

LEGISLATIVE COUNCIL

ORAL HISTORY PROJECT

At Sydney on Thursday 10 December 2015

The discussion commenced at 10.10 a.m.

PRESENT

Mr David Blunt
Dr David Clune
The Hon. John Hannaford

Dr CLUNE: Can you tell us how you became a member of the Legislative Council in 1984?

Mr HANNAFORD: I never intended to become a member of Parliament. I had agreed to be a candidate on the Coalition ticket. It was intended that I would be number 10 so that I would not get elected, because up until then the Coalition had never got more than six seats. I had always wanted to be a candidate, because I had been on the executive of the Liberal Party in many senior positions, and it was my thought that it would be an interesting experience—but not in a winnable spot. I had run a lot of candidates and this was going to be my opportunity. To my surprise, I ended up at the top of the ticket. When I was told that, about 5.30 a.m. the day before nominations closed, I felt ill. Be that as it may, having got to that position I decided that I had to adopt a role. I decided that I would commit myself to achieving cultural and structural change within government and the community. If I was going to be a member, I thought I might as well try to do something. I particularly wanted to have a role in changing the activities and reputation of the Council. I had been significantly critical within the Liberal Party of the activities of the upper house. I took the view that something had to be done.

Dr CLUNE: What were you expecting when you arrived and how did the expectation match the reality?

Mr HANNAFORD: I have to say I had no expectations. If you come in with no expectations then you absorb what is occurring and you look at what it is possible to achieve. Keep in mind that I came in as part of the last group of elected members. I think I came in on a salary that was about 15 per cent of what I was then earning as a lawyer. Much of my work as a member from 1984 to 1988 was essentially as a campaign organiser to try to win the 1988 elections. I sold my interest in my business as a managing partner in a legal firm—I focused on campaigning to win the 1988 election. Essentially, from 1984 to 1988 you turned up in Parliament. You did your duty as an MLC. There was nothing else that an upper house member did in those days. A lot of my time was spent on developing what would be the policy framework for the Coalition Government when it came to office in 1988. Part of that was achieving the reforms that we needed in the Legislative Council and making certain that the Liberal Party was committed to those reforms. There were people within the Liberal Party that were as committed as members of the Labor Party to the abolition of the upper house. That continued right through until the day that I left.

Dr CLUNE: That was not Liberal policy though, was it?

Mr HANNAFORD: It was not Liberal policy, but if they were able to get their way then it would have been. Barry O'Farrell, if my recollection is correct, was one of those who would have loved to have seen the abolition of the upper house. I think John Fahey, because of his experience with dealing with the upper house over the industrial relations bill and other issues, would have been an abolitionist. Certainly, there was a group there.

Dr CLUNE: What is your recollection of the 1978 reconstitution of the Council?

Mr HANNAFORD: The party was divided about it, but those that would be described as the small "I" liberals—who were basically dominant within the party at that particular time—were strong reform advocates and were supportive of the Wran approach to reform. Then we had Virginia Chadwick and her group that got preselected to contest the 1978 election. Within the Liberal Party there was a view that the upper house should never be abolished, that it was an appropriate check and balance. I think that Max Willis in the upper house and John Dowd in the lower house were the strong campaigners within the Liberal Party for that view.

Dr CLUNE: How effective was the Legislative Council as a house of review when you came in?

Mr HANNAFORD: It wasn't, to the best of my recollection. You prepared amendments, the Government had the numbers. We had Nile in but Fred did not have the balance of power. You advocated for amendments. If you came up with something that the Government thought was good then it might have been accepted, but for the vast majority of the period it was a rubber stamping of the Government's agenda. We had no committee system. There was effectively no oversight of the Government. It was a continuation of what had been the situation for decades.

Dr CLUNE: What is your view about the rise of the crossbenches and the fact that no government has had control since 1988?

Mr HANNAFORD: I think it has actually caused governments to discipline themselves about the extent to which they drive radical reforms. I remember Neville Wran as Premier saying that the role of a government was to lead but not get too far in front of people's expectations. That was not a lesson that was learnt by the 1988 Greiner Government. You might recall the education reforms, which generated the largest demonstration out on the Domain that had been seen against a government. The Government got ahead of public opinion and that, in my view, led to it becoming effectively a minority government in 1991.

In 1988 a significant number of Independents got elected in the lower house - I had a lot to do with getting them there - but they did not have the balance of power. The Greiner Government did not pay appropriate heed to the role that Independents could play. Apart from the member for Wollongong, Arkell, I think every one of them lost their seats in 1991. Some were very good local members and could well have survived had the needs of their local community been able to be articulated and respected by the government. The Greiner Government did not understand how to deal with Independents at that time.

I was the negotiating intermediary in the upper house in the first Greiner Government. That gave us some experience in how to negotiate with the crossbenchers. Of the five of them, we had to get at least three members of the crossbenches to get anything through during that period. Terry Metherell wanted to negotiate with the crossbenchers about his education reforms. Again, he was persuaded that it would be better for him to sit out and have an intermediary negotiate. If there were sticking points that required him to step in then that would happen—and it did on a couple of occasions. There were a lot of negotiations but that legislation predominantly then went through. With the industrial relations bills, notwithstanding advice to him that he should not turn up, John Fahey insisted that he wanted to be in the upper house as the minister is entitled to do. I think, he would say today that it was not a wise decision. In these things you need an intermediary.

After the 1991 election, Independents in the lower house had the balance of power with Clover Moore, John Hatton and Peter Macdonald. Those three worked together, and Tony Windsor was a rural Independent. We negotiated an agreement with Hatton and the others as to the reform of the lower house, and there was a consultative mechanism put in place with Tim Moore, and then Garry West, and myself from the upper house. We had four crossbenchers in the upper house. After that election, the Government needed only the support of the Niles in the Council to win divisions. We met with the Independents in both houses every week to discuss the legislative agenda. The role of the Premier was to come in if no agreement could be made. The Independents wanted to deal with the leader but we got them to understand that the leader should be the access point of last resort if agreements could not be reached. It was basically a governance arrangement that was put in place.

Dr CLUNE: When you were Leader of the Government how did you feel about dealing with the crossbenchers?

Mr HANNAFORD: You had to be prepared to listen and to negotiate. What we put in place was a series of meetings with the crossbenchers in the upper house. We met each Tuesday morning in my office to discuss what was to be the legislative program, and we made certain that the crossbenchers got access to any advisers they needed. I learnt out of the experience with the lower house Independents about the need to negotiate and be prepared to give, but maintain your philosophical position in relation to legislation. That had to be sustained, but you could then look at the operating provisions. I took the approach that it is better to get 80 or 90 per cent of something than 100 per cent of nothing. It certainly was not a lesson learnt by some Federal governments in recent times. We were not as skilled at it as the Labor Party. I remember one very senior Labor member saying to me: "You were very good at being able to run things bureaucratically, but you were never good at understanding how to use and take advantage of power." I was quite surprised at that comment because if you know how to use power then you also know how to abuse power. I think it is still true today: Coalition governments do not know how to use power.

Dr CLUNE: What was your philosophy as Leader of the Government from 1992 to 1995? What was your general approach to managing the house?

Mr HANNAFORD: I think my fundamental principle was that you had to manage to get the legislative program through. You had an agenda. Legislation had been passed by the lower house and, therefore, you had to try to manage it through. What was the fundamental approach? I looked at trying to achieve the Government's legislative agenda and it was my role, as leader of the upper house, to massage that through to the best of my ability.

I think the only time that I went close to losing control of the house was just before Christmas, just after I had taken over as leader, and it related to HomeFund. I tried to close the session because I needed time to consult but they were not going to agree. I then had to agree to adjourn the house to the following week because tempers were just so high. It was early in the morning and everybody was tired, and we just needed time to think. Something finally got negotiated on that legislation.

If things required negotiating then you tried to keep the ministers out of it and be the middle person. Whenever I had difficulties, it was when the ministers wanted to come in and take control themselves. In the lower house, there were a number of what I would describe as rednecks who were totally abusive of the Independents. By the end of 1995 the relationship between the Coalition and the Independents was almost poisonous because of that aggressiveness. In the upper house we also had certain people who I would regard as rednecks who were totally abusive of the crossbenchers. Those people made it very, very difficult to sustain relationships because of some of the very nasty remarks that were being thrown at them. As a leader, I had some difficulties trying to keep the redneck element under control. We had some ministers who were of a similar attitude towards some of the crossbenchers. Putting them into a negotiating room was like putting a spark into petrol. It made it very difficult.

Mr BLUNT: Keeping the lower house ministers out of those detailed negotiations must have meant that you and your upper house colleagues had to be across the detail of every bit of legislation.

Mr HANNAFORD: Yes, whoever was leading on a bill had to be totally on top of the detail because primarily you were the interface in the negotiations. Tim Moore, and then Garry West, and myself maintained the lines of communication, trying to achieve the objective.

Dr CLUNE: What was your attitude to the position when you were the Leader of the Opposition from 1995 to 1999? Some people say the role of the Opposition is to oppose everything on principle.

Mr HANNAFORD: We rarely did. There was a lot of legislation that we supported. Keep in mind, we had lost government by a handful of votes in a handful of seats in 1995. There were a number of our people in the lower house who took the view that we should act like a government in waiting. We were in a position in the upper house, if we had the support of the crossbenchers, to actually try to govern. And you might recall that when the opportunity arose Max Willis became the President. There were people in the lower house that were absolutely aggressively opposed to that. They took the view that we were taking away a vote on the floor of the house, which would have meant that we could have been a government in Opposition.

My view was that it was not an appropriate position to take. We were the Opposition and our role was to make certain that those things that we had a strong philosophical difference about were opposed. Then you negotiated with the crossbenchers to get them on side to support you. But the attitude that you should continue to try to govern, even though you had lost government, because you had the numbers in the upper house, was not a position that was taken by a majority of the Coalition. Certainly, there was an aggressive minority that took a different view.

Dr CLUNE: What do you think were your main achievements during your career in the Legislative Council?

Mr HANNAFORD: I would refer you to my valedictory speech on 7 September 2000 where I outlined them. In terms of the Legislative Council, we got the Government to agree to the establishment of standing committees in 1988. We went for five committees. I think I might have been hoping to get three. The head of the Premier's Department, Gerry Gleeson, who did not like the idea of committees at all, whittled us down to two - State Development and Social Issues - with a budget that meant we would only just be able to operate. But we got the committee structure in place and when Labor came in they established Law and Justice in 1995.

I chaired State Development and Max Willis had Social Issues. I think Social Issues became the more relevant because of its adoption inquiry. Both Virginia Chadwick and I wanted to get adoption reform up. We were not sure how we would be able to. For instance, Johnno Johnson who had adopted children was very strongly opposed to the concept of transparency. Labor, I think, would have opposed it. There were number of people, I subsequently learnt, in influential positions within the Coalition who were either adoptees or adopters. I was an adopting parent as well but I was involved with the program of transparency when it was first introduced. We took the view that you had to take the community with you. Virginia, as Minister for Family and Community Services, agreed that she would make a reference to Max Willis. I drafted the terms of the reference

and the inquiry was then referred to the committee by the Minister, which meant that it did not have to go to the party room. I suspect if it had gone to the party room it might have been different, but at that stage we were a new Government, ministers were influential and Virginia made the reference. I think she might have consulted with the Premier. The inquiry took place and subsequently we got adoption reform.

I regard that, in some ways, as the single biggest achievement of the committee system because it defined what I regarded as the role the committees could perform: take important social or other issues where reform was needed in the community, provide a forum where they could be discussed, and then negotiate an outcome. You might recall that Fred Nile was on the committee and was greatly influenced by the adoption lobby that were opposed to any reform. Carrying Fred Nile into a space where he changed his mind and agreed to reform resulted in us getting legislative reform. It would never have happened otherwise. I can remember my sister-in-law fundamentally opposed the reform, some of my closest friends and judicial officers I knew opposed the reform. I cannot tell you the amount of vitriolic personal mail I received. Even though it was Virginia Chadwick that made the reference, it was regarded by many in the adoption lobby as an agenda of mine. They might have been right; the anguish and anger came my way.

In terms of the State Development Committee, we were about trying to change the way bureaucracy managed matters. As a result of its reports, the bureaucracy did change. One of the committee rules we wrote was that government had to respond to a committee report within six months. Once government responded and said this would happen then bureaucracy would often accept that and implement it. If you just had a report where there was no government position stated then nothing would happen. Of course, some responses were so nebulous that no reforms were ever achieved. It would be a useful exercise to see what has been achieved by committee recommendations and what the government's responses were. When they said they would implement the reform, was it actually implemented or did the bureaucracy just pay lip service to reform?

Dr CLUNE: What were the other major changes in the Council during your time?

Mr HANNAFORD: We got the policies committees up. We then got the estimates reforms up—not necessarily in the way I would have wanted them, but they came in. You might recall that ministers started appearing before the committees. Initially, we had joint Legislative Council-Legislative Assembly estimates committees and it was the Coalition ministers who wanted to appear. That is what they wanted and that is what eventuated. I took the view that the desirable approach with committees should be that it was the public service that was being seen to be answerable to the Parliament. So, in the same way as you have in Canberra, the bureaucrats would appear before the committees. We never achieved that because ministers wanted to appear.

The bureaucrats, no doubt, would have dissembled, but the politicians would have got a better understanding of the relationship between the bureaucracy, ministers and the Parliament. In terms of the public service, some of my departmental heads said preparing briefings for estimates hearings was the best opportunity they had ever experienced in getting to understand the full operations of their own organisations. I can say that categorically as I think each one of the bureaucratic heads made that comment to me: that it assisted them in getting their heads completely around the budget and the operations of their agencies. Had you then brought that level of knowledge into the Parliament I think it would have significantly broadened the understanding and relationship between the Parliament and the bureaucracy. Ministers would have sat out and understood what was going on and remained in control. We did not get that achievement here in New South Wales. It occurs at a Federal level and I think it works much better and significantly enhances the relationship between the bureaucracy and the Parliament.

Then came the issue of the accountability of the executive to the Parliament in the Egan cases. What drove me to want to achieve that? We are all to an extent governed by our own experiences. A number of departmental heads thought it appropriate to remind me that the departments were the executive. The role of the government was to propose the legislation that the departments wanted and to set the policy directions. The role of the Parliament was to pass legislation. The departments were always there, the department heads would survive, and you, as a minister, would come and go. That had a lasting impact on me.

I remember an area of significant reform that I wanted to pursue where a very senior official in the Cabinet office made it clear to my staff that post the 1995 elections I would not be there. I might win by getting this reform through now but it would never get implemented - the bureaucracy would make certain it did not happen. A number of similar incidents imprinted the view on me that we had a governance problem between the public service, the executive and the Parliament. I saw numerous examples of where power went to a minister's head. Governments formed the view that they were all-powerful. I took the view that, in terms of governance,

the Parliament should supervise the government. The government was the interface between the bureaucracy and the Parliament. Ministers were the executive arm of the Parliament administering the State for the benefit of the people as represented by Parliament. That concept unfortunately seemed to have declined. When the opportunity arose with the Egan cases in the late 1990s, some of us grasped it because it gave us the opportunity to clearly assert that the executive was answerable to the Parliament.

Earlier I mentioned a Labor member saying to me, in effect, "You people do not know how to exercise power". It was as if you get into government, have absolute power, and you use it. I did not regard that as sound governance. Certainly some of my ministerial colleagues were of a similar view. The estimates committees were a part of the way in which you could get the bureaucracy, in my view, to be seen to be answerable to the Parliament. That slipped to an extent, but I got some of it up.

Dr CLUNE: Who are the MLCs that impressed you most during your term in office?

Mr HANNAFORD: Lloyd Lange always impressed me, particularly with his desire to drive reform and the establishment of committees. I recall, in terms of governance and the issue of the relationship of the executive and the Parliament, Max Willis, supported by Ted Pickering. Ted gave me a good feel for the role of a member of the Parliament, but put in concepts of governance. Max had a very good feel for that. John Jobling was a great support to me as whip. In terms of understanding the dignity of the Parliament, I mention John Johnson.

I used the term "mentor" in my valedictory speech because people like Ted, Max and Virginia Chadwick provided me with some clear thoughts of my own as to where things would be going. Were they crucial colleagues that I talked to as we developed all those scrutiny programs? Absolutely, because you had to have people who would support you and were supportive of, basically, a reform agenda. Keep in mind that some of our people said they wanted to be a government in opposition. Anything that would be seen as keeping a Labor Government accountable, those in the lower house thought was a great idea. You sold the reform as a way of keeping the Labor Party accountable. It was not seen as a governance agenda. I suspect the lower house members always took the view that when we return to office we will wind all those things back. I took the view that it would never happen. If you get absolute power then some people take the view that you govern absolutely. I believed that, with the reforms that were made in the upper house, it was unlikely that any government would ever have absolute control. We articulated and implemented the concepts that are still here.

Keep in mind that it was not the crossbenches that drove reform in the upper house; it was, in fact, the Coalition. I had to go and talk to the crossbenchers and explain to them what was being achieved. Liz Kirkby was the one who embraced it most; she understood exactly what was happening. The Labor Government was opposed to these accountability reforms. It was not something that was being driven on a cross-party basis, nor was it an issue where we sought to undermine the Government. This was a reform agenda that was being driven by the leadership of the upper house as a governance matter. It was seen by the crossbenches as significant reform enhancing the relevance of the Council. That is the way—if my recollection is correct—Liz Kirkby and Fred Nile saw it.

Mr BLUNT: At the outset did you ever think that the Carr Government's resistance to the Legislative Council's assertions of its power to call for State papers would end up before the High Court of Australia?

Mr HANNAFORD: I do not think that John Evans and I ever discussed that possibility. You had to keep in mind that it was likely, and therefore you had to make certain that your drafting of things was always reasonable. I knew most of the judges—I did not know them well but I had a good idea of their attitudes towards things. I always took the view that if you were reasonable and accountable in the process that was taking place then you would most likely carry them. Did I address my mind to all of the constitutional arguments that might have been used? No, that was not something that was in my mind then; whether John did, I do not know. I do not think that we actually ever discussed that. But the important part was that you had to have a balanced, transparent and accountable process. If it was reasonable, then you knew you would win the day. If it was not reasonable, I was not going to win the day even at the outset, as I would not have carried the crossbenches.

Mr BLUNT: In terms of the specific policy matters that were the subject of those orders for papers at the beginning of the process—there was the redevelopment of the Sydney Showground with Fox Studios, there was the closure of veterinary laboratories and so on—one of the critical policy issues was the Lake Cowal goldmine project. Could you reflect upon the significance of that project in particular and why the Opposition moved for the Treasurer to table all relevant documents pertaining to it?

Mr HANNAFORD: There was a strong belief that there had been ministerial interference in the way in which the bureaucracy had handled those projects. In relation to Lake Cowal, my recollection is that there was a strong bureaucratic report in favour of the project and it was rejected. Then after all of this went on Lake Cowal got approved. In respect of both of those decisions, I suspect that there was ministerial interference. The issue for us was to find out the nature of that interference. That was the political imperative. The issue then was: what is the framework you need that would allow the upper house, as a house of review, to put in place an appropriate mechanism for accountability? That led to the drafting of the first lot of measures for calls for papers. I think that subsequently we might have refined those measures but the key issue was the accountability of the executive to the Parliament. And it underpinned a philosophy that I had: that the executive did not account to the Parliament just through question time; the governance of the State was in the hands of Parliament. The Parliament is the place where the government is formed, the government has a role in terms of providing the interface between the bureaucracy and the Parliament, the executive is answerable to the Parliament. So it was a question of checks and balances.

It was my view that we had got to the stage in the last several decades where the bureaucracy took the view that it was answerable to the government, not the Parliament. We had tried to counter this, firstly in terms of the estimates committees, but had not completely achieved my objective. We were now looking at this issue of making the executive clearly accountable. By getting the papers of the bureaucracy before the upper house, the public service was made to respond to the Parliament about the material that it had provided as advice to the government. So that was the governance framework which underpinned the steps that were taken in the Egan cases. As I said moving the censure motion on 1 May 1996 in relation to the Treasurer's failure to table documents concerning Lake Cowal:

When the house requires production of documents, pursuant to standing orders, the Parliament is the supreme authority in a democratic system to which the people, particularly the elected authorities, must be answerable.

Note, most importantly, the "elected authorities"—it should be the government and the bureaucracy that are accountable. That was the thinking, in terms of where I was coming from.

Mr BLUNT: Regarding that censure motion, and subsequent motions concerning the powers of the house to order the production of documents, that motion was supported by the members of the crossbench. To what degree were the crossbench members on board with your approach? Perhaps not just the crossbench members but members of the Opposition; did they take some convincing to follow?

Mr HANNAFORD: My colleagues did not because, again, they were seeing the politics. Not necessarily all of them had thought through the issues of principle but certainly the leadership team were working on the issues of principle. I had to take a principled approach to the crossbenches - if the principle was not sound, then I would not have taken the crossbenches with me. Some of them had concerns about how far you would need to move to get the Government to come to the party and comply with the requirements of the Parliament. My recollection is that some of them were concerned with the concept of having to evict a Minister. The consequence may well have been that that Minister would never have been able to return to the house. Were they prepared to go that far? This could not be an opportunistic issue. I would never have taken the crossbenches with me on a position that was seen to be politically opportunistic. It was a position of principle in relation to the role of the Leader of the Government and the role of the Legislative Council in the process of government. That is why the Treasurer was suspended and removed from the chamber for defying a resolution of the house. I suspect that Liz Kirkby took on board my thoughts and articulated them. Fred Nile may also have articulated them.

Mr BLUNT: Had Treasurer Egan continued to refuse to produce documents, even after the court cases, where did you see things headed then? Would you have been prepared to move for his expulsion?

Mr HANNAFORD: I think the advice to us was that we could not expel him, but we could have kept him out of the Parliament. I think by that stage we had started looking at the legal position as to what our powers were. Expulsion could have been seen as punitive. Keep in mind that around that time there was also the debate about the expulsion of another member, Franca Arena. It might have been Liz Kirkby who asked me, "Where do we stop in relation to this?" The position I was going to take was that until the Government complied the Treasurer would have to stay out of the house. If another Minister took over and continued to take that position then that Minister would have had to have stayed out of the house. At a point in time, the Government would not have had a majority. That is how I saw it. I think that we took the view that you can expel a member when he is

bringing the house into disrepute. Egan was not bringing the house into disrepute; he was in the situation of taking a Government position of not being accountable to the Legislative Council.

In sum, yes, we would have been prepared to go to the point where we would have sought to prohibit the presence of that Minister or any other Minister in the house until such time as the Government complied. Had the Opposition taken a formal position on that? No. Had there been discussions about where it led? Yes. But it never went formally to the party room for a decision on where it would go.

Remember that out of the first High Court decision there was a debate about what were the boundaries of the house. They took the view that the house was just the chamber and the offices, not the footpath in Macquarie Street. You might recall that there was then some discussion as to whether or not we ought to be defining what the boundaries of the house were.

Mr BLUNT: You mentioned the so-called footpath point from the High Court decision. To what extent were the proceedings in the house "stage managed"? I am thinking, for instance, about the actions of the Usher in taking Mr Egan by the arm and taking him to the footpath in order to create a legal trigger.

Mr HANNAFORD: I had no discussions about that. I expected that he would be just taken outside the chamber. You would have to talk to the Clerk as to how that came about. The perception at the time was that the precinct of Parliament was actually the boundaries of the real estate. I think that the Presiding Officers took the view that the Parliament was the whole of the house. When people were expelled from the lower house by resolution because of misbehaviour they were sent out of the building and they had to leave the whole of the precinct. The concept within the Parliament was that the precincts were the physical external boundaries. The first time that it came to anybody's attention that the precincts were not the physical boundaries was that decision of the High Court. The Parliamentary Precincts Act followed and defined all that.

Mr BLUNT: What was your response to the judgements, both the High Court judgement in *Egan v Willis* and then the Court of Appeal decision in *Egan v Chadwick*?

Mr HANNAFORD: I was never surprised at the actual outcome. I always took the view that what we did would be supported by the courts. From the moment the Government took on the challenge I never had a doubt that the Parliament's position would be supported, because the courts have a very strong view about accountability. Also the courts take the view that they are the final arbiter. I was a bit surprised at some of the judgements and the judges that articulated some of those positions because the role of the court is to make decisions on the constitutionality of actions and the constitutionality of the laws. I took the view that they would always come down on the issue of accountability of the executive government. The courts do not particularly like executive governments, so if they can make certain that they are accountable they will do so. But some of the doubts that were expressed by some of the judges, which still raise issues today, I was surprised about.

I think that the Council has moved on in terms of the issue of being able to require a person who is not a member of the government to appear. I have a feeling that we have exercised that power and issued notices to attend. Potentially that could have led to similar issues. I think that we have moved on and issued notices to attend and to produce material for people who are not members of the bureaucracy.

Mr BLUNT: That is in part precisely the subject of some legal advice from senior counsel that was tabled in the house last month. It goes to that question.

Mr HANNAFORD: Yes, the Parliament would have had the power if it was necessary. Go back to Chief Justice Spigelman's comments on the issue of Cabinet confidentiality. If it was necessary for the proper functioning of the Parliament then the Parliament could require disclosure. If it was for a frivolous reason, if it was an attempt to assert authority by the Parliament, the courts would have asked why it was necessary and said no. If you have a look again at Spigelman's comments about Cabinet documents—remember Spigelman was once a bureaucrat and he understood Cabinet processes—there is still left open the issue of what is a Cabinet document. Spigelman referred to, if my recollection is correct, the records of the discussion in Cabinet. Nobody has ever actually looked at what does that mean. At a New South Wales level there are no minutes of discussions in Cabinet. What is said by individual ministers is not recorded, whereas in Canberra it is. Discussion within Cabinet has now been defined as the material that is put before the Cabinet. In terms of freedom of information, that was manipulated, in my view, by the bureaucracy in order to minimise what could be released and maximise the protection of documents that were prepared for the purposes of committees of the Cabinet.

I have some doubt as to whether or not the minutes of committees of Cabinet are, in fact, the discussions of Cabinet. That is something yet to be clarified. I would have taken the view that it is Cabinet that is protected, not the processes that would lead to material getting to the Cabinet. I took the view that the courts would protect Cabinet discussions. I had no doubt that that would always be the position. That is why, in terms of the drafting of material, we put in place the checks and balances. If I had said that Parliament could get access to Cabinet discussions, we would have lost in the courts. There was reasonableness in the drafting of the rules for disclosure.

It was the same in providing access to documents. Members of Parliament could get access but they could not get copies. That was because there would be too much of a temptation sometimes for some members of Parliament to release material. Again, we had to put in place a reasonable level of accountability in relation to the way in which you got access to and used material. Keep in mind that we had a Freedom of Information Act. You did not want the powers of the Parliament to be used to get access to material in an alternative way to the use of freedom of information. Otherwise the call for papers procedure could be open to abuse.

Mr BLUNT: In that regard, the High Court having upheld the power of the house at common law to order the production of documents and the Court of Appeal then having clarified matters in relation to the powers of the house despite claims of privilege by the executive, can you reflect on your observations between those court decisions in 1998 and 1999 and the time you left? Can you also give us your observations as an interested expert observer of politics in New South Wales since that time? Do you believe the power has been exercised effectively by the house?

Mr HANNAFORD: I had a concern that the power was potentially being abused. I started seeing lots of calls for documents and I wondered why. I started to wonder who was, in fact, looking at the documents. Were the documents being examined or were there political games being played? I had heard that there were some instances where there was a call for documents, documents were being produced and no-one was looking at the documents. I have never seen a report to the Parliament on the number of members that might have looked at the material. I remember saying to somebody, "If those documents are not being examined for the purpose for which the order for production was made, it would be putting into disrepute the whole process of a call for papers."

I do not think that we have actually put in accountability measures to ensure that there has not been an abuse. I would say that we ought to identify members to be looking at the material that is being produced who would then be responsible to the Parliament. In some countries, there are examples of the way in which members of Parliament are given responsibility to act effectively as an ombudsman. So if you have a problem you go to this particular member of Parliament and they then call on the department to produce the files. They look at them and then report to the Parliament on whether there has been inappropriate administration. Remember, it was only MLCs who were allowed to look at the material, not members of staff.

There ought to be a process of response to the house. The Parliament has asked for these documents to be produced; they must have been produced for a reason. What was the reason? We do not articulate in debates the reasons. It would not be appropriate to list all the reasons because then it could be said that, once you have looked at the material, you should only respond to those reasons, not to the things that you have now found out because you did not previously know about them. But there ought to be a clear response to the Parliament that, as a result of an examination of these materials, there are no issues of concern or these are matters of concern which are apparent to us and some further action ought to be considered. There should be a debate in the house about this.

We never got to the stage of producing a report on the purposes and the outcomes of a call for papers. It seems that what has happened is that somebody, at least in relation to some matters, has seen problems in their examination of the material and that has triggered the establishment of committees. But it is ad hoc. I think that a governance framework ought to be considered around the use of the call, otherwise it will fall into disrepute. I think there has got to be some discussion and the opposition and government need to think through what is a proper framework.

Somebody is responsible for triggering a demand for papers. If that person has triggered it and got support, then that person ought to be taking responsibility for undertaking examination of a file. But that person needs to be doing it in conjunction with somebody else because there have got to be checks and balances. What you might consider inappropriate behaviour in relation to administration might be viewed differently by

somebody else. Then that person needs to report. Do they report to the Parliament or should they report back to a particular committee? A committee could then take on responsibility of looking at the issue and forming a view that this is a matter of such serious maladministration that it ought to either come back to the Parliament, with a request for a formal committee hearing, or the government ought to be looking at the processes. Again, the issue is of governance. I do not think the framework has been completed.

Mr BLUNT: What are your views on governments claiming legal professional privilege and public interest immunity over certain documents that are returned to the house?

Mr HANNAFORD: If you look back at what was said by the courts, I think it has been clearly articulated. Legal professional privilege is an abused claim and not fully understood. Public interest immunity by government is similarly an abused claim and not particularly well understood. Each of the judges articulated it in a different way. As to some of the independent arbiter reports, my recollection is that Sir Laurence Street came at it in a way which I would not necessarily have agreed with. It is an area that does require more discussion, but it should be a discussion that is taken on the basis that each of these claims is abused by those that seek to use them and they should never be taken at face value. Where such claims are made, it requires independent analysis and report. I have seen them with all their failings both in government, in opposition and outside in the bureaucracy.

Mr BLUNT: Are you able to shed some light on the process by which the provision for an independent legal arbiter was originally decided upon?

Mr HANNAFORD: That decision was made totally by the Clerk. There is the potential for an arbiter to be appointed who might tend to favour the government's position in order to curry favour with the government. I do not say that that has ever happened. A lot of the arbiters have, in fact, ruled against the government's claims but there is that potential. In hindsight, I would have thought that it would be preferable that there be appointed more than one arbiter to look at these important issues. As a person who has had to sit in judgement on things, you have to sometimes sweat over the decisions that you take without the benefit of being able to talk it through. I have had to deal with that in forums that I have presided over. If you had two arbiters expressing a unanimous view then it would require a lot of argument by those in the house to articulate a view different from that of the two. If it is a highly political issue, a single arbiter could be dragged into the political environment and I think a lot of Supreme Court judges would be reluctant to be drawn into that political maelstrom. But if there were two of them and they had a unanimous view then they would be supporting each other. And it would minimise that political storm from engulfing them.

Should the arbiter be appointed by the Clerk? I do not think so. The Clerk is there to be an adviser to the Parliament; the appointment of an arbiter ought to be the role of the house. He is not there to make a decision; he is there to provide advice to the Parliament. The house should make the ultimate decision based upon advice. It should be open for members to go back and have a look at the material themselves and form a different view. The Clerk would provide advice to the Parliament, provide advice to the President. The President might consult with the relevant parties to see whether or not there were difficulties. If there was consultation between the Leader of the Government and the Leader of the Opposition and they were in agreement, I would be surprised if the crossbenchers would voice dissent.

I am not quite certain in hindsight that we have completed the governance framework appropriately, keeping in mind it is the house that is in control. The Clerk is an officer of the house. I do not think the Clerk should be put into the position of making an appointment which could result in a political storm being triggered. I could envisage an arbiter having very strident views about the attitude of certain bureaucrats and the claims that have been made for public interest immunity or legal professional privilege. Having had the opportunity of reading extracts from certain reports, I think they were very politically tempered. I would have written more strident comments.

Mr BLUNT: Once again, there is considerable food for thought. Those observations are really interesting. You touched upon this earlier but perhaps you could rephrase it as a formal answer: what do you make of instances where governments claim Cabinet confidentiality as a means to exempt certain documents from the power of the house to order the production of papers, and should the ability of governments to claim Cabinet confidentiality—however one defines the deliberations of Cabinet—be tested at some point?

Mr HANNAFORD: Do I suspect that reports are generated and marked as for a Cabinet committee or Cabinet for the purposes of protecting those documents? Yes, I do, I believe that is accurate. Can I give you an

instance of it? It would require me to breach Cabinet confidentiality. Do such things happen? Well, I will take it outside of Cabinet confidentiality into a situation where as a member of the Opposition I had seen a document—a significant report for the health department, a bound leather document. I had seen it, I had read it, I knew it existed and I was seeking production of the document. I was told the document did not exist. I was told to my face that it never existed. When we went into government and I was commissioned by the Minister for Health to write a report on health in Western Sydney—referred to as the "Hannaford report"—I still wanted this document. I was told it did not exist. The day after I became Minister for Health I was given a copy of the document. It had a sticky label attached to the outside of the document with the words "draft report". I have not the slightest doubt that the sticky label was put onto it after I started asking for it, because it was not on the document when I originally saw it. I was told that I had never asked for the right document. Had I asked for the "draft report" it would have been produced for me. It is the most blatant example that I have seen of the process being manipulated.

Does bureaucracy, therefore, engage in those games? I know they did on that occasion and I suspect that they have done on others. Should there be a process in place whereby it could be assessed whether or not a claim of Cabinet confidentiality is correct? Yes, there should be. Should the Parliament have access to Cabinet documents? No. If a document has been prepared specifically for Cabinet deliberation then it should not be available, but if there has been a manipulation of the process that should be disclosed, and it might engender a different type of approach to the administration of documents. There should be a discussion as to the role of committees of the Cabinet. Are the records of the committees the deliberations of the Cabinet? Are the committees of the Cabinet a process whereby there can be detailed consideration of material which leads then to the production of reports back to the Cabinet?

It is a matter which I think ought to be the subject of further debate. I once had a view that committees of the Cabinet were not the Cabinet. I have tempered those views. Subject to adequate safeguards against abuse, I think the committees of Cabinet ought to be able to get the full and frank views of the bureaucracy and the advisers on matters they are considering. It might result in a lot of work being delegated so that the Cabinet does not have to spend as much time on detailed matters. Therefore, I would say that Cabinet committees ought to be treated as Cabinet for the purposes of the protection of Cabinet deliberations.

Something that I considered an achievement in terms of better government - the public service might not agree - was the change in the public sector superannuation scheme. In Cabinet, I raised this as a possibility and the Premier appointed me as a committee of one to develop a proposal and come up with a report by the end of the week so it could be announced. I had to work intensively and there were lots of papers to consider. That was a highly controversial matter in those days and today there would have been a call for papers on it. You would not have wanted all that material released into the public domain.

The processes are abused because reports are received by the bureaucracy and government and they say, "I think we need to keep a lid on this one", and it is suddenly stamped as a Cabinet document. If a committee of Cabinet has asked for a report to be prepared, then there should be a proper paper trail that leads to that report being identified. The process has to be clear.

Mr BLUNT: I have two questions that will allow you to reflect more broadly upon everything we have talked about this morning. What is your assessment of the council and its role today; and, secondly, what are your thoughts on possible future reforms to make the council more effective?

Mr HANNAFORD: Can I honestly say to you that I have not addressed my mind to such questions? It was something I kept an eye on for the first couple of years after I retired but I have not thought about it recently. I could not even claim my knowledge as being completely informed on how the Council is working today. That is the extent to which I have moved on. So it would be unfair for me to make any comment. However, as I have indicated, I have, as an outsider, been concerned as to whether or not the governance arrangements have been abused. That is for others to think about as we did in the late 90s.

Mr BLUNT: Unless there is anything else you wish to add in conclusion, can I thank you for the time that you have devoted to come down here, especially today for this interview, for your contribution to this stage of the process in talking about reforms for the council and particularly the Egan cases? Can I also thank you for your contribution last time in relation to the establishment of the committee system? There has been a great deal of really valuable material that has come forward through the interview today, a great deal of food for thought for me as current Clerk but also, I am sure, for those who will read this transcript in future years. Can I take the opportunity to record, as an officer of the house who is absolutely committed to serving this great institution, on

behalf of all the officers, present and past, our gratitude to you for your contribution to the house in relation to the reforms that you initiated and your service to the Legislative Council and the people of New South Wales?

Mr HANNAFORD: Thank you very much.

The discussion concluded.