

Background

At the public hearing of the GPSC 4 Museums and galleries inquiry, held on 17 February 2017, several witnesses declined to answer questions regarding the preliminary business case for the relocation of the Powerhouse Museum, on the grounds that answering these questions would involve breaching cabinet confidentiality:

Mr DAVID SHOEBRIDGE: ...We heard in evidence earlier this morning that the construction cost for the riverbank project that was considered at about the time you were doing your work was in the order of \$600 million to \$800 million. Would that be right?

Mr BROOKE: I have been advised that the content of the preliminary business case is Cabinet in confidence. So, unfortunately, I cannot comment.¹

Mr DAVID SHOEBRIDGE: ... As part of your considerations for the preliminary business case, were you looking at the impacts on the Powerhouse site and the loss of value from the Powerhouse site as a result of a relocation?

Mr BROOKE: I am going to sound a bit like a broken record and a boring old accountant, but the contents of the preliminary business case are, I am advised, Cabinet in confidence. Those deliberations are Cabinet in confidence, in my understanding.²

Mr DAVID SHOEBRIDGE: What is the estimated cost of the relocation of the collection? What sort of figures are we talking about?

Mr ROOT: As I said in my opening statement I am informed that that information is Cabinet in confidence and is therefore privileged.³

The committee subsequently resolved to seek advice from the Clerk regarding:

- a) the steps the committee could take to press witnesses who declined to answer questions at the hearing on the grounds of cabinet confidentiality; and
- b) how the committee could access the preliminary business case and other working documents.

Advice

A fundamental consideration for the committee is whether, notwithstanding the objections raised by witnesses regarding Cabinet confidentiality, access to the documents or information sought is relevant and necessary for its inquiry. Presuming the answer to this question is 'yes', the committee has two options: they could summons the witnesses to a further hearing or, initiate an order for papers under standing order 52. Whatever option the committee chooses, it will need to be cognisant of the position of the Executive and the Legislative Council with regards to the production of Cabinet documents.

Access to Cabinet documents

Egan v Chadwick (1999) confirmed the Council's power to order documents subject to claims of public interest immunity and legal professional privilege but did not adjudge that this power extended to Cabinet documents. However in his judgement, Spiegelman CJ distinguished between documents which disclose the actual deliberations within Cabinet ('true' Cabinet documents) and those which are in the nature of reports or submissions prepared for the assistance of Cabinet, the latter which may or may not be covered by the prohibition.

¹ Evidence, Mr Graham Brooke, Partner, KPMG, 17 February 2017, p 19.

² Evidence, Mr Graham Brooke, Partner, KPMG, 17 February 2017, p 20.

³ Evidence, Mr Peter Root, Managing Director, Root Projects Australia, 17 February 2017, p 31.

Priestly JA came to a different conclusion, suggesting that like the courts, the Council has the power to compel the production of Cabinet documents. Bret Walker SC has expressed a similar view, suggesting that the automatic exclusion of Cabinet documents from scrutiny by the Council represents an ‘extremely dubious and problematic state of the law’.⁴ However, the Executive has consistently maintained that it is not required to produce Cabinet documents, even on the occasions when they have furnished such documents in response to an SO 52.⁵

The Legislative Council does not concede that it cannot obtain Cabinet documents, notwithstanding the distinction between different types of Cabinet documents noted in a report of the legal arbiter in relation to disputed claims of privilege under SO 52.⁶ However, the matter remains unresolved as it has never been pursued in the same way the power to order the production of documents subject to claims of privilege on the grounds of public interest immunity and legal professional privilege were pressed in the matters which precipitated *Egan v Chadwick*.

Option 1 – summons the witnesses to a further hearing

The committee could summons the relevant witnesses to a further hearing. Under section 4 of the *Parliamentary Evidence Act 1901* committees have the power to compel witnesses to answer a ‘lawful question’.⁷ A lawful question is considered to be a question of fact, as opposed to opinion, relevant to the committee’s terms of reference. The witnesses should be advised that an instruction under the Act to ‘give evidence’ also empowers committees to require a person attending to give evidence to produce these documents. This interpretation of the provision is supported by legal advice from Bret Walker SC.⁸

The witnesses would need to be advised to bring the documents sought by the committee and forewarned that the committee intends to press them to answer its questions and provide the documents, notwithstanding their objections on the grounds of cabinet confidentiality. If the witnesses refuse to answer the questions or produce the required documents at the hearing, the committee would need to contemplate invoking section 11 of the *Parliamentary Evidence Act 1901*:

‘Penalty for refusal to answer’

- (1) if any witness refuses to answer any lawful question during the witness’s examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or serjeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be.⁹

However, section 11 has never been invoked by the Legislative Council or any of its committees. Given its archaic wording, and the lack of any precedents, it is difficult to advise the committee what would happen next. As I previously advised members of the *Operation Prospect* select

⁴ C25: Marking 25 Years of the Committee system in the Legislative Council, 20 September, 2013, pp 7-8.

⁵ LC Minutes 26/5/2005, 1408.

⁶ The Hon Terence Cole QC, ‘Disputed claim of privilege: Desalination plant’, Report of the Independent Legal Arbiter, pp 3-4.

⁷ A lawful question is considered to be a question of fact, as opposed to opinion, relevant to the committee’s terms of reference, see Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, Federation Press, 2008, p 508. Various legal opinions to the Government over 30 years have asserted that questions are not lawful if they require the provision of information subject to public interest and other immunities. This immunity is not accepted by the Council, although committees often accommodate such claims, for example by going *in camera*.

⁸ Correspondence from Mr Bret Walker SC, to Clerk of the Parliaments, 18 November 2015, regarding Greyhound Welfare Order for Papers.

⁹ *Parliamentary Evidence Act 1901*, s 11(1).

committee, there are clear legal and reputational risks for any committee contemplating this course of action, which I could discuss further should the committee wish to pursue this option. (see flow chart, attached).

Option 2 – initiate an order for papers under SO 52

Instead of, or in addition to, summoning witnesses to a further hearing, the committee could resolve that the chair or any other committee member order that the relevant documents be tabled in the House under SO 52. (While committees are authorised to order the production of documents under SO 208, such orders have been resisted by the Executive in recent years and committee members have usually resorted to seeking papers via the House).

Members should be aware that, based on recent precedents, the government is unlikely to provide the documents on the grounds of cabinet confidentiality. I would therefore suggest that the committee include a preamble outlining the Council's position regarding such claims, as per a 2012 order relating to an earlier order for papers pertaining to the CBD metro light rail in 2012 (attached).

The motion should also provide that, in the event that documents are not furnished, that the return should identify how the provision of those documents to the House would disclose the actual deliberations of Cabinet, as variously articulated in *Egan v Chadwick*. As I envisage the committee is seeking only a small number of documents, the order could stipulate the return be received within 7 days, if not less. Again, given past precedents, it is likely that the government will also refuse to identify how the provision of those documents would disclose the actual deliberations of Cabinet.

Even if the committee is not successful in its attempts to receive the documents, there is no harm in restating the Council's position in relation to this significant aspect of its powers. Indeed, as Bret Walker urges, in the absence of a 'sea change' in the advice routinely given to the Executive regarding Cabinet documents, members should 'shape' their powers by their conduct:

Perhaps the only thing at the moment—but certainly the first thing to be done at the moment—is that the Council and thoughtful individual members of the Council, as well as the Council speaking collegiately, ought to say, 'We note that the return is deficient in this fashion; we deplore the deficiency; we maintain that *Egan v. Chadwick* is wrong, and we move on'. Fifty years from now, somebody occupying a temporary position, as I had when I was senior counsel for the President in *Egan v. Willis* and *Egan v. Chadwick*, will put together all of those statements, add what Chief Justice Gleeson said about the way in which one understands the extent of powers and, I hope, will then opine, in the circumstances that then obtain that: 'It may have taken a long time, but the statement of position by the Legislative Council, long made, now ought to be recognised as the true state of affairs.' And that is because the way in which the law is made in this area is not as it is for any other area with which I am familiar. So it is partly what you do but what you do also includes what you say.¹⁰

¹⁰ Bret Walker SC, *C25: Marking 25 Years of the Committee system in the Legislative Council*, Keynote address, 20 September 2013, p14.

One advantage of pursuing an order for papers, rather than holding another hearing, is that it would avoid placing individual public servants in a difficult position where they might once again refuse to provide or discuss the documents sought, on the basis of legal advice from the Executive prohibiting them from doing so.

David Blunt

Clerk of the Parliaments

27 February 2017

Pairs

Ms Cotsis
Mr Foley
Mr Wong

Ms Cusack
Mr Lynn
Miss Gardiner

Question resolved in the affirmative.

Ms Sharpe then moved: That private members' business item no. 2103 outside the order of precedence be called on forthwith.

Question put and passed.

39 ORDER FOR PAPERS—CBD AND SOUTH EAST LIGHT RAIL PROJECT—FURTHER ORDER

Ms Sharpe moved, according to notice:

1. That this House notes that:
 - (a) on 8 May 2014, this House ordered the production of documents relating to the traffic and patronage modelling, the business case and cost benefit analysis for the CBD and South East Light Rail Project,
 - (b) on 5 June 2014, the House received a return to order which did not include the business case or traffic and patronage modelling other than the summaries of what was already publicly available, and
 - (c) the index to the return to order included correspondence from the Secretary of Transport for NSW stating that: 'Transport for NSW has reviewed its relevant files for the purposes of determining whether it holds any documents, other than Cabinet documents, that fall within the terms of the resolution. I note that all agencies are obliged to protect the confidentiality of Cabinet documents and not produce or refer to any such documents in complying with the resolution.'
2. That this House notes the following judgements by Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in *Egan v Chadwick* (1999) concerning cabinet documents:
 - (a) 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 the doctrine of collective ministerial responsibility by revealing the 'actual deliberations of Cabinet'; that a distinction must be made between documents which disclose the actual deliberations within cabinet and those which are described as "Cabinet documents", but which are in the nature of reports or submissions prepared for the assistance of cabinet; and that the production of documents prepared outside cabinet for submission to cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to cabinet,
 - (b) Meagher JA took the view that the immunity of cabinet documents from production was 'complete', arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government; but without exploring the distinction between different types of cabinet documents drawn by Spigelman CJ, and
 - (c) Priestley JA took a different view, noting that a court has 'the power to compel production to itself even of Cabinet documents' and that the 'function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council', and that 'notwithstanding the great respect that must be paid

to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government'.

3. That this House further notes that in evaluating a disputed claim of privilege on documents returned to an order of the House in 2005, the Hon Terrence Cole AO, RFD, QC, stated that: '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 submissions prepared for the assistance of Cabinet. A claim for privilege for true Cabinet documents will always be upheld. ... When privilege is claimed for other Cabinet documents, a judgement process is required to weigh the competing public interests.'
4. That this House further notes that in its October 2013 report entitled 'The Mt Penny return to order', the Privileges Committee:
 - (a) stated that '... the Committee does not necessarily accept that *Egan v Chadwick* is the final word on this matter, and that the Council does not have the power to order cabinet documents. The three Justices in *Egan v Chadwick*, Spigelman, Meagher and Priestly, took significantly different approaches to this issue. The Committee believes that the dissenting judgment of Justice Priestley is instructive', and
 - (b) specifically rejected the definition of 'cabinet information' in the Government Information (Public Access) Act 2009 as an appropriate definition of cabinet documents for the purposes of responding to orders for papers made by the Legislative Council under standing order 52.
5. That under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution the following documents, not previously provided to the House, created since 1 April 2011, in the possession, custody or control of the Minister for Planning, the Department of Planning and Infrastructure, the Minister for Transport, Transport for NSW or NSW Treasury relating to the traffic and patronage modelling, the business case and cost benefit analysis for the CBD and South East Light Rail Project:
 - (a) the final version of the business case prepared by Transport for NSW,
 - (b) the traffic and patronage modelling relied on in the business case for the CBD and South East Light Rail Project,
 - (c) the NSW Treasury and PriceWaterhouseCoopers (PWC) cost benefit analysis, and
 - (d) any legal or other advice regarding the scope or validity of this order of the House created as a result of this order of the House.
6. That in the event that any documents are not provided to the House in response to this order on the basis of a claim of cabinet confidentiality, the return identify how the provision of those documents to the House would breach the immunity attaching to cabinet documents as variously articulated in *Egan v Chadwick*.
7. That this House regards failure to comply fully with an order of this House for the production of documents as an unacceptable interference with the capacity of this House to fulfil its constitutional roles.

Debate ensued.

Omit clause 2 of the proposed *Ombudsman and Public Interest Disclosures Legislation Amendment Bill 2014*. Insert instead:

2 Commencement

- (1) Schedule 1 to this Act commences on 5 March 2015.
- (2) Schedule 2 to this Act commences on the date of assent to this Act.

No. 2 **Govt no. 2 [c2014-176]**

Schedule 1 to the proposed *Ombudsman and Public Interest Disclosures Legislation Amendment Bill 2014*. Insert after proposed section 35 (4):

- (5) The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission is to review the operation of subsections (3) and (4) as soon as possible after 5 March 2016.

Question put and passed.

43 SUSPENSION OF STANDING AND SESSIONAL ORDERS—ORDER FOR PAPERS—CBD AND SOUTH EAST LIGHT RAIL PROJECT—FURTHER ORDER

On the Deputy President (Mr Khan) calling on the Clerk to read the order of the day, Ms Sharpe moved, according to contingent notice: That standing and sessional orders be suspended to allow a motion to be moved forthwith that private members' business item no. 2103 outside the order of precedence relating to a further order for papers regarding the CBD and South East Light Rail Project be called on forthwith.

Debate ensued.

Question put and passed.

Ms Sharpe then moved: That private members' business item no. 2103 outside the order of precedence be called on forthwith.

Question put and passed.

44 ORDER FOR PAPERS—CBD AND SOUTH EAST LIGHT RAIL PROJECT—FURTHER ORDER

Order of the day read for resumption of the interrupted debate of the question on the motion of Ms Sharpe:

1. That this House notes that:
 - (a) on 8 May 2014, this House ordered the production of documents relating to the traffic and patronage modelling, the business case and cost benefit analysis for the CBD and South East Light Rail Project,
 - (b) on 5 June 2014, the House received a return to order which did not include the business case or traffic and patronage modelling other than the summaries of what was already publicly available, and
 - (c) the index to the return to order included correspondence from the Secretary of Transport for NSW stating that: 'Transport for NSW has reviewed its relevant files for the purposes of determining whether it holds any documents, other than Cabinet documents, that fall within the terms of the resolution. I note that all agencies are obliged to protect the confidentiality

of Cabinet documents and not produce or refer to any such documents in complying with the resolution.’

2. That this House notes the following judgements by Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in *Egan v Chadwick* (1999) concerning cabinet documents:
 - (a) 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 the doctrine of collective ministerial responsibility by revealing the ‘actual deliberations of Cabinet’; that a distinction must be made between documents which disclose the actual deliberations within cabinet and those which are described as “Cabinet documents”, but which are in the nature of reports or submissions prepared for the assistance of cabinet; and that the production of documents prepared outside cabinet for submission to cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to cabinet,
 - (b) Meagher JA took the view that the immunity of cabinet documents from production was ‘complete’, arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government, but without exploring the distinction between different types of cabinet documents drawn by Spigelman CJ, and
 - (c) Priestley JA took a different view, noting that a court has ‘the power to compel production to itself even of Cabinet documents’ and that the ‘function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council’, and that ‘notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government’.
3. That this House further notes that in evaluating a disputed claim of privilege on documents returned to an order of the House in 2005, the Hon Terrence Cole AO, RFD, QC, stated that: ‘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 submissions prepared for the assistance of Cabinet. A claim for privilege for true Cabinet documents will always be upheld. ... When privilege is claimed for other Cabinet documents, a judgement process is required to weigh the competing public interests.’
4. That this House further notes that in its October 2013 report entitled ‘The Mt Penny return to order’, the Privileges Committee:
 - (a) stated that ‘... the Committee does not necessarily accept that *Egan v Chadwick* is the final word on this matter, and that the Council does not have the power to order cabinet documents. The three Justices in *Egan v Chadwick*, Spigelman, Meagher and Priestly, took significantly different approaches to this issue. The Committee believes that the dissenting judgment of Justice Priestley is instructive’, and
 - (b) specifically rejected the definition of ‘cabinet information’ in the Government Information (Public Access) Act 2009 as an appropriate definition of cabinet documents for the purposes of responding to orders for papers made by the Legislative Council under standing order 52.
5. That under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution the following documents, not previously provided to the House, created since 1 April 2011, in the possession, custody or control of the Minister for Planning, the Department of Planning and Infrastructure, the Minister for Transport, Transport for NSW or NSW Treasury relating to the traffic and patronage modelling, the business case and cost benefit analysis for the CBD and South East Light Rail Project:

- (a) the final version of the business case prepared by Transport for NSW,
 - (b) the traffic and patronage modelling relied on in the business case for the CBD and South East Light Rail Project,
 - (c) the NSW Treasury and PriceWaterhouseCoopers (PWC) cost benefit analysis, and
 - (d) any legal or other advice regarding the scope or validity of this order of the House created as a result of this order of the House.
6. That in the event that any documents are not provided to the House in response to this order on the basis of a claim of cabinet confidentiality, the return identify how the provision of those documents to the House would breach the immunity attaching to cabinet documents as variously articulated in *Egan v Chadwick*.
 7. That this House regards failure to comply fully with an order of this House for the production of documents as an unacceptable interference with the capacity of this House to fulfil its constitutional roles.

Debate resumed.

Question put.

The House divided.

Ayes 21

Ms Barham	Ms Fazio *	Mr Searle
Mr Borsak	Mr Foley	Ms Sharpe
Mr Brown	Mr Green	Mr Shoebridge
Mr Buckingham	Dr Kaye	Mr Veitch
Ms Cotsis	Mr Moselmane	Ms Voltz *
Mr Donnelly	Revd Mr Nile	Ms Westwood
Dr Faruqi	Mr Primrose	Mr Whan

* Tellers

Noes 16

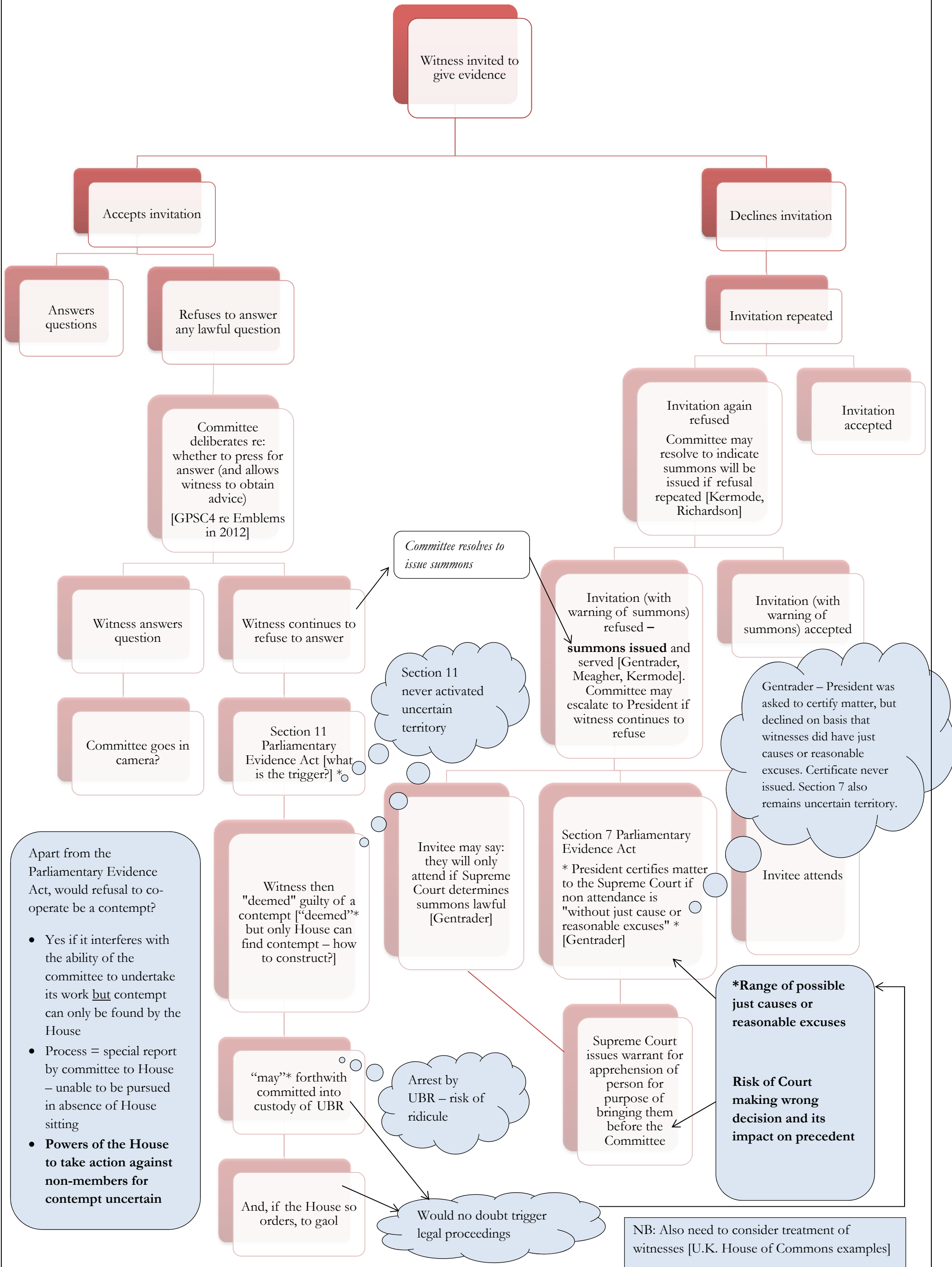
Mr Blair	Miss Gardiner	Mrs Mitchell
Mr Clarke	Mr Gay	Mrs Pavey
Mr Colless *	Mr Khan	Mr Pearce
Ms Cusack	Mr Lynn	Dr Phelps *
Ms Ficarra	Mr MacDonald	
Mr Gallacher	Mrs Maclaren-Jones	* Tellers

Pairs

Mr Secord	Mr Ajaka
Mr Wong	Mr Mason-Cox

Question resolved in the affirmative.

Public interest immunity issues that may be anticipated in the inquiry



Apart from the Parliamentary Evidence Act, would refusal to cooperate be a contempt?

- Yes if it interferes with the ability of the committee to undertake its work but contempt can only be found by the House
- Process = special report by committee to House – unable to be pursued in absence of House sitting
- **Powers of the House to take action against non-members for contempt uncertain**

Section 11 never activated uncertain territory

Gentrader – President was asked to certify matter, but declined on basis that witnesses did have just causes or reasonable excuses. Certificate never issued. Section 7 also remains uncertain territory.

***Range of possible just causes or reasonable excuses**

Risk of Court making wrong decision and its impact on precedent

NB: Also need to consider treatment of witnesses [U.K. House of Commons examples]