Submission No 4

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

Name: The Hon. Keith Mason

Date Received: 7 January 2022

7 January 2022

The Hon Peter Primrose MLC,
Chair, Privileges Committee

Dear Mr Primrose,

I refer to your letter dated 29 November 2021 inviting me to offer submissions to the Privileges Committee inquiry into the examination, publication and use of cabinet documents by Legislative Council committees.

In former lives I served as Solicitor-General for NSW and President of the Court of Appeal. And for a number of years past I have been appointed from time to time to evaluate disputed claims of privilege in the context of Standing Order 52. These things are mentioned not to enhance the quality of the opinions expressed below but to show that my professional life has offered perspectives on the issue from a variety of standpoints.

As your letter indicates, *Egan v Chadwick* (1999) 46 NSWLR 563 established ((by majority) that the Legislative Council does not have the power to compel the production of certain Cabinet documents. That is not the context of the present issue. However, the Court's reasoning points to more general constitutional principles touching the relationship between the legislative and executive arms of government.

Obligations to respect the confidentiality of Cabinet deliberations rest upon the shoulders of individual Ministers and are reflected in their solemn undertakings taken as Executive Councillors. Departures occur, but infrequently.

Long convention has generated the basal constitutional principle of responsible government. One aspect of it is the collective responsibility of Ministers of the Crown and the confidentiality of Cabinet deliberations forms a key part. Its rationale has been stated by the High Court:

> *"It has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decisions which may be made."* [*Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615]

These principles may generate a public interest immunity that will be recognised by the courts in an appropriate context after weighing the possible harm to the public interest from disclosure against the possible harm to the public interest in suppressing information relevant to the specific legal proceedings. Like all privileges, the onus of persuasion rests upon the party asserting the privilege. But if established in the specific context, the immunity may prevent Cabinet documents that disclose deliberations from being the subject of subpoena or production in litigation. However, merely because a Cabinet document discloses a policy decision taken by Government will not suffice to engage these principles: see *Prineas v Forestry Commission of New South Wales* (1984)

53 LGRA 160. And discovery of the stances adopted by individual Ministers will seldom be relevant in any litigation.

But, contrary to the approach suggested by Meagher JA in *Egan v Chadwick,* public interest immunity does not offer an absolute protection to Cabinet documents and their claim to protection from disclosure in court must be weighed against competing public interests: see generally Anne Twomey, *The Constitution of New South Wales* (2004)*,* pp 707-8, citing *Sankey v Whitlam* (1978) 142 CLR 1 at 43, 63-4, 98-9 and *Northern Land Council* at 616-8. See also *Evidence Act 1995,* s 130.

I am unaware of any instance where these principles have been addressed in the parliamentary context, specifically where an Upper House is not controlled by the government. But the issue can certainly arise in this context given that the authorised or unauthorised publication of Cabinet deliberations occurs from time to time. I would venture five general observations.

First, the constitutional role of the Upper House extends to maintaining the accountability of the Executive and consideration of legislative change (see generally *Egan v Willis* (1998) 195 CLR 424). This is a broader focus than that of a court with jurisdiction in a specific criminal or civil trial. It follows that it will in practice be harder to show (as an aspect of the balancing exercise) the unimportance of information in a disputed document to the matter at hand than will occur in a curial setting.

Second, and absent any legislation on the topic, while the House must itself determine where the public interest lies if there is a call to restrict the publication of a Cabinet document that has come into its control, the House may be assumed and expected to weigh the impact of its actions upon the effective maintenance of the principles of responsible government.

Third, it would be open to the House to establish in advance some process whereby there was at least consultation with the Department of Premier and Cabinet before publication of a document that truly revealed recent Cabinet deliberations. There could even be an independent evaluation and report. Since, however, Cabinet documents seldom ‘arrive’ in the House there may be little need for a sessional or standing order.

Fourth, if the House determines to use or publish the document that is in its control then it may do so.

Fifth, I am not able to assist on the question whether and how these principles apply directly to a Committee of the House.

The Hon Keith Mason AC QC