parliamentary joint service departments.

As representative of the House, the President also tables communications received from other legislatures, governments or officials,<sup>4</sup> and documents relating to the powers, responsibilities and proceedings of the House.<sup>5</sup>

### Documents tabled by ministers

Ministers may table documents at any time when there is no other business before the House (SO 54(1)). Most of the documents tabled in the House are executive documents presented by a minister or parliamentary secretary according to statute. These include statutory reviews required under an Act and the annual reports of government departments and statutory authorities.

### Documents tabled by committee chairs

Committee chairs, or another member of the committee on behalf of the chair, are required to table committee reports, along with accompanying documents, in the House within 10 calendar days of the report being adopted by the committee (SO 230).

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3 See, for example, the *Ombudsman Act 1974*, s 31AA(1) (next sitting day); the *Independent Commission Against Corruption Act 1988*, s 78(1) (within 15 sitting days of receipt); and the *Police Integrity Commission Act 1996*, s 103(1) (within 15 sitting days of receipt).

4 For example, messages of condolence received following the Sydney bushfires in 2001-2002, *LC Minutes* (12/3/2002) 20-21; and messages of condolence received following the Bali bombings of 2002, *LC Minutes* (23/10/2002) 408-409.

5 These have included court judgments relating to the powers of the House, *LC Minutes* (22/6/1999) 142; a legal opinion concerning the execution of a search warrant on the office of a member, *LC Minutes* (14/10/2003) 319; legal opinions concerning the provision of motor vehicles to members of Parliament in response to an order of the House, *LC Minutes* (3/12/1997) 284, 287; and correspondence concerning the referral of a matter to the ICAC by a committee of the House, *LC Minutes* (24/10/2002) 426.

### **Documents tabled by private members**

Unlike the President and ministers, private members may only table documents by leave of the House (SO 54(4)).

In many instances leave is denied, such as where the document is already in the public domain, or the House is unaware of the contents of a document at the time leave is sought.<sup>6</sup>

According to *Odgers*, the rationale for restricting the right to table documents to the President and ministers is based on their distinct duties: the President has a duty to inform the House about its powers and proceedings; and ministers are obliged to inform the House about public affairs in general.<sup>7</sup>

### **Documents tabled by the Clerk**

Standing order 54(2) authorises the Clerk, under the authority of any Act or by resolution of the House, to table documents at any time when there is no other business before the House.

Section 40 of the *Interpretation Act 1987* provides that statutory rules (including regulations, by-laws, ordinances and rules of court) are to be tabled in each House of Parliament by a minister or the Clerk, within a certain time of their being made or of their publication in the Gazette. In practice, statutory rules and other instruments are tabled by the Clerk on the Tuesday of each sitting week. This is discussed in more detail in Chapter 14 (Delegated Legislation).

Returns to an order of the House for the production of documents under standing order 52 are also tabled by the Clerk as are the reports from the independent legal arbiter in relation to these orders (SO 52(2)). The tabling of documents under this standing order is discussed later in this chapter.

### **Motions after tabling**

Once a document is presented to the House, a motion may be moved that a day be appointed to consider the document or that it be printed (SO 57).

On tabling of a report from a committee, a motion may be moved without notice that the House take note of the report (SO 232).

### **Amendments after tabling**

Once a document has been tabled in the House, clerical or typographical errors can be corrected under the authority of the President. However, the approval of the House is required if a minister wishes to amend the document by omitting or adding material (SO 58).

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<sup>6</sup> See, for example, *LC Minutes* (7/6/2005) 1427, (28/9/2006) 248.

<sup>7</sup> *Odgers*, 11th edn, p 436.

### Tabling out of session

As noted above, the President, Ministers and the Clerk often table in the House a variety of reports and other documents. The majority of these reports may also be presented when the House is not sitting either under authority of the legislation under which the report was prepared or under the standing orders.

Examples of reports presented out of session under the authority of legislation include:

- Reports of independent bodies such as the Independent Commission Against Corruption, prepared under the *Independent Commission Against Corruption Act 1988*, which may be received by the President out of session, made public under authority of the relevant legislation, and later tabled in the House.<sup>8</sup>
- Reports of the Auditor General under the *Public Finance and Audit Act 1983*, which must be tabled with the President if the House is sitting, and received by the Clerk if the House is not sitting. On receipt by the Clerk, such reports are deemed to have been laid before the House.<sup>9</sup>
- Reports prepared under annual reporting legislation, which may also be received by the Clerk when the House is not sitting and be deemed to have been laid before the House. The Clerk reports receipt of such reports when the House next meets.

Where legislation requires that a report or other document be presented to Parliament but does not provide for the report's tabling out of session the report can be presented to the Clerk under the authority of standing order 55, which provides:

Where, under any Act, a report or other document is required to be tabled in the House by a Minister, and the House is not sitting, such report or document may be lodged with the Clerk.

When lodged with the Clerk, the report or other document is deemed to have been tabled and published by order or under the authority of the House. Documents received by the Clerk when the House is not sitting are reported to the House on the next sitting day. However, documents may not be lodged with the Clerk when the House is prorogued (SO 55(3)).

Where there is no legislative requirement that a report be presented to the House, standing order 55 does not apply.<sup>10</sup> In such cases, reports cannot be received by the Clerk out of session and are held for tabling by a minister on the next sitting

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8 The *Independent Commission Against Corruption Act 1988* also provides that, if a report includes a recommendation that the report be made public 'forthwith', the President may make it public, whether or not the House is in session and whether or not the report has been laid before the House (s 78(3)). Similar provisions are included in the *Ombudsman Act 1974* at s 31AA(2) and the *Police Integrity Commission Act 1996* at s 103(3).

9 *Public Finance and Audit Act 1983*, ss 52A(2), 52B(2), 52F(2).

10 See, for example, reports under the *Privacy and Personal Information Act 1998*.

day. Although there are few reports that fall into this category, there are instances where reports of some significance have not been tabled or made public despite the Government providing the report to the Clerk. For example, following the Special Commission of Inquiry into the Waterfall Rail Accident, the Government agreed that the Independent Transport Safety and Reliability Regulator would report quarterly on the implementation of the recommendations of the Special Commission. However, as there was no requirement under legislation that the reports of the Independent Transport Safety and Reliability Regulator be presented to the House, they could not be tabled out of session.

If the House is not sitting when a parliamentary committee wishes to report to the House, the committee may present its report to the Clerk, at which time the report is deemed to have been tabled in the House and to have been published by order or under the authority of the House (SO 231).

## PUBLICATION OF DOCUMENTS

All documents presented to the House by the President, ministers and the Clerk are considered to be public, unless otherwise ordered by the House (SO 54(3)). Documents presented by private members, however, are not automatically published. While these documents may be inspected by other members of the Council, they can only be made public if authorised by the House (SO 54(4)).

In some cases, the House will impose certain conditions on the publication of documents tabled by a private member. For example, in 1997 the House passed a resolution granting leave to the Hon Franca Arena to table certain documents regarding allegations of paedophile activities among prominent persons, but imposed various conditions regarding access to the documents. Under the resolution, the documents were to be retained in the custody of the Clerk and not considered public, although the Clerk was granted leave to provide a copy of the documents to a Special Commission of Inquiry and to the Commissioner of Police. On receipt of the report of the Commissioner of Police, the House was to reconsider whether it was necessary or desirable to continue to restrict access to the documents.<sup>11</sup>

As discussed in Chapter 3 (Parliamentary Privilege), the publication of a document by order or under the authority of the House attracts absolute privilege under section 27 of the *Defamation Act 2005*.

## PRINTING OF DOCUMENTS

Documents tabled by either the President, a minister or the Clerk are authorised to be published (SO 54(3)), with the exception of documents subject to a claim of privilege. Once a document has been tabled, other than a petition or a return to an

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<sup>11</sup> *LC Minutes* (21/10/1997) 123-127.

address or order, a motion may be made that it be printed (SO 57). On the first sitting day of each month a list of papers tabled in the previous month and not ordered to be printed is tabled by a minister. On tabling of the list, a motion may be moved without notice, that certain papers on the list be printed (SO 59).<sup>12</sup>

Documents tabled under legislation and lodged with the Clerk when the House is not sitting are printed by authority of the Clerk under standing order 55(2)(b).

In 1934, on a motion moved by the Attorney General, the Hon Henry Manning, as a matter of necessity and without previous notice, the House rescinded an order, made two months earlier, for printing papers tabled by the Minister dealing with contracts entered into by the Railway Department for the supply of sleepers.<sup>13</sup> This action was taken by the Attorney General in response to a request for the return of the papers by the Minister for Transport, as the legal documents and contracts were required by the Commissioner for Railways to allow him to deal with claims concerning the contracts. The motion before the House was only to rescind the order to print the papers and would seem not to have affected the status of the documents as tabled papers.

## RECORDS OF DOCUMENTS

All papers tabled in the House are recorded in the Minutes of Proceedings and an index of these papers is published in the Journals.

The only exception to this occurred on 24 August 1960, the first sitting day of the third session of the 39th Parliament, when the Attorney General, the Hon Robert Downing, tabled minutes of a joint meeting of members of the Assembly and Council convened according to section 5B of the *Constitution Act 1902* to consider the Constitution Amendment (Legislative Council Abolition) Bill. The Hon Colonel Hector Clayton, Leader of the Opposition in the Council, immediately moved that the document be not entered in the Minutes of Proceedings as the meeting itself was not a proceeding of the House.<sup>14</sup> The motion was carried on division 30 to 20.<sup>15</sup>

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12 Before 2004, all documents tabled and not ordered to be printed were referred to the Printing Committee for consideration. The Printing Committee would report to the House if the printing of any of the documents was recommended. The adoption of standing order 59 in 2004 made obsolete the need for a printing committee.

13 *LC Minutes* (19/6/1934) 38.

14 On 7 April 1960 the Council had declined the request for a free conference on the Constitution Amendment (Legislative Council Abolition) Bill 1960. However, on 13 April 1960 both Houses received messages from the Governor convening a joint sitting on the bill on 20 April 1960. In response the Council resolved that it did not consider that a situation had arisen conferring constitutional power on the Governor to convene such a joint sitting, and informed His Excellency that the Council would not attend the joint sitting. Nonetheless, a joint sitting of members did take place on 20 April 1960, at which 23 government supporters in the Council attended.

15 *LC Minutes* (24/8/1960) 17; *LC Debates* (24/8/1960) 15-16.

From 1856 until 1904 the Journals contained printed parliamentary papers. From 1904 until 2006 parliamentary papers were published in separate volumes called the 'Joint Volumes of Parliamentary Papers'.

However, in 2006, by agreement between both Clerks, the publication of the Parliamentary Papers Series was discontinued. While historically most documents ordered to be printed, such as annual reports, could only be accessed via the Parliamentary Papers Series, by 2006 this had ceased to be the case, with departments and agencies routinely making publications such as annual reports available through the internet. In addition, with the increasing use of scanners and email, requests for information can be met far more easily than by photocopying pages of a Joint Volume of the Parliamentary Papers Series.

## CUSTODY OF DOCUMENTS

Under standing order 50, the Clerk has custody of the Journals and records of the House and all documents tabled in the House. Such documents may only be taken from the office of the Clerk by a resolution of the House or, if the House is not sitting for more than two weeks, by approval of the President.

The *State Records Act 1998* provides for exempt public offices, including the Houses of Parliament, to enter into agreements with the State Records Authority for the application, with or without specified modifications, of any of the provisions of the Act to their records. On 23 November 2006, the Council passed a resolution authorising the Clerk to enter into a memorandum of agreement with the Authority for the transfer of records of the House to the care, but not control, of the Authority. The resolution also expressly authorised the Clerk, under standing order 50, to transfer to the Authority from time to time as occasion may require the records of the House not currently in use. The resolution has continuing effect until rescinded or amended by the House.<sup>16</sup>

Under the resolution, documents transferred to the Authority are subject to access orders in accordance with the spirit of Part 6 of the *State Records Act 1998* as follows:

- Documents tabled in the House and authorised to be made public are open to public access.
- Documents tabled in the House and not made public will remain closed to public access for 30 years from the date of tabling, after which the Clerk may make an open access direction. This category of documents includes privileged documents tabled in response to orders under standing order 52 and documents tabled by private members, which are only available to members of the House unless ordered to be made public by the House.

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<sup>16</sup> LC Minutes (23/11/2006) 431-432.

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- Documents which have not been published by authority of the House or a committee, such as *in camera* evidence and confidential submissions, will remain closed to public access unless authorised by resolution of the House.

A memorandum of Agreement between the Clerks of the two Houses and the Director of State Records was signed on 5 March 2008.

### **Inspection of documents**

Any tabled document can be inspected at the office of the Clerk at any reasonable time. The Clerk may charge a reasonable fee for copies of extracts from documents tabled in the House (SO 60).

## PETITIONS

The right to petition Parliament is a well established parliamentary proceeding. Petitions are tabled in the House on most sitting days.

Only members may present a petition, although any citizen or group of citizens may request a member to present a petition to the House on their behalf. This can be any member, although it is not the practice for the President or ministers to present petitions. Members are not obliged to present a petition but generally take the view that they should present any petition forwarded to them regardless of any disagreement they may have with its content. Members may not petition the House on their own behalf (SO 68(6)).

Petitions have been presented on a wide range of subjects, requesting the House to introduce legislation, to repeal or change existing laws or to take particular action for the benefit of particular persons. A petition from an individual citizen may seek the redress of a personal grievance such as the correction of an administrative error.

The rules relating to petitions are primarily designed to ensure the authenticity of petitions and provide protection to the petitioner and the House. The standard form of a petition is attached at Appendix 13. Under standing orders 69 and 70, a petition must:

- be signed by the member presenting it;
- be typewritten or written in ink, and be in English;
- contain both the printed name of the person signing the petition and their signature;
- be respectful and temperate in its language and not contain language disrespectful to Parliament;
- not contain references to any debate of the House unless it is relevant to the petition.



The subject of a petition must be a matter on which the House has the power to act, that is, a State matter under the Commonwealth Constitution and one involving legislation or government administration. However, this requirement has been interpreted broadly to include matters on which the government can make representation on behalf of its constituents, such as matters of national or even international significance. For example, petitions have been presented in relation to federally funded public dental health services, greenhouse gases and cross-jurisdictional matters such as the Snowy Hydro scheme. A petition must not request, either directly or indirectly, a grant of public monies.<sup>17</sup>

While most petitions are received from citizens of New South Wales, the House may also receive petitions from citizens outside the State.

Petitions need only contain one signature but usually include tens or hundreds of signatures. In May 2004, a petition regarding the deregulation of pharmacies included 500,000 signatures, making it the largest petition presented to the House.<sup>18</sup>

It is the responsibility of the member presenting a petition to ensure that the petition complies with the standing orders and rules of the House (SO 70(3)). While there is no requirement that a petition be submitted to the Clerk before being presented to the House, it is customary for members to do so in order to ensure that the petition is in order<sup>19</sup> as petitions have been ruled out of order after being presented to the House.<sup>20</sup> Where a petition does not comply with the standing orders there is precedent for members to seek the consent of the House to present it as an 'irregular petition'. Leave is generally granted where the petition is irregular in a technical sense and not in substance.<sup>21</sup> On occasion the House has declined leave to present an irregular petition.<sup>22</sup>

Petitions are dealt with in the House after the tabling of papers (SO 38). To present a petition at any other time requires leave of the House.<sup>23</sup> On occasion, members have tabled petitions, by leave, during debate on substantive motions.<sup>24</sup>

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17 In 1861 a petition seeking compensation for financial loss following the Lambing Flat riots was considered out of order, *LC Minutes* (10/4/1861) 6.

18 *LC Minutes* (4/5/2004) 664.

19 Ruling: Burgmann, *LC Debates* (26/10/2006) 3506.

20 See, for example, a petition received from Roman Catholic Clergymen, subsequently withdrawn as they had erroneously designated themselves as The Very Reverend and Reverend the Clergy of Diocese of Sydney, *LC Minutes* (15/11/1866) 99; a petition disallowed as there were no signatures written on the petition itself and the petition did not contain a prayer, *LC Minutes* (1/10/1861) 21; a petition disallowed as the prayer did not conform to order, *LC Minutes* (30/10/1861); four petitions disallowed as the prayer was in contravention of the standing orders but subsequently presented again and received, *LC Minutes* (26/8/1915) 62; and a petition withdrawn as it requested that the House support a motion already agreed to, *LC Minutes* (17/8/1988) 15.

21 For example, where the petition did not contain a request in the correct format, *LC Minutes* (3/6/1998) 533, (19/11/1998) 897, (24/11/1999) 265, (31/8/2004) 952, (28/2/2006) 1843, (23/11/2006) 421.

22 *LC Minutes* (25/6/1998) 597, (5/12/2002) 567.

23 *LC Minutes* (8/12/1938) 136, (28/11/1996) 519, (3/12/1998) 1015.

24 *LC Minutes* (28/5/1997) 772, (6/4/2006) 1956.

When presenting a petition it is only necessary to state the name of the petitioners, the number of signatures, the subject matter of the petition and the request for action (SO 68(3)).

After a petition has been announced to the House, a motion is moved that the petition be received (SO 68(4)). It is also in order to move that the petition be read by the Clerk (SO 68(4)(b)).<sup>25</sup> No amendment or debate is permitted on the question that the petition be received or that it be read by the Clerk (SO 68(5)), although the question can be negatived<sup>26</sup> or decided on division.

A copy of each petition received by the House is referred by the Clerk to the appropriate minister for consideration (SO 68(9)).

The presentation of a petition is recorded in both the Minutes and in Hansard. An abstract of all petitions presented is published in the Journal.

The information contained in a petition which has been presented to the House is considered to be public. As noted in *Odgers*:

Any person may therefore inspect a petition and extract any information from it, including names and addresses of signatories. There is nothing to prevent such a person then sending material to the signatories. The harassment or other adverse treatment of a person in consequence of their signing a petition could be held by the Senate to constitute a contempt.<sup>27</sup>

The Standing Committees on Law and Justice, State Development and Social Issues are authorised to inquire into any petition which has been tabled and which is relevant to the functions of the Committee.<sup>28</sup> Unlike Senate committees which have occasionally undertaken inquiries based on petitions relating to their standing references,<sup>29</sup> Council committees have not initiated an inquiry based on a petition, although the subject matter of petitions often coincides with committee inquiries.

## E-Petitions

The standing orders of the Council do not currently authorise electronic petitions, and to date no electronic petitions have been received.

In the Senate, petitions which are posted and signed electronically on the internet are accepted if a senator is prepared to attest that the petition has been posted with the text available to the signatories.<sup>30</sup> The Queensland and Tasmanian Parliaments now also provide for e-petitions.

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25 *LC Minutes* (28/10/1986) 403, (11/9/2001) 1140.

26 *LC Minutes* (23/4/1858) 17.

27 *Odgers*, 11th edn, p 444.

28 *LC Minutes* (10/5/2007) 58.

29 *Odgers*, 11th edn, p 445.

30 *Ibid*, p 444.

### Petitions for use of documents in court

Under Article 9 of the *Bill of Rights 1689*, parliamentary proceedings may not be questioned or impeached in any court. This does not mean, however, that all references to parliamentary proceedings are prohibited in a court. As McGee points out, the 'historical' use of such proceedings is permissible:

Evidence of proceedings in Parliament may be admitted before a court, provided that the evidence is used in a way that is consistent with article 9 and does not involve an examination of the propriety of the proceedings or of the motives or intentions of those taking part in the proceedings.<sup>31</sup>

The traditional prohibition on referring to parliamentary proceedings led to a practice amongst some Westminster parliaments where litigants sought permission from the House to refer to parliamentary proceedings. This permission was sought via a petition. It was considered that, by obtaining the House's prior agreement to their use, they insured themselves against the possibility that the House would hold them in contempt for referring to its proceedings without its permission.<sup>32</sup> This practice has now been abandoned by the House of Commons, the Senate and the New Zealand House of Representatives.

In 1980, the House of Commons resolved to allow references to be made in court to the Official Report and Committee reports and evidence, without the presentation of a petition.<sup>33</sup>

The Senate took a similar move in 1988:

Immunity of parliamentary proceedings from scrutiny in the courts was formerly supported by a parliamentary practice of not allowing reference to the records of those proceedings in the courts without the approval of the House concerned. This practice was sometimes mistakenly regarded as the full extent of the immunity which it was designed to protect. Because in recent times the courts have usually been scrupulous to observe the law and to refrain from questioning parliamentary proceedings, the practice was unnecessary, and was abolished by the Senate in 1988.<sup>34</sup>

This principle was illustrated in *Kable v New South Wales*, when the plaintiff sought to introduce evidence of certain parliamentary debates and to tender the second reading speech in relation to the Community Protection Bill. Master Harrison refused to admit the Hansard record into evidence because the plaintiff was seeking to use the Hansard record to show that the legislation was introduced for an improper purpose. Relying on the decision in *Mundy v Askin*,<sup>35</sup> he said:

I refuse to allow the extracts from Hansard to be introduced into evidence ... because ... they are not being used to assist in the interpretation of

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31 McGee D, *Parliamentary Practice in New Zealand*, 3rd edn, Dunmore Publishing, Wellington, 2005, p 628.

32 *Ibid*, p 632.

33 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 105.

34 *Odgers*, 11th edn, p 34.

35 [1982] 2 NSWLR 369 at 373.

legislation as in *Mundy* but rather to examine the motives of what was said and done in the House.<sup>36</sup>

The Senate does, however, require senators and Senate officers to seek Senate approval before giving evidence in respect of Senate or Senate committee proceedings.<sup>37</sup> The New Zealand House of Representatives took a similar step in 1996.<sup>38</sup>

Before 1995, it was usual practice in the Council for the parties in legal proceedings to petition the Council to obtain leave from the Parliament to adduce official parliamentary records, such as Hansard or the Minutes of Proceedings, into evidence in a court. The enactment of the *Evidence Act 1995*, and in particular section 155, obviated the requirement for the parties to petition the Parliament for such leave, and since that time official parliamentary records, as public documents, have been admissible in evidence.

However, in certain circumstances, for abundant caution, the Council continues to require the presentation of a petition seeking the production of documents in matters of a particularly serious nature, notwithstanding the adoption of the *Evidence Act 1995*. In two recent cases, members presented separate petitions to the House for the release of documents and, on the following day, the House agreed to a motion that leave be granted to produce the required material. In 1997, the petition related to an appeal to the High Court following a decision of the Court of Appeal in *Egan v Willis*<sup>39</sup> and, in 2000, the petition related to a case before the Court of Appeal and the removal of a Supreme Court judge.<sup>40</sup>

In the case of documents that have been tabled in the House, following petition from the parties, the House may give leave for the documents to be produced and for the Clerk, or the Clerk's representative, to attend the court to produce the documents.<sup>41</sup>

### Petitions for and against bills

Petitions have been presented both for and against the passage of particular bills in the House.<sup>42</sup> The petition opposing the National Competition Policy Amend-

36 [2000] NSWSC 1173 at [16].

37 *Odgers*, 11th edn, p 34.

38 *McGee*, above n 31, p 633, standing order 401(1).

39 *LC Minutes* (2/12/1997) 261, (3/12/1997) 282.

40 *LC Minutes* (22/6/2000) 536, (23/6/2000) 554, (15/5/1990) 158.

41 As occurred in *Sankey v Whitlam* (1978) 142 CLR 1. See also documents tabled by the Hon Franca Arena, retained in the custody of the Clerk, and provided to the Special Commission of Inquiry and to the Commissioner of Police investigating Mrs Arena's claims, *LC Minutes* (21/10/1997) 123-126.

42 For an example of a petition in support of the passage of a particular bill, see the Family Impact Commission Bill, *LC Minutes* (3/12/1998) 1015. For examples of petitions against the passage of a particular bill, see the National Competition Policy Amendments (Commonwealth Financial Penalties) Bill, *LC Minutes* (4/5/2004) 664; and the Same-Sex Marriage Bill, Same-Sex Marriage (Dissolution and Annulment) Bill and Same-Sex Marriage (Celebrant and Registration) Bill, *LC Minutes* (9/5/2007) 46.

ments (Commonwealth Financial Penalties) Bill in relation to the deregulation of pharmacies contained 500,000 signatures, as cited above.<sup>43</sup> There have also been petitions requesting the House to introduce particular legislation,<sup>44</sup> and to amend existing legislation.<sup>45</sup>

While the majority of these petitions are presented during the usual time for presenting petitions, on occasion leave has been granted for a petition relating to a bill to be presented during the second reading debate on the bill itself.<sup>46</sup>

Petitions to be heard at the Bar of the House for or against a bill are discussed in more detail in Chapter 18 (The Inquiry Power).<sup>47</sup>

### Petitions for a private bill

A private bill<sup>48</sup> may only be initiated by a petition signed by one or more of the parties applying for the bill, requesting the House to pass the bill (SO 165(1)). Notice of the intention to petition for such a bill must be advertised before presentation of the petition, to alert potential opponents to the proposed bill (SO 164). Within three months before the presentation of the petition for the bill, a notice containing a statement of the general objectives of the bill and indicating what private interests are likely to be affected by the bill must be published once a week, for four consecutive weeks, in certain specified newspapers. Proof of such advertisements must be supplied at the time of presenting the petition for the bill.

Petitions for a private bill are discussed in more detail in Chapter 12 (The Legislative Process).

## DOCUMENTS QUOTED BY MINISTERS IN DEBATE

In 2004 the House adopted a new procedure whereby any document relating to public affairs quoted by a minister in debate may be ordered to be laid on the

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43 *LC Minutes* (4/5/2004) 664.

44 For example, legislation to take the organisation of the Gay and Lesbian Mardi Gras and hand it over to ethnic groups to produce a multicultural ethnic parade to show the diversities of ethnicity, *LC Minutes* (2/5/2000) 409; legislation to establish zones free of genetically engineered crops, declare a freeze on the intentional release of new genetically engineered crops, and consult with farming groups regarding the economic impacts of introducing genetically engineered crops, *LC Minutes* (3/12/2002) 537; and legislation to ensure that high standards of care are provided for all animals held in local council pounds, *LC Minutes* (17/10/2001) 1209.

45 For example, urging amendments to the *Local Government Act 1993* to empower local councils to arbitrate on disputes between residents as an alternative to issuing orders, *LC Minutes* (4/4/2006) 1936.

46 During debate on the Guardianship Amendment Bill, the Hon Patricia Forsythe, by leave, tabled a petition from 609 citizens requesting a Royal Commission Inquiry into the practices of Australian Guardianship Authorities, *LC Minutes* (28/5/1997) 664.

47 See 'Witnesses at the Bar of the House'.

48 A private bill is a bill that is intended to benefit the private interests of a particular individual or group. See Chapter 12 (The Legislative Process) for more details.

table by motion without notice moved immediately at the conclusion of the minister's speech. A minister may decline to table the document, on the grounds that it is of a confidential nature or should more properly be obtained by an order of the House (SO 56).

The first application of the new standing order occurred on 7 September 2006 and raised a number of procedural issues. In that case, the House agreed on division to a motion requiring the Minister for Roads to table a document which he had quoted during an answer to a question without notice. At the conclusion of Question Time, the opposition whip raised a point of order that the House had ordered that the document be tabled, and asked the Chair to indicate whether the document had been tabled as ordered by the House. The Acting President ruled that the House's resolution did not determine the timing of the tabling of the document. When the House resumed after lunch the Leader of the House, on behalf of the Minister for Roads, tabled a document in response to the House's order. The opposition whip again raised a point of order asserting that the document tabled was not the document the minister had had in his hand and from which he had quoted. A number of members who spoke to the point of order noted that the document from which the minister had quoted had been folded while the document which had been tabled was not. In response, the Leader of the Government informed the House that the document which had been tabled was a clean copy of the document ordered to be tabled by the House, but nonetheless tabled the original document. On ruling on the point of order, the Deputy President referred to *Odgers* which states: '[T]he chair has no responsibility to judge the accuracy or correctness of a document tabled'.<sup>49</sup>

## ORDERS FOR THE PRODUCTION OF DOCUMENTS

Under standing order 52, the House may order the production of documents held by the Government. These orders are commonly referred to as 'orders for papers' or 'orders for returns'.

The power of the House to order the production of documents is a common law power based on the principle of 'reasonable necessity' – that is, the House has such powers as are reasonably necessary for the House to carry out its legislative and scrutiny functions. While there is statutory authority in New South Wales for the power of Parliament to compel witnesses to attend and answer questions,<sup>50</sup> the power to order production of documents has not been addressed by statute. This contrasts with the position in other Parliaments in Australia. In some States, the power to order the tabling of papers has been specifically conferred on the Houses by legislation.<sup>51</sup>

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49 *LC Debates* (7/9/2006) 1620.

50 *Parliamentary Evidence Act 1901* (NSW), ss 4, 7-9, 11.

51 *Commonwealth Constitution*, s 49; *Constitution Act 1975* (Vic), s 19(1); *Constitution Act 1934* (SA), s 38; *Parliamentary Privileges Act 1891* (WA), s 1.

Between 1856 and 1934 the Council ordered the production of documents to the House on numerous occasions. In the vast majority of cases, the Government complied with these orders and produced the documents as required. From 1934 until 1995 the practice of ordering the production of documents fell into disuse. However, in 1995, the practice was revived, although the power of the House to order the production of documents was challenged by the Government in the *Egan* cases, as outlined below.

### **The *Egan* cases**

The issue of orders for papers by the Council came to prominence in October/November 1995, when the Council passed a series of resolutions in relation to three different matters requiring the production of certain documents held by the Government.<sup>52</sup> In each of those instances the Government failed to produce the documents. In subsequent procedures censuring the Treasurer and Leader of the Government, the Hon Michael Egan, for failing to produce the documents, the Government objected to production of the documents on various grounds, including that the House lacked the power to make such orders and that the documents were subject to public interest immunity. With the exception of some documents in one case, the papers specified in the resolutions were not tabled as required.

On 13 November 1995, the Leader of the Opposition, the Hon John Hannaford, moved a motion noting the failure of the Government to comply with the orders of the House, adjudging Mr Egan guilty of contempt and suspending him for seven days. An amendment to the motion by a cross-bench member resulted in the minister not being suspended. However, the matter was referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report on what sanctions should be imposed where a minister fails to obey an order of the House to table papers by a certain date.

In April/May 1996 the House passed further resolutions requiring the production of documents held by the Government. These documents were also not produced. On 2 May 1996, before the Privileges Committee was due to report, the House resolved to suspend Mr Egan for the remainder of the sitting day for failing to table the required papers. When he refused to leave the chamber, arguing that the House had no authority to compel the production of documents and therefore no grounds for suspending him, the Usher of the Black Rod, Mr Warren Cahill, was directed by the President, the Hon Max Willis, to escort Mr Egan from the chamber and the parliamentary precincts. The Black Rod did this, taking Mr Egan from the chamber and the Parliament building out on to the footpath of Macquarie Street. The suspension subsequently became the trigger for the decision of the

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52 The three matters related to the closure of certain veterinary laboratories and the Biological and Chemical Research Institute at Rydalmere, the Government's negotiations with 20th Century Fox concerning the conversion of the Sydney Showground into a film complex, and the Government's decision to recentralise the Department of Education resulting in the closure of regional offices.

New South Wales Court of Appeal in *Egan v Willis and Cahill*<sup>53</sup> and in turn the High Court decision in *Egan v Willis*.<sup>54</sup>

Several days after the Supreme Court proceedings were filed, the Report of the Standing Committee on Parliamentary Privilege and Ethics concerning the sanctions issue was tabled in the House. The report found that the power of Parliament to order the tabling of papers was uncertain and it would not be appropriate for the Committee to recommend the imposition of sanctions. The Committee recommended that legislation should be introduced to clarify the powers and privileges of the House including the production of documents.<sup>55</sup>

At the next sitting on 14 May 1996, the President informed the House that a Statement of Claim had been issued from the Supreme Court in the Administrative Law Division for unlawful trespass. The House authorised the President and the Usher of the Black Rod to have legal representation in the case. The House also resolved that in view of the legal proceedings, the order of the House of the previous sitting day for Mr Egan to attend in his place to explain his non-compliance with the order for papers be deferred until after the court case was finalised.<sup>56</sup>

The Court of Appeal delivered its judgment in the case of *Egan v Willis and Cahill* on 29 November 1996, a copy of which was tabled in the House by the President.<sup>57</sup> The Court unanimously held that 'a power to order the production of state papers ... is reasonably necessary for the proper exercise by the Legislative Council of its functions'.<sup>58</sup> In his decision Gleeson CJ noted:

The capacity of both Houses of Parliament, including the House less likely to be 'controlled' by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.<sup>59</sup>

The Court also held that the resolution of the Council suspending Mr Egan was within the Council's power as a measure of self-protection and coercion. However, while the standing orders warranted the removal of Mr Egan from the Council chamber, they did not warrant his removal from the land occupied by the Parliament. Mr Egan's removal to the footpath of Macquarie Street was, therefore, excessive and constituted a trespass.

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53 (1996) 40 NSWLR 650.

54 (1998) 195 CLR 424.

55 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into sanctions where a Minister fails to table documents*, Report No 1, May 1996.

56 *LC Minutes* (14/5/1996) 125-126.

57 *LC Minutes* (3/12/1996) 526. The judgment related to the failure of Mr Egan, as the Leader of the Government, to comply with an order for papers on four separate occasions, his subsequent suspension from the House, and the legal proceedings instituted by Mr Egan in the Supreme Court for unlawful trespass by the President and the Usher of the Black Rod.

58 (1996) 40 NSWLR 650 at 667 per Gleeson CJ.

59 *Ibid* at 665 per Gleeson CJ.



At the conclusion of formal business on that day, Mr Egan made a ministerial statement regarding the judgment of the Court of Appeal, explaining that the Government intended to lodge an appeal to the High Court. Following the ministerial statement, according to the resolution of the House of 14 May 1996, the President called on Mr Egan to attend in his place at the table to explain his reasons for non-compliance with the order of the House on four occasions to table certain papers. Mr Egan then moved as a matter of privilege and without notice, that in view of the further legal proceedings he had instituted in the High Court, the order of the House be postponed again until the legal proceedings had been finally decided. The House agreed to this motion.<sup>60</sup> The following day the President announced receipt of an application, lodged by the Crown Solicitor, for special leave to appeal to the High Court from the judgment of the Court of Appeal in *Egan v Willis and Cahill*.<sup>61</sup>

On 6 June 1997 the High Court granted Mr Egan special leave to appeal the decision of the New South Wales Court of Appeal in relation to the powers of the Council in the matter *Egan v Willis and Cahill*.<sup>62</sup>

In the subsequent decision of the High Court on 19 November 1998, the majority (Gaudron, Gummow and Hayne JJ) confirmed that it was reasonably necessary for the Council to order one of its members, even when they are a minister, to produce certain papers in accordance with the system of responsible government under which the Council has a role in scrutinising the actions of the executive in a bicameral Parliament. As the majority judgment noted:

It has been said of the contemporary position in Australia that, whilst ‘the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people’ and that ‘to secure accountability of government activity is the very essence of responsible government’.<sup>63</sup>

However, while the *Egan v Willis* cases clearly established the power of the Council to order the production of documents, the issue of documents subject to a claim of privilege, such as public interest immunity or legal professional privilege, remained unresolved. This matter came to a head in late 1998, when the Government once again refused to table documents in response to an order from the House, this time claiming that the documents were privileged and therefore not required to be produced.

On 24 September 1998, the House passed a resolution ordering the production of documents relating to the contamination of Sydney’s water supply system.<sup>64</sup> The documents were not tabled by 29 September 1998 as required, and on 13 October

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60 *LC Minutes* (3/12/1996) 529.

61 *LC Minutes* (4/12/1996) 536.

62 *LC Minutes* (16/6/1997) 791.

63 *Egan v Willis* (1998) 195 CLR 424 at 451.

64 *LC Minutes* (24/9/1998) 730-731.

1998 the President reported receipt of a letter from the Director-General of the Cabinet Office, dated 29 September 1998, indicating that the Government would not be complying with the resolution of the House on the basis that the documents were covered by legal professional privilege or public interest immunity. This position was based on advice from the Crown Solicitor, dated 28 September 1998.<sup>65</sup>

On 13 October 1998, the Leader of the Opposition, the Hon John Hannaford, moved a motion censuring the Leader of the Government, Mr Egan, for his failure to table the documents on Sydney's water supply and calling on Mr Egan to table the documents with the Clerk by 5.00 pm the next day. Under the resolution, the Government was to table the documents in two categories: documents not subject to claims of legal professional privilege or public interest immunity and documents subject to such claims. Reasons were to be stated for any claims of privilege and those documents were to be made available only to members of the Council and not to be published or copied. The resolution also included a dispute mechanism, whereby a claim of privilege could be disputed and referred to an independent legal arbiter for evaluation of the merits of the claim. Mr Egan unsuccessfully moved an amendment to restrict the motion. The original motion was agreed to on division by 23 votes to 14.<sup>66</sup>

The following day, 14 October 1998, the President informed the House that summonses had been issued from the Administrative Law Division of the Supreme Court in proceedings instituted by Mr Egan, against the Hon Virginia Chadwick, President of the Legislative Council, Mr John Evans, Clerk of the Parliaments, and Mr Warren Cahill, Usher of the Black Rod. The statement of claim alleged that the House had no power to order production of documents the subject of legal professional privilege or public interest immunity, no power to determine a claim for such privilege or immunity and no power to appoint an independent arbiter to determine a claim for such privilege or immunity. The statement of claim also sought an injunction restraining the defendants from taking any steps to compel compliance with the orders made on 13 October 1998.<sup>67</sup>

When papers claimed to be privileged were not tabled with the Clerk as required by 5.00 pm on the next sitting day, 14 October 1998, a motion was successfully moved on 20 October 1998 by the Leader of the Opposition adjudging Mr Egan guilty of contempt for failing to table all the required documents. He was suspended for five sitting days or until he fully complied with the order of 13 October 1998, whichever occurred first. Mr Egan having left the chamber, the President announced that the suspension of Mr Egan was from the chamber only.<sup>68</sup>

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65 *LC Minutes* (13/10/1998) 740.

66 *LC Minutes* (13/10/1998) 749-752.

67 *LC Minutes* (14/10/1998) 759-760.

68 *LC Minutes* (20/10/1998) 773-776.

On 22 October 1998, the President informed the House that amended summonses had been issued. In addition to the original claim, the amended summonses claimed that the orders of the Council on 20 October 1998 were also beyond the powers of the House and that the order which suspended the Treasurer for five sitting days or until compliance with the order of 13 October 1998 was punitive in nature. An injunction was also sought restraining the defendants from suspending Mr Egan on 20 October 1998.<sup>69</sup>

On 24 November 1998, the House again ordered papers to be tabled relating to the closure of veterinary laboratories, the development of the Sydney Showground site, the Department of Education, the Lake Cowal gold mine and Sydney Water. It required that a return be made of any documents that it was considered should not be made public, showing the reasons for the claim. Those documents were to be made available only to members and not published without an order of the House. Only Cabinet documents were not to be made available to members, although they were still to be given into the custody of the Clerk. If a dispute arose over a claim of privilege, the Clerk was authorised to release the document to an independent legal arbiter appointed by the President who was either a Queen's Counsel, a Senior Counsel or a retired Supreme Court judge.<sup>70</sup>

On 26 November 1998, the Hon Jeff Shaw tabled the papers relating to the closure of veterinary laboratories, the development of the Sydney Showground site, the restructure of the Department of Education and the proposed Lake Cowal gold mine. He then made a statement relating to the non-tabling of documents identified as privileged documents and an assessment commissioned by the Government of the validity of this claim by Sir Laurence Street, former Chief Justice of the Supreme Court. He then tabled the report of Sir Laurence Street entitled *Legislative Council's Order for production of documents – Assessment of privilege*, dated 25 November 1998, together with a list of documents for which privilege was claimed.<sup>71</sup>

Following the continued failure of the Government to table the documents identified as privileged, the Leader of the Opposition, the Hon John Hannaford, moved a motion adjudging Mr Egan guilty of contempt. The main point of dispute was that the House demanded the right to inspect all papers for which privilege had been claimed, with the exception of Cabinet documents. Claims of privilege accepted by the arbiter appointed by the House were only to affect whether the documents should be made public. The House demanded that Mr Egan deliver such papers to the Clerk on 27 November 1998 or be suspended for the remainder of the session or until he complied with the order of the House.<sup>72</sup>

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69 *LC Minutes* (22/10/1998) 796-797.

70 *LC Minutes* (24/11/1998) 920-927.

71 *LC Minutes* (26/11/1998) 946-947.

72 *LC Minutes* (26/11/1998) 947-961.

On 27 November 1998, when the papers demanded had not been received by the Clerk, the President directed the Usher of the Black Rod to escort Mr Egan from the chamber, according to the resolution of 26 November 1998.<sup>73</sup>

On 2 December 1998, the House agreed to a sessional order setting out procedures for the production of documents which provided that any privileged documents be kept by the Clerk, that inspection of such documents (except for Cabinet documents) be by members only, and that an independent legal arbiter be appointed to resolve any disputes regarding claims of privilege.<sup>74</sup>

The judgment of the New South Wales Court of Appeal in the case of *Egan v Chadwick* was delivered on 10 June 1999, and tabled in the House by the President.<sup>75</sup> The judgment held that the Council's power to call for documents extends to compelling the executive to produce documents to the Council in respect of which a claim of legal professional privilege or public interest immunity is made.<sup>76</sup>

However, the majority opinion (Spigelman CJ and Meagher JA) did hold that public interest may be harmed if access were given to documents which would conflict with individual or collective ministerial responsibility such as records of Cabinet deliberations.<sup>77</sup> For Meagher JA the restriction was absolute applying to Cabinet documents as a class.<sup>78</sup> In his judgment, Meagher JA observed:

The Cabinet is the cornerstone of responsible government in New South Wales, and its documents are essential for its operation. That means their immunity from production is complete. The Legislative Council could not compel their production without subverting the doctrine of responsible government, the doctrine on which the Legislative Council also relies to justify its rights to call for documents.<sup>79</sup>

Spigelman CJ adopted a different approach. He argued that the restriction depended on the content of Cabinet documents: only those documents which reveal the actual deliberations of Cabinet should remain confidential, based on the idea of collective Cabinet responsibility and the confidentiality of Cabinet deliberations. This is presumably a reference to the minutes of Cabinet.<sup>80</sup> His concern was 'to avoid inconsistency between the power to call for documents and one of the bases on which it has been determined that the power is reasonably necessary (namely executive accountability derived from responsible government)'.<sup>81</sup> On the other hand, the Chief Justice thought that '[d]ocuments prepared outside Cabinet

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73 *LC Minutes* (27/11/1998) 970.

74 *LC Minutes* (2/12/1998) 997-1000.

75 *LC Minutes* (22/6/1999) 142.

76 (1999) 46 NSWLR 563; *LC Minutes* (23/6/1999) 148-150.

77 (1999) 46 NSWLR 563 at 595.

78 *Ibid* at 597.

79 *Ibid*.

80 *Ibid* at 574-575.

81 *Ibid* at 576.

for submissions to Cabinet may, or may not, depending on their content, manifest a similar inconsistency'.<sup>82</sup>

Priestley JA, dissenting, argued that no restriction fell on any documents as government documents are generated at public expense for public benefit. He stated:

Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.<sup>83</sup>

Following the Court of Appeal's decision in *Egan v Chadwick*, on 23 June 1999 the House agreed to a motion by the Leader of the Opposition requiring the Government to table by 29 June 1999 documents referred to in the resolution of the House of 24 September 1998 relating to the contamination of Sydney's water supply system.<sup>84</sup> The Government complied with that resolution, and has continued to comply with subsequent orders requiring the production of documents.

In effect, *Egan v Willis* and *Egan v Chadwick* have confirmed the Council's power to order the production of government papers including those documents for which claims of legal professional privilege or public interest immunity could be made at common law, with one exception: documents that disclose the actual deliberations of Cabinet.

### **Orders for the production of documents since the *Egan* cases**

Since the *Egan* cases, the House has continued to order the production of State papers. Thirty orders for documents were made in the three years following 1999. In 2003, 15 orders were made, rising to 25 in 2004, 41 in 2005 and 56 in 2006, before declining to 10 in 2007, making a total of 177 overall.

Documents provided by the Government in response to such orders have ranged from a single report to more than 100 boxes of privileged documents on the millennium trains.<sup>85</sup> Between 1998 and 2007, there were 41 returns to an order for papers that were referred to an independent legal arbiter.

The change in the composition of the House following the March 2007 election has seen a significant decline in the number of resolutions agreed to for the production of papers.

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<sup>82</sup> *Ibid* at 575.

<sup>83</sup> *Ibid* at 592.

<sup>84</sup> *LC Minutes* (23/6/1999) 148-150.

<sup>85</sup> The documents were subsequently returned to the relevant departments and agencies to reassess their claims of privilege, *LC Minutes* (25/6/2003) 174. The reassessed documents were tabled on 2 September 2003, with some retaining a claim of privilege and some not, *LC Minutes* (2/9/2003) 257.

### **Procedures for the production of documents under standing order 52**

When the House makes an order for papers, the terms of the order are communicated by the Clerk to the Director General of the Department of Premier and Cabinet. Once the documents have been provided, they are tabled in the House by the Clerk or, if the House is not sitting, they may be lodged with the Clerk. In addition to the documents themselves, an indexed list of the documents must be provided, showing the date of creation, a description, and the author of each document.

Once the documents have been tabled in the House or lodged with the Clerk, they are deemed to have been published by authority of the House, unless a claim of privilege is made.

The Clerk is required to maintain a register showing the name of any person examining documents tabled under standing order 52.

#### *Claims of privilege*

Where documents required by the House under an order for papers are subject to claims of legal professional privilege or public interest immunity, the return to order must also include a statement of the reasons for the claim. The documents to which the claim relates are only available to members of the House, and may not be copied or published without an order of the House.

#### *Disputing claims of privilege*

A claim of privilege may be disputed by any member of the Council by communication in writing to the Clerk. On receipt of such a communication, the Clerk is authorised to release the disputed documents to an independent legal arbiter for evaluation and report as to the validity of the claim. The arbiter's report must be completed within seven calendar days. The independent legal arbiter is appointed by the President and must be either a retired Supreme Court judge, Queen's Counsel or Senior Counsel.

The report of the independent legal arbiter is lodged with the Clerk. It is then available to members of the Council only and may not be copied or published without an order of the House. At the next sitting, the President informs the House that the report has been received. The usual practice following this advice is for a member to give notice of motion that the report be tabled. On a following sitting day, the member moves the motion, usually during formal business, and the report is tabled at a later hour of that day. Similarly, in cases where the arbiter has recommended that the claim of privilege on certain documents be denied, a member will usually give notice of a motion requiring the Clerk to lay the documents considered not to be privileged on the table of the House and authorise them to be published. The motion is moved on a subsequent day and, if agreed to, the documents are tabled by the Clerk later that same day.

## Executive compliance with orders for documents

Since the decisions in the *Egan* cases, the Government has in general complied with orders for the production of documents to the House. There have been instances where the Government has initially provided less documents than required under an order, or has supplied a defective index which has been later rectified,<sup>86</sup> but such instances have not involved any challenge to the House's right to obtain the documents. There are two areas, however, in which the Government has adopted a narrow view of its obligation to comply: documents which have not been returned before the prorogation of Parliament, and Cabinet documents.

### *Effect of prorogation on orders for documents*

On 25 May 2006, at the commencement of the second session of the 53rd Parliament, the Clerk tabled correspondence from the Premier's Department indicating that the Government had received advice from the Crown Solicitor that the orders for papers in place at the time of the prorogation of the preceding session had lapsed, and that there was no power to restore the original resolutions in the new session. Consequently, no documents would be produced to the House in respect of those orders.<sup>87</sup>

In response to that advice, the House passed new orders for documents in terms similar to those agreed to before prorogation. Each of the new orders noted that the Government would not be producing papers in respect of the earlier resolutions, despite the fact that 'there are many established conventions recorded in the Journals of the Legislative Council where the Government has complied with an order of the House for state papers in the subsequent session'.<sup>88</sup> The first of these new orders, concerning the controversial proposed sale of Snowy Hydro Limited, also included provisions asserting the House's right to access State papers despite executive claims of privilege or immunity, except for documents disclosing Cabinet deliberations, and declared that any failure to comply with orders for the production of State papers was an unacceptable interference with the House's capacity to fulfil its constitutional roles, and would be treated as a contempt.<sup>89</sup> The documents were eventually tabled.<sup>90</sup>

### *Cabinet documents*

As discussed earlier, in *Egan v Chadwick*, Spigelman CJ held that 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 a key element in our

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86 See, for example, *LC Minutes* (31/8/2004) 948-949.

87 *LC Minutes* (25/5/2006) 47.

88 *LC Minutes* (25/5/2006) 53-57, (6/6/2006) 70-72.

89 *LC Minutes* (25/5/2006) 53-57.

90 *LC Minutes* (6/6/2006) 75, (8/6/2006) 125, (29/8/2006) 142-143.

system of responsible government: the doctrine of collective ministerial responsibility. While he concluded that the production of documents which recorded the 'actual deliberations of Cabinet' was inconsistent with collective ministerial responsibility,<sup>91</sup> he specified that the production of documents 'prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, manifest a similar inconsistency'.<sup>92</sup>

This distinction between different types of Cabinet documents has subsequently been noted in reports of the independent legal arbiter in relation to disputed claims of privilege under standing order 52. For example, in a report tabled with the Clerk on 22 December 2005 concerning documents relating to a proposed desalination plant,<sup>93</sup> the Hon Terrence Cole QC observed:

In assessing a claim for public interest immunity in relation to 'Cabinet documents', a distinction is to be drawn between (a) true Cabinet documents, that is, those documents which disclose the actual deliberations of Cabinet; and (b) Cabinet documents, that is, reports or submission prepared for the assistance of Cabinet.

A claim of privilege for true Cabinet documents will always be upheld. That is because the public interest in maintaining the principle of or doctrine of collective responsibility of Cabinet for its decisions outweighs any other public interest. It is at the core of the operation of government [*Commonwealth Northern Land Council* (1993) 176 CLR 604 at 615; *Egan v Chadwick* 46 NSWLR at 574-5]. It has thus been held that the Legislative Council does not have the power to require production of such documents [*Egan v Chadwick*, ...]

When privilege is claimed for other Cabinet documents, a judgment process is required to weigh the competing public interests.<sup>94</sup>

Since 2004, the Government has displayed increasing resistance to orders for documents on the grounds of Cabinet confidentiality. In a number of cases, in withholding documents the Government has either failed to address the specific criteria identified by Spigelman CJ in relation to Cabinet documents, namely that they must reveal the actual deliberations of Cabinet, or has failed to supply any reasons at all for non-compliance with an order. However, in some of those cases the Government has subsequently provided the document anyway. For example:

- In response to an order of the House on 28 October 2004 for the production of a report concerning a juvenile justice facility, the Government advised that the report was excluded from documents produced to the House under standing order 52 as it 'formed part of the Cabinet process'. A copy of the report was nevertheless provided to the House but on the

91 (1999) 46 NSWLR 563 at 574-575.

92 *Ibid* at 575.

93 *LC Minutes* (28/2/2006) 1840.

94 The Hon Terrence Cole QC, 'Disputed claim for privilege: Desalination plant', Report of the Independent Legal Arbiter, pp 3-4.



basis that it had been made public by the Government itself since the date of the House's order.<sup>95</sup>

- In response to an order of the House on 8 December 2004 for the production of papers prepared by a consulting firm in relation to Redfern-Waterloo, and a subsequent request for an explanation for the Government's failure to produce the papers, the Government stated that the documents had not been produced as they had been 'classified as Cabinet documents'.<sup>96</sup>
- In response to an order of the House on 24 February 2005 for the production of listed studies undertaken by consultants concerning Grey Nurse shark populations, and a subsequent request for an explanation of the failure to produce the listed documents, the Government asserted that the specified studies 'formed part of a Cabinet Minute' and were therefore exempt from orders for the production of documents.<sup>97</sup> Following receipt of the Government's advice, the House agreed to a further order for production of the documents with an additional paragraph in the following terms:

That, if any document falling within the scope of this order is not produced as part of the return to order on the grounds that it formed part of a Cabinet Minute, or was held for consideration as part of Cabinet deliberations, a return be prepared showing the date of creation of the document, a description of the document, the author of the document and the reasons why the production of the document would 'disclose the deliberations of Cabinet' as discussed by the Court of Appeal in *Egan v Chadwick* [1999] NSWCA 176.<sup>98</sup>

Subsequently, the Director General of the Premier's Department advised that an index of the documents would not be provided as, based on Crown Solicitor's advice, the Government did not concede that the Council had the power to impose such a requirement.<sup>99</sup> This assertion is contradicted by the established practice and convention since 1856 where the Council has ordered the compilation of a return and the government has complied with the order.

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95 *LC Minutes* (9/11/2004) 1099. During debate on the motion which led to the order, the opposition had argued that the report had been intended to be an 'independent operational review' of the facility, did not reveal the thinking of any minister and, 'by itself, cannot shed any light on Cabinet deliberations'; *LC Debates* (28/10/2004) 12187-12188.

96 Correspondence from the Director General of the Premier's Department to the Clerk of the Parliaments dated 22 December 2004, *LC Minutes* (22/2/2005) 1229.

97 Correspondence from the Director General of the Premier's Department to the Clerk of the Parliaments dated 10 March 2005, *LC Minutes* (22/3/2005) 1283.

98 *LC Minutes* (1/12/2005) 1813.

99 LC tabled paper No 4791, *LC Minutes* (28/2/2006) 1839.

On 23 November 2006 the House passed a further order for documents relating to Grey Nurse shark surveys.<sup>100</sup> The Government complied with this order.

- In response to an order of the House on 5 May 2005 for the production of a report in relation to the *Noxious Weeds Act 1993* prepared by Mr Robert Gledhill, the return asserted that 'all documents held by the Minister's office have been prepared for, or are related to the preparation for Cabinet, and therefore cannot be provided'.<sup>101</sup> Nevertheless, two days later, a minister tabled the document in the House, although the Government still maintained that it formed part of a Cabinet Minute.<sup>102</sup>
- In response to an order of the House on 3 May 2006 for the production of documents concerning juvenile justice, the return included a letter from the Director-General of the Department of Juvenile Justice dated 11 May 2006 which asserted that a review of security at a specific juvenile justice centre had not been provided as it had been prepared 'for the purposes of informing Cabinet'.<sup>103</sup>

The order concerning Grey Nurse shark populations cited above is the only instance to date where the House has taken further action in relation to the Government's refusal to supply documents which it has claimed are subject to Cabinet confidentiality. As indicated, in many other instances the Government has ultimately supplied the required documents, while nevertheless maintaining that the documents formed part of the Cabinet process.

However, on 25 May 2006, a notice of motion given by an opposition member included provisions disputing the position adopted by the Government in refusing to comply with certain orders for papers, and asserting the need for the House to be informed of the nature of any document claimed to be a Cabinet document and the reasons why the document's production would 'disclose the actual deliberations of Cabinet'.<sup>104</sup> The notice concluded that:

[T]here must be a proper limitation on the Executive's power to deny the electors and their representatives information concerning the conduct of the executive branch of government, including a limitation on the unrestrained and unexplained use of Cabinet confidentiality as a basis for claiming exemption from an order for the production of State papers, and that, if such a limitation is not adopted on the basis of the conventions of respect and comity between the arms of government, it may ultimately be imposed at law.<sup>105</sup>

The notice was interrupted by prorogation.

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100 *LC Minutes* (23/11/2006) 429.

101 *LC Minutes* (24/5/2005) 1386.

102 *LC Minutes* (26/5/2005) 1408.

103 *LC Minutes* (23/5/2006) 19.

104 *LC Notice Paper* (6/6/2006) 180-182.

105 *LC Notice Paper* (6/6/2006) 181.

## UNPROCLAIMED LEGISLATION

Standing order 160(2) provides that a list of legislation not proclaimed within 90 days of assent is to be tabled by a minister on the second sitting day of each month. The standing order was adopted in 2004, but its origins can be traced to earlier resolutions of the House.

On 11 October 1990, the House agreed to a motion by a cross-bench member requiring a list of unproclaimed legislation to be tabled in the House every six months, together with a statement of the reasons for non-proclamation, and the proposed proclamation dates. The terms of the resolution were based on a resolution first passed by the Senate in 1988. However, no return was provided in response to the House's order.

On 22 October 1996, the House passed a resolution expressing concern at the failure of the Attorney General and Minister for Industrial Relations to proclaim the commencement of certain provisions of the *Industrial Relations Act 1996*. The resolution also required the minister to table a list of all legislation not proclaimed 90 calendar days after assent on the second sitting day of each month, which was subsequently complied with.<sup>106</sup>

From 1997 to 2003, the requirement to table a list of unproclaimed legislation was the subject of a sessional order. The provisions of the sessional order were adopted as standing order 160(2) in 2004.

Standing order 160(2) resembles 'permanent' orders for the production of documents employed in the Senate. These orders require the periodic production of certain documents over an indefinite period. For example, the Senate has a permanent order requiring the production of indexed lists of government files and for the production of lists of commencement dates of legislation.<sup>107</sup>

The Government complies with standing order 160(2), tabling a list of unproclaimed legislation on the second sitting day of each month.

## ADDRESSES FOR DOCUMENTS

Documents concerning the royal prerogative, dispatches or correspondence to or from the Governor, or the administration of justice, may only be sought by way of an address to the Governor requesting that the document be laid before the House (SO 53).

Between 1856 and the early 1900s, addresses to the Governor were commonplace, but the process fell into disuse during most of the 20th century. However, since 2002 the issue has arisen again in relation to the administration of justice. This is discussed in detail in Chapter 16 (Relations with the Executive) and Chapter 20 (Relations with the Judiciary).

<sup>106</sup> *LC Minutes* (13/11/1996) 442, (4/12/1996) 546.

<sup>107</sup> *Odgers*, 11th edn, p 438.