Submission No 1

INQUIRY INTO EXAMINATION, PUBLICATION AND USE OF CABINET DOCUMENTS BY LEGISLATIVE COUNCIL COMMITTEES

Organisation: Department of the Senate

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OF THE SENATE

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19 January 2022

The Hon. Peter Primrose MLC
Chair
NSW Legislative Council Privileges Committee
Parliament House
Macquarie Street
Sydney NSW 2000

By email: privilege@parliament.nsw.gov.au

Dear Chair

inquiry into the examination, publication and use of cabinet documents by Legislative Council committees

Thank you for your letter seeking a submission to the Privileges Committee inquiry into the examination, publication and use of cabinet documents by Legislative Council committees.

At the outset, it is useful to note the different constitutional arrangements which apply in relation to the Commonwealth and New South Wales parliaments. As you are aware, the powers of the New South Wales Houses to require information rely on the common law doctrine of "reasonable necessity". By contrast, under section 49 of the Constitution the Commonwealth Houses inherited the "powers, privileges and immunities" of the House of Commons UK as they existed at Federation. Of course, the power of the Senate to require information under section 49 has its genesis in the same principle that a parliament cannot effectively perform its legislative and accountability functions without access to information about legislative proposals and the operations of government.

Principles and process for assessing public interest claims in relation to cabinet documents

In Senate practice, there is no difference between the treatment of claims of cabinet confidentiality and other public interest immunity claims. In particular, public interest immunity claims made by the executive, on this or any other ground, are not binding on the Senate. The Senate has long taken the view that there is no category of documents that is immune from production and insists that it is for the Senate (and not the government) to determine claims to withhold documents in the public

interest. A series of resolutions beginning in 1975 emphasise this, including an order of continuing effect of 13 May 2009 relating to public interest immunity claims.

Odgers' Australian Senate Practice notes that "It has long been recognised that there is information held by government that it would not be in the public interest to disclose." It goes on to outline "potentially acceptable grounds" for claims of public interest immunity, based on cases in the Senate. This emphasises that the Senate does not accept an approach based on the categorisation of documents but seeks to identify the public interest on a case-by-case basis.

The continuing order made in 2009 applies these principles to the proceedings of Senate committees. It provides that claims to withhold information or documents may only be raised on public interest grounds and must be supported by a statement specifying the harm to the public interest that could result from the disclosure of the information.

In 2014 my predecessor, Dr Rosemary Laing, explained to the Legal and Constitutional Affairs References Committee that the process established by the 2009 resolution is:

> ...a means to balance competing public interest claims by government on the one hand, that certain information should not be disclosed because disclosure would harm the public interest in some way, and by parliament's claim, as a representative body in a democratic polity, to know particular things about government administration, so that the parliament can perform its proper function of scrutinising and ensuring accountability for expenditure and administration of government programs.[1]

In short, the process is intended to ensure that committees have enough information before them to determine where the public interest in a particular matter lies. This is essentially the task a committee has in determining whether to use or publish evidence it has received.

Odgers records the extent to which the Senate has previously accepted public interest immunity claims made on the grounds of disclosure of cabinet confidentiality:

> It is accepted that deliberations of the Executive Council and of the cabinet should be able to be conducted in secrecy so as to preserve the freedom of deliberation of those bodies. This ground, however, relates only to disclosure of deliberations. There has been a tendency for governments to claim that anything with a connection to cabinet is confidential. A claim that a document is a cabinet document should not be accepted; as has been made clear in relation to such claims in court proceedings, it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word "cabinet" in or on it. [14th ed., p. 665]

[1] Legal and Constitutional Affairs References Committee—Report—*A claim of public interest immunity raised over documents*, March 2014, paragraph 2.10.

Where a committee receives a cabinet document indirectly, it may be minded to seek information from the relevant minister to help it determine whether it is in the public interest to publish the document. However, it is ultimately a matter for the committee whether it wishes to seek the views of the government before weighing the competing interests and determining whether to use or publish a document.

In weighing these matters, Senate committees are frequently advised that the Senate has previously been persuaded to accept that there is a significant public interest in the confidentiality of documents which would reveal cabinet deliberations, but not necessarily in relation to documents which might be considered inputs to cabinet processes. This approach – which has been in place for decades and is reflected in the commentary in Odgers – no doubt seeks to prevent government overreach in categorising administrative documents to attempt to put them beyond parliamentary scrutiny.

There are few acknowledged instances of Senate committees receiving and considering the publication of cabinet documents (in the narrower sense of documents which would reveal the deliberations of cabinet). One example of a committee refusing to allow such a document to be received occurred during a budget estimates hearing of the Legal and Constitutional Affairs Legislation Committee on 23 May 2012. In that case, the committee sought the Minister's views before meeting privately to determine that the document should not be tabled.[2] As estimates hearings must be conducted in public, a decision by the committee to receive that document would have necessitated its publication.

I would be happy to provide any further information which may assist the committee.

Yours sincerely

(Richard Pye)

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2 Legal and Constitutional Affairs Legislation Committee, Committee Hansard, 23 May 2012, pp 61-62, 74 and 82.