Submission No 6

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

Name: Mr David Blunt

Date Received: 27 January 2022

LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

25 January 2022

D22/00939

The Hon. Peter Primrose MLC
Chair
Privileges Committee
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Chair,

Submission – Inquiry into the examination, publication and use of cabinet documents by Legislative Council committees

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

I note that the Committee's inquiry arises from the report of the Public Accountability Committee entitled, *Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry*, dated November 2021.

As evident from that report, at the request of the PAC, I met with them to discuss this matter on 8 November. The special report followed that discussion.

I have had the benefit of reading a draft of the submission to this Committee's inquiry from the Hon Keith Mason AC QC. I note that, of the three specific questions that you have asked me in your letter of invitation to make a submission to this Committee, Mr Mason has addressed the question about whether there are any legal impediments to a Committee examining, publishing or using Cabinet documents that come into its possession, including any implications from *Egan v Chadwick* (1999) 46 NSWLR 563. I have nothing further to add on this question.

In relation to the question as to the process a Committee should follow to determine the balance of public interests in relation to the examination, use or publication of such material, I note that Mr Mason alludes to the possibility of the House establishing a process including consultation with the Department of Premier and Cabinet (DPC). Although not explicit in Mr Mason's draft

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submission, I did wonder whether he was also hinting at a role for an arbiter. In this regard, I draw to the Committee's attention, the attached paper, written and delivered by Sharon Ohnesorge and Beverly Duffy in 2017, and published in the *Public Law Review* in 2018, entitled "Evading Scrutiny: Orders for Papers and access to Cabinet information by the NSW Legislative Council."[1] The paper made a number of recommendations, including a role for the independent legal arbiter in evaluating claims of privilege on the basis of Cabinet confidentiality.

I should note that at the time the paper by Sharon and Beverly was delivered and published the Legislative Council had not really contested or challenged the non-production of documents in returns to order on the grounds of Cabinet confidentiality. Things changed in 2018 with the House asserting its power to order production of a number of specific documents which had been withheld from the House on the grounds that they contained "Cabinet information." The majority of members contested this assertion and eventually copies of the documents were produced, on the understanding of the executive government on a "voluntary" basis, but as articulated by the House "under Standing Order 52."[2] The House has continued to assert its power to require the production of similar documents in 2019, 2020 and 2021, with the same eventual result.[3]

It should also be noted that Sharon and Beverly's paper asks important questions arising from the different judgements of Spigelman CJ and Priestly J in *Egan v Chadwick.*[4] Namely whether the Legislative Council should assert its right to require the production of all Cabinet documents (the Priestly position) or all documents excluding those which disclose the actual deliberations of Cabinet (the Spigelman position). Although this question has been referred to in debate in the House since 2018, this important question remains unresolved.[5] However, the House has on a number of occasions resolved "that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, *at a minimum*, that articulated by Spigelman CJ in Egan v Chadwick (emphasis added)."[6]

I will now return to the idea of a role for an independent legal arbiter in regard to the matters at hand. An arbiter could evaluate and report to a Committee in a matter such as the case in point, on whether the documents in question are Cabinet documents as asserted by DPC. If the House continues to rely on the Spigelman position as outlined above, the test as to true Cabinet documents beyond the power of the House to order the executive to produce being those

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[1] S Ohnesorge & B Duffy, "Evading Scrutiny: Orders for papers and Access to Cabinet Information by the New South Wales Legislative Council," (2018) PLR 118.

[2] The documents obtained were business cases for the Powerhouse Museum and Sydney Stadiums, and the Tune Report into Out of Home Care. For further details see the paper entitled "Orders for Papers and Parliamentary Committees: An update from the New South Wales Legislative Council," delivered at the 49th Presiding Officers and Clerks Conference in Wellington on 10 July 2018 (attached).

[3] See *New South Wales Legislative Council Practice*, Second edition, The Federation Press, 2021, pp 708-709 for details including *LC Minutes of Proceedings* references: in 2019 the final business case for the Broken Hill Long-term Water Supply Solution and the review of the Native Vegetation Code were provided directly to the Member who had moved the relevant orders, Mr Justin Field. In 2020 the final and strategic business cases for the Western Harbour Tunnel and Northern Beaches Link were eventually produced to the House. Subsequently, in 2021, the final business cases for Stages One and Two of the Parramatta Light Rail project were eventually produced to the House: *LC Minutes of Proceedings*, 24/3/2021 p 2088.

[4] (1999) 46 NSWLR 563.

[5] See the discussion in *New South Wales Legislative Council Practice*, Second edition, The Federation Press, 2021, under the heading "Was Egan v Chadwick correctly decided in relation to Cabinet documents?', pp 710-713.

[6] See for example *LC Minutes of Proceedings*, 21/6/2018, p 2798.

disclosing the actual deliberations of Cabinet, an arbiter could evaluate the assertion by DPC that a document is truly a Cabinet document, by assessing whether any of the documents in question disclose the actual deliberations of Cabinet. A Committee may find such an evaluation of assistance as it weighs the competing public interests in the examination, publication and use of such documents. This could be combined with a rebuttable presumption that documents evaluated as disclosing the actual deliberations of Cabinet not be examined, published or used except where doing so is essential for the purposes of the inquiry.[7]

Such a process could be the subject of a sessional order or a new clause in the resolutions establishing committees. However, given the fact that this is the first instance in my memory that this issue has arisen in a Legislative Council Committee, a sessional order may not be required, with any such extremely rare matter arising in a Committee being the subject of a special report to the House, requesting that the House authorise the appointment of an independent legal arbiter by way of an instruction to the Committee.

I trust this information and the attached papers are of assistance to the Committee. Please do not hesitate to contact me if you require any further information.

Yours sincerely,

David Blunt
Clerk of the Parliaments

[7] On the other hand, if the House was to at some point adopt the Priestly position, that it has the power to order the production of all Cabinet documents, there would be no need for such a rebuttable presumption.

Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council

Sharon Ohnesorge and Beverly Duffy*

The Egan cases confirmed the power of the New South Wales Legislative Council to order the production of state papers, with the exception of documents revealing the actual deliberations of cabinet – "true" cabinet documents. At present, the Council remains largely unaware of how many documents are being withheld by the Executive on this basis, let alone whether the documents withheld are "true" cabinet documents. With this scrutiny gap in mind, this article examines the manner in which courts and tribunals deal with cabinet documents in the context of public interest immunity claims, before making a case, on constitutional grounds, for the Council to have access to all cabinet documents. Finally, while acknowledging that there is no easy solution, the article proposes some potential options for reform, such as a role for the independent legal arbiter, to ensure that the Council is able to exercise fully its constitutional role holding the Executive to account. Recent controversies regarding cabinet documents in other Australian jurisdictions, as well as the publication of "The Cabinet Files" by the ABC in February 2018, make this discussion particularly relevant.

INTRODUCTION

In the lead up to the last State election, the New South Wales government announced its intention to move the Powerhouse Museum from the centre of the city to Sydney's west. In mid-2016 an upper house inquiry was established to examine the proposal. At a public hearing for the inquiry in early 2017, witnesses declined to answer questions about the business case for the museum's relocation, on the grounds of cabinet confidentiality:

> 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 ...[1]
>
> 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.[2]

* Sharon Ohnesorge, Acting Director, Committees, New South Wales Legislative Council.

Beverly Duffy, Clerk Assistant, Procedure, New South Wales Legislative Council.

This article is drawn from a paper presented at the *Australasian Study of Parliament Group (ASPG) 2017 National Conference*, Hobart, 27–29 September 2017. The authors would like to thank their colleagues in the Department of the Legislative Council for providing research assistance or for commenting on the draft article, including Liz Clarke, Stephen Frappell, Jenelle Moore, Velia Mignacca and Susan Want.

[1] Evidence to Portfolio Committee No 4 – Legal Affairs, Parliament of New South Wales, *Inquiry into Museums and Galleries*, 17 February 2017, 20 (Mr Graham Brooke, Partner, KPMG).

[2] Evidence to Portfolio Committee No 4 – Legal Affairs, Parliament of New South Wales, *Inquiry into Museums and Galleries*, 17 February 2017, 31 (Mr Peter Root, Managing Director, Root Projects Australia).

After the hearing the committee sought advice from the Clerk of the Parliaments about pursuing the desired documents. One option canvassed was to initiate an order for papers under Standing Order 52.[3] The Clerk advised that in taking this course members would need to be aware of the opposing positions of the Executive and the Legislative Council regarding cabinet documents – in other words, such an order would most likely be resisted. In further advice regarding what steps they could take to enforce the order, the Clerk suggested it would involve several unknowns. Would the House support pursuit of the documents? If a member was suspended for not providing the documents, would that member challenge the suspension in court? And if so, would the court read down the powers of the Legislative Council?[4]

Almost 20 years after *Egan v Chadwick*,[5] and in light of recent controversies between the Executive and parliaments regarding access to cabinet documents, it is timely to grapple with the following questions:

1) Should the Council have access to all cabinet documents?
2) Are only "true" cabinet documents being withheld from the Legislative Council?
3) What can be done to address the scrutiny gap?

These questions form the structure of this article. The first part outlines the current state of the law regarding the Council's right to access cabinet documents in response to an order for papers – namely, that "true" cabinet documents are exempt from production. It then traces the development of how cabinet information has been dealt with by the courts in the context of public interest immunity law. The authors suggest that there are sound constitutional grounds for arguing that the Council *should* have access to all cabinet documents, including "true" cabinet documents. The part concludes by briefly touching on developments in other jurisdictions.

The second part of the article is focused on what happens *in practice*: cabinet documents, including but not limited to "true" cabinet documents, are being withheld from scrutiny by the Legislative Council, reflecting the disparate views between the Executive and the Council regarding the definition of a cabinet document. With neither the documents nor an index of documents provided, the Council has no way of knowing how many documents are being excluded on cabinet-in-confidence grounds. The final part considers the way forward, outlining steps the Council could take to address the scrutiny gap.

While these questions are of particular relevance for the New South Wales Legislative Council, parliaments in other Australian jurisdictions grapple with similar issues from time to time. Therefore, while this article focuses on the Legislative Council's unique orders for papers process, the question of access to cabinet documents is relevant for all Australian houses of parliament – particularly upper houses, where Governments generally do not hold the balance of power.

SHOULD THE COUNCIL HAVE ACCESS TO ALL CABINET DOCUMENTS?

The current state of the law in New South Wales is that documents disclosing the *actual* deliberations of cabinet are not required to be produced to the Legislative Council in response to an order for papers, in accordance with the majority in *Egan v Chadwick*.[6] According to Spigelman CJ, with whom Meagher JA agreed, this is because the production of such documents would be inconsistent with the doctrine of ministerial responsibility, which his Honour recognised as an element of responsible government, a concept fundamental to Australia's constitutional system of government.[7]

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[3] Standing Order 52 regulates the common law power of the Legislative Council to order the production of state papers, and includes an arbitration mechanism for dealing with privilege claims.

[4] Advice to General Purpose Standing Committee No 4, Parliament of New South Wales, 27 February 2017, 28 March 2017 (Clerk of the Parliaments) <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2403#tab-otherdocuments>.

[5] The High Court in *Egan v Willis* (1998) 195 CLR 424 clearly affirmed the power of the Council to order the production of state papers, but did not consider the production of papers subject to a claim of privilege by the Executive. *Egan v Chadwick* (1999) 46 NSWLR 563 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 "true" cabinet documents. This case is discussed further below.

[6] *Egan v Chadwick* (1999) 46 NSWLR 563.

[7] *Egan v Chadwick* (1999) 46 NSWLR 563, 574.

In his decision, Spigelman CJ noted that the courts have always recognised the significance of cabinet confidentiality as an application of the principle of collective responsibility, itself rooted in the principle of responsible government, when the issue of access to cabinet documents has arisen in the context of claims for public interest immunity in the course of litigation. However, his Honour went on to note that the courts have distinguished between "documents which disclose the actual deliberations within Cabinet" ("true" cabinet documents) and "those which are described as 'Cabinet documents', but which are in the nature of reports or submissions prepared for the assistance of Cabinet".[8] With respect to the documents in the former category, Spigelman CJ quoted from the decision of the High Court in *Commonwealth v Northern Land Council*:

> 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 decision which may be made. ... Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government.[9]

Accordingly, his Honour concluded that the Council's power to call for documents should be restricted to documents that do not, directly or indirectly, reveal the deliberations of cabinet, so as 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)".[10] This is effectively the legal position as it currently stands.

However, in the authors' view there is a reasonable argument that cabinet documents, including those revealing the actual deliberations of cabinet, should not be exempt from production to the Legislative Council, contrary to the majority in *Egan v Chadwick*. This argument is based on two grounds: first, the Council's constitutional role in scrutinising the Executive in a system of responsible government; and secondly, the power of the courts to order the production of cabinet documents in legal proceedings.[11] A third reason – namely, that governments are inclined to "draw a long bow" when it comes to withholding cabinet documents – is discussed further below.

Before considering the argument in detail, however, it is useful to trace the development of how cabinet information has been dealt with under public interest immunity law over the last 50 or so years. This development reflects the wider move in modern democracies towards the concept of open government – ie from a traditional approach that was "intensely deferential to cabinet secrecy"[12] to a position where cabinet documents (even "true" cabinet documents) are no longer subject to absolute immunity from disclosure. As one commentator has observed:

> ... [T]he development of a public interest balancing test under the doctrine of [public interest immunity] and the movement away from conferring absolute immunity from disclosure on classes of documents are both key features of the phase of liberal democracy which is also typified by FOI legislation and the philosophy of open government.[13]

[8] *Egan v Chadwick* (1999) 46 NSWLR 563, 574. Unlike Spigelman CJ, Meagher JA did not distinguish between different types of cabinet documents, finding that the immunity of cabinet documents from production was "complete" (at 597). The core of agreement between the two judgments relates to the immunity from production to the Legislative Council of documents disclosing the actual deliberations of cabinet.

[9] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[10] *Egan v Chadwick* (1999) 46 NSWLR 563, 576 (Spigelman CJ).

[11] See Bret Walker, Transcript of Keynote Address to the *C25 Seminar*, Parliament of New South Wales, 20 September 2013 <https://www.parliament.nsw.gov.au/lc/seminars/Documents/C25%20Seminar%20-%20Uncorrected.pdf>.

[12] Walker, n 11, 10.

[13] A Cossins, "Revisiting Open Government: Recent Developments in Shifting the Boundaries of Government Secrecy Under Public Interest Immunity and Freedom of Information Law" (1995) 23 *Federal Law Review* 226, 227.

The Evolution of Public Interest Immunity Law Concerning Cabinet Documents

The common law provides for various privileges and immunities that confer a right to resist disclosure of information in legal proceedings. This includes public interest immunity.[14] Public interest immunity prevents the production of a document in legal proceedings, although relevant and otherwise admissible, if disclosure of that document would be "injurious to the public interest".[15] As Gibbs ACJ stated in the seminal case of *Sankey v Whitlam*, the public interest has two aspects that may conflict – namely, "the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents" on the one hand, and "the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done" on the other.[16] It is the role of the court, and not the Executive, to undertake this balancing exercise and determine whether the document should be produced.[17] The common law position is reflected in the *Evidence Act 1995* (NSW)[18] and is similar to that in the UK[19] and Canada.[20]

Cabinet information, along with defence secrets and information about diplomatic relations with foreign governments, has traditionally been seen as the archetypal public interest immunity claim.[21] As recognised by Spigelman CJ in *Egan v Chadwick*, this is based on the doctrine of collective ministerial responsibility and the associated convention of cabinet confidentiality.[22]

The doctrine of public interest immunity, previously known as Crown privilege, and particularly the treatment of cabinet information, has evolved significantly since the first half of the 20th century.

The first key case in that evolution is *Duncan v Cammell, Laird and Co Ltd*,[23] decided in 1942 during World War II. The cabinet documents subject to the immunity claim in that case contained information about a torpedo system built for the British Admiralty. In its decision, the UK House of Lords drew a distinction between claims of public interest immunity based on the contents of a particular document, and claims based on the document belonging to a class, which, in the public interest, must *as a class* be withheld from production, regardless of the contents of the document.[24] Cabinet documents, it was held, fell into the latter category. Importantly, the House of Lords also held that a certificate from a minister certifying that a document was a cabinet document and therefore should not be disclosed in the public interest, was conclusive and non-examinable by a court.[25]

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[14] In addition to public interest immunity, privileges available at common law include, for example, legal professional privilege. Interestingly, claims of "privilege" by the Executive in response to orders for papers have been made not only on the basis of these privileges and immunities, but also on other bases that are not themselves recognised heads of privilege, such as "commercial in confidence" (in reference to a contractual confidentiality requirement that could not in itself ground a legitimate public interest immunity claim) or "privacy": see, eg Hon Keith Mason AC QC, "Report Under Standing Order 52 on Disputed Claim of Privilege: WestConnex Business Case" (8 August 2014) 10–11.

[15] *Sankey v Whitlam* (1978) 142 CLR 1, 38 (Gibbs ACJ).

[16] *Sankey v Whitlam* (1978) 142 CLR 1, 38, quoting *Conway v Rimmer* [1968] AC 910, 940 (Lord Reid).

[17] *Sankey v Whitlam* (1978) 142 CLR 1, 38–39 (Gibbs ACJ).

[18] *Evidence Act 1995* (NSW) s 130(1).

[19] *Conway v Rimmer* [1968] AC 910; *R v Chief Constable of the West Midlands Police, Ex p Wiley* [1995] 1 AC 274.

[20] *Carey v Ontario* [1986] 2 SCR 637.

[21] *Sankey v Whitlam* (1978) 142 CLR 1, 57 (Stephen J).

[22] *Egan v Chadwick* (1999) 46 NSWLR 563, 574. The convention of cabinet confidentiality encompasses what is referred to in the case law as the "candour" argument, ie the notion that proper decisions at high levels of government can only be made if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and that the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them: *Sankey v Whitlam* (1978) 142 CLR 1, 40 (Gibbs ACJ).

[23] *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624.

[24] *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624, 636 (Lord Chancellor).

[25] *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624, 636 (Lord Chancellor).

This position changed in 1968, with the House of Lords ruling in *Conway v Rimmer* that it was for the *courts*, and not a *minister*, to balance the public interest and decide whether a claim of public interest immunity should be granted.[26] However, the Court maintained the distinction between contents and class-based claims, and recognised cabinet documents as indisputably belonging to a class absolutely protected from disclosure.[27]

The position shifted again in 1978 with *Sankey*. That case concerned an action for conspiracy brought by a private citizen against former Prime Minister Gough Whitlam and three members of his cabinet in relation to the so-called "loans affair". The applicant sought access to a range of cabinet documents and other state papers concerning high-level policy decisions.

In its decision the High Court maintained, consistent with *Conway*, that the public interest in withholding cabinet documents from production is based on their status as such (and the associated damage to cabinet confidentiality that disclosure would entail) and not their actual contents. However, the Court rejected the principle expounded in *Conway* that cabinet documents as a class should be absolutely immune from disclosure in the public interest: "It is impossible to accept that the public interest requires that all [such documents] should be kept secret for ever, or until they are only of historical interest."[28]

Importantly, the Court found that not all cabinet documents are worthy of the same protection. Gibbs ACJ in particular considered that the subject matter of the documents was relevant in balancing the competing public interests:

> ... [A]lthough there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, *the protection is not absolute*, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it *will not treat all such documents as entitled to the same measure of protection* – the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned.[29]

In determining that the documents sought (or extracts thereof) should be produced, the Court took into account: (a) the fact that their subject matter was of "no continuing significance from the point of view of the national interest" and that disclosure could not affect any present activity of government;[30] and (b) that upholding the immunity claim would deny the informant the opportunity to present his case that the defendants committed criminal offences while carrying out their ministerial duties, with the result that "a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office".[31]

The decision in *Sankey* to take into account the subject matter of a cabinet document in balancing the public interest led some commentators to suggest that the High Court had actually swept aside class-based protection of cabinet documents in favour of contents-based claims.[32] However, this suggestion was not borne out in *Northern Land Council*,[33] the final case in the evolution of the common law relating to public interest immunity and its application to cabinet information. The case concerned an action by the Northern Land Council to rescind an agreement with the Commonwealth in relation to uranium

[26] *Conway v Rimmer* [1968] AC 910.

[27] *Conway v Rimmer* [1968J AC 910, 952 (Lord Reid).

[28] *Sankey v Whitlam* (1978) 142 CLR 1, 41–42 (Gibbs ACJ), see also 58–62 (Stephen J), 95–96 (Mason J).

[29] *Sankey v Whitlam* (1978) 142 CLR 1, 43 (emphasis added).

[30] *Sankey v Whitlam* (1978) 142 CLR 1, 46 (Gibbs ACJ).

[31] *Sankey v Whitlam* (1978) 142 CLR 1, 46–47 (Gibbs ACJ), 56 (Stephen J).

[32] See, eg M Ryan and G Fell, "Public Interest Immunity for Cabinet Documents: Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd" (1988) 11 *Sydney Law Review* 602.

[33] *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

mining in the Ranger Project Area on the ground of alleged unconscionable conduct. In the course of the proceedings, the Northern Land Council sought the production of 126 notebooks recording discussions at cabinet meetings concerning the pre-contractual negotiations between the parties.

In upholding the Commonwealth's public interest immunity claim, the High Court affirmed that the immunity of cabinet documents as a class was not absolute, "even if, as in the case of records of Cabinet deliberations, the highest degree of protection against disclosure is warranted".[34] Documents recording the deliberations of cabinet were nevertheless found to fall within a class for which there are "strong considerations of public policy militating against disclosure, whatever their contents", with the Court concluding that the public interest in their disclosure would prevail only in the most exceptional circumstances.[35]

Factors identified by the Court as relevant in balancing the public interest in claims relating to cabinet documents include whether the documents concern matters that remain current or controversial, and whether the immunity claim is made in the context of a civil or a criminal proceeding, with the majority remarking:

> [W]e doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights. In criminal proceedings the position may be different.[36]

Finally, the Court held that where, in exceptional circumstances, there is a significant likelihood of the public interest in favour of disclosure outweighing that against disclosure, the appropriate course is for the judge to inspect the documents for the purpose of deciding whether the relevance of the material to the proceedings is sufficient, even in those exceptional circumstances, to justify disclosure.[37]

Today, *Sankey* and *Northern Land Council* remain the leading cases on public interest immunity and its application to cabinet documents in Australia, despite some academic criticism of the *Northern Land Council* decision.[38] More recent case law from New South Wales[39] demonstrates that, while cabinet documents do fall into a class of documents afforded protection on the basis of their status rather than their contents, a court assessing a claim for public interest immunity over such documents will take into account a range of factors in balancing the public interest, applying the general principles set down in *Sankey* and *Northern Land Council*. These factors include: the nature of the cabinet document, eg whether it discloses the actual deliberations of cabinet or was merely submitted to cabinet; the subject matter of the document, including whether that subject matter concerns policy development or a commercial dispute; the importance of the document to the proceedings; whether the proceedings are civil or criminal in nature; the circumstances in which the document was prepared, including any applicable statutory scheme; and whether the document was prepared by a consultant external to government. The weight accorded to any one of these factors will vary according to the circumstance of the case. If necessary, the court will inspect the documents in determining the claim.[40]

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[34] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 617–618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[35] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[36] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[37] *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 619 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

[38] See, eg Cossins, n 13.

[39] See, eg *State of New South Wales v Public Transport Ticketing Corp* [2011] NSWCA 60; *R v Obeid (No 9)* [2016] NSWSC 520; *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* (2017) 95 NSWLR 1.

[40] See, eg *State of New South Wales v Public Transport Ticketing Corp* [2011] NSWCA 60; *R v Obeid (No 9)* [2016] NSWSC 520.

The Case for the Council Having the Right to Access All Cabinet Documents

As observed by Sir Anthony Mason in a significant paper published in 2014, the central proposition of Spigelman CJ's judgment in *Egan v Chadwick* is that the power of the Council to require production of documents is derived "in significant degree" from its constitutional role within a system of responsible government.[41] In *Egan v Willis*, the High Court made the following observations about responsible government:

> A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. The point was made by Mill, writing in 1861, who spoke of the task of the legislature 'to watch and control the government: to throw the light of publicity on its acts'. 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'.[42]

This passage (not mentioned by the majority in *Egan v Chadwick*) makes clear that securing the accountability of government activities is the "very essence" of responsible government.[43] Mason therefore argues that, while cabinet confidentiality is an important element of, and conducive to, promoting and maintaining full and frank deliberations in cabinet

> [t]o say, as the majority in *Egan v Chadwick* did, that this element of ministerial responsibility is to prevail over the role of a House in securing accountability of government, *inverts the true order of constitutional priorities* and the right of the public to be fully informed about the activities of its government, and have those activities scrutinised by their elected representatives. ... As the Executive is responsible and answerable to the Legislature, the confidentiality of Cabinet deliberations cannot stand as a reason for denying to the Council the existence of a power that is necessary for achieving one of its constitutional functions when the Council considers that it needs access to Cabinet deliberations in order to review executive activity.[44]

In other words, in any conflict between the preservation of cabinet confidentiality and parliamentary scrutiny of executive activity, constitutionally speaking the latter should prevail over the former.[45]

Bret Walker SC has also pointed to the Council's constitutional role in a system of responsible government in arguing that it should have full access to cabinet documents:

> Responsible government is another facet of the same proposition by which the representatives, according to a ballot on the floor of the popular Chamber, will make or break the government. ... What in short is the special aspect of Cabinet documents which could keep them from the compulsory power hitherto declared for State papers to be produced to a House ... given that it is after all in the name of and for the people and through their representatives that the account is being held?[46]

In addition to these constitutional arguments, a number of judges and commentators have pointed out the obvious incongruity between the position of the courts and the Legislative Council vis-à-vis access to "true" cabinet documents, and have suggested that the majority in *Egan v Chadwick* was wrong to deny the right of the Council to order their production. For example, Walker has described this state of affairs as "extremely dubious and problematic", arguing:

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[41] A Mason, "The Parliament, the Executive and the Solicitor-General" in G Appleby, P Keyzer and JM Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate, 2014) 60.

[42] *Egan v Willis* (1998) 195 CLR 424, 451 (Gaudron, Gummow and Hayne JJ).

[43] Mason, n 41, 64.

[44] Mason, n 41, 64 (emphasis added).

[45] See also G Griffith, "Parliamentary Privilege: Major Developments and Current Issues" (NSW Parliamentary Library Research Service, Background Paper No 1/07, April 2007) 32; Walker, n 11, 7–8.

[46] Walker, n 11, 8.

> If that is good enough for the administration of justice one asks what is it either of its nature or *a priori* which says that the accountability of the Executive, one of the bulwarks of democracy, is categorically less important so that not by an ad hoc judgement or a specific weighing of factors in the particular circumstances but that they are automatically immune in every case.[47]

Similarly, Mason has pointed out that the majority judgments proceed as if the position articulated in the modern case law on public interest immunity did not exist. As the former Chief Justice succinctly put it: "If claims for privilege for such documents are not treated as conclusive in the courts, why should they be treated differently in Parliament?"[48]

Indeed, in his dissenting judgment in *Egan v Chadwick*, Priestley JA made the point that the case for the existence of the power in the Council is stronger than that in the courts, given the Council's high constitutional functions:

> So, if in the adversary situations in which the case law has established public interest immunity may attach, a branch of government other than the Executive is trusted with the power to compel the production of documents for which the Executive claims such immunity, equally there should be no objection in the different situation that arises between the Executive and a House of Parliament, to the possession by another branch of government other than the Executive, of the same power; *the more so when the power is necessary for the proper carrying out of the function of that branch of government.*
>
> 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 as in the courts when dealing with documents in respect of which the Executive claims public interest immunity.[49]

Developments in Other Jurisdictions

It is interesting to note that certain other Australian houses of parliament have challenged Executive resistance to release of cabinet documents (or purported cabinet documents). For instance, the Western Australian Parliament has given the Auditor General the role of expressing an opinion as to whether it is reasonable and appropriate for a minister not to provide information to Parliament.[50] In a recent 2016 report, the Auditor General found that decisions by three ministers to withhold information from Parliament due to cabinet confidentiality were not reasonable, including on the basis that some of the requested information were publicly available statistics, and were not prepared solely for the purpose of cabinet deliberations.[51]

Another very recent example of a parliament seeking access to cabinet documents occurred in Tasmania. In March 2016, the Standing Committee of Public Accounts, a joint committee of the Parliament of Tasmania, commenced an inquiry into the financial position and performance of government-owned energy entities.[52] During the inquiry, the committee sought a copy of a 2015 letter from the Treasurer to the Minister for Energy concerning the sale of the Tamar Valley Power Station. The government provided a redacted copy but resisted the committee's repeated requests for an unredacted copy of the letter, claiming public interest immunity on the grounds that the document was cabinet-in-confidence.

The committee subsequently issued a summons for the Treasurer to provide the document but again he refused to provide the letter. On 5 April 2017 the committee made a special report to Parliament, which included legal advice disputing the grounds upon which the Premier refused to comply.[53]

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[47] Walker, n 11, 7, 8.

[48] Mason, n 41, 63.

[49] *Egan v Chadwick* (1999) 46 NSWLR 563, 594 (emphasis added).

[50] *Auditor General Act 2006* (WA) s 24.

[51] Western Australian Auditor General's Report, "Opinions on Ministerial Notifications" (August 2016) 8–14.

[52] Standing Committee of Public Accounts, Parliament of Tasmania, "The Financial Position and Performance of Government Owned Energy Entities", Report No 16 (2017).

[53] Standing Committee of Public Accounts, Parliament of Tasmania, "Failure to Comply with Summons", Special Report No 5 (2017).

On 23 May 2017 the chair of the committee, the Hon Ivan Dean MLC, moved a motion in the Legislative Council calling on the Treasurer to reconsider his refusal to comply with the summons, noting that the principle of parliamentary accountability is embodied in a system of responsible government and suggesting that the letter be provided to an independent and suitably qualified third party as arbiter to assess the validity of the claim to immunity (referencing the arbitration system provided for in New South Wales under Standing Order 52).[54] The motion was agreed to but was not debated or voted on in the House of Assembly and so the matter remains unresolved.

ARE ONLY "TRUE" CABINET DOCUMENTS BEING WITHHELD FROM THE LEGISLATIVE COUNCIL?

The Legislative Council and the Executive hold disparate views regarding what constitutes a cabinet document.

As noted above, in *Egan v Chadwick* Spigelman CJ distinguished between documents that disclose the actual deliberations of cabinet ("true" cabinet documents) and those that are in the nature of reports or submissions prepared for the assistance of cabinet, which may not be "true" cabinet documents. However, in responding to orders for papers the New South Wales Department of Premier and Cabinet (DPC) relies on the definition of cabinet documents in the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act).[55] This definition includes not only official records *of* cabinet but also documents prepared *for* cabinet.[56] While DPC acknowledges that this definition may not be entirely consistent with the views of the majority in *Egan v Chadwick* it is nevertheless its preferred definition. Indeed, in 2013 DPC proposed that for the sake of consistency and clarity the Legislative Council should incorporate this definition into Standing Order 52.[57]

The Legislative Council rejects the definition of cabinet documents in the GIPA Act, as noted by the Privileges Committee in 2013 and the Council in 2014.[58] According to the Clerk of the Parliaments, this definition is much broader in scope than the position articulated by Spigelman CJ in *Egan v Chadwick* and, if adopted, would have a deleterious impact on the Council's scrutiny function:

> While it is understood that uniformity of terms and expressions would assist agencies, limiting the power of the Legislative Council to order the production of State papers by reference to the terms, definition or tests contained in GIPA could have a significant and detrimental impact on the ability of the House to hold the executive government to account.[59]

According to the Clerk, the test proposed by an independent legal arbiter in 2005, which is consistent with the majority judgments in *Egan v Chadwick*, is to be preferred:[60]

> 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.[61]

[54] Tasmania, *Parliamentary Debates*, Legislative Council, 23 May 2017.

[55] Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny Return to Order* (2013) 78–79.

[56] Privileges Committee, n 55, 79.

[57] Supplementary Submission 8a to Privileges Committee, *Inquiry into the 2009 Mt Penny Return to Order*, July 2013, 11 (Department of Premier and Cabinet).

[58] Privileges Committee, n 55, 93; New South Wales, *Minutes*, Legislative Council, 19 November 2014, 340–341.

[59] Submission 11 to Privileges Committee, *Inquiry into the 2009 Mt Penny Return to Order*, August 2013, 6 (Clerk of the Parliaments).

[60] Privileges Committee, n 55, 80.

[61] T Cole, "Disputed Claim for Privilege: Desalination Plant, Report of the Independent Arbiter" (22 December 2005) 3–4.

Given the disparate views between the Executive and the Council regarding the definition of cabinet documents, it follows that documents the Council considers it should have access to through orders for papers are being withheld. However, the extent of this practice is difficult to measure, as the Clerk explained in a submission to the Privileges Committee in 2013:

> The Legislative Council remains largely unaware of the extent to which the Government withholds documents on the basis that they are Cabinet documents. There are occasionally indications that the Executive Government has withheld documents explicitly on the grounds of Cabinet confidentiality, but this is rare.[62]

As noted by the Clerk, in most cases the Council is only aware that a cabinet document is not being provided if it has made a request for a specific document that is known to be, or is subsequently identified by the Executive to be, a cabinet document. But, in most cases, orders for papers are couched in broad terms and specific documents are not requested. Notwithstanding the requirement under Standing Order 52 to provide an index detailing any documents over which a claim of privilege is made, including cabinet documents, agencies are advised by DPC not to comply with the Standing Order: "Cabinet documents should not be produced or referred to in responding to the Resolution."[63] The requirement for an index to be provided is discussed further below.

There is no doubt that agencies are following these instructions, as reference to cabinet documents is rarely included in returns to orders. As the following email from the Sydney Catchment Authority (SCA) to DPC relating to a 2014 order for papers demonstrates, such references are removed if inadvertently included: "... document PG94 is a Cabinet document, please remove reference to the document in the SCA index list of documents and remove the document PG94 from material provided to the Legislative Council".[64]

As a consequence, the Council has no idea whether or how many documents are being held back on cabinet-in-confidence grounds, a predicament noted by the Leader of the Opposition, the Hon Luke Foley, in 2013:

> I can report that last night the Legislative Council received returned papers from the Executive Government that were subject to an order carried a couple of sitting weeks ago. I can report that there is an assertion there that Cabinet documents have not been provided. We cannot refer that to [independent arbiter] Sir Laurence Street as if it were a dispute about whether a particular document ought to be privileged or not privileged; it is simply an assertion. We do not know what the documents are that have not been provided ... What is to be done?[65]

The Hollowmen Effect?

Are governments ascribing cabinet status to documents for the sole purpose of evading scrutiny even beyond the boundaries of the GIPA Act, thus increasing the quantum of material withheld in response to an order for papers? John Hannaford, the Leader of the Opposition during the *Egan* litigation, suspects so: "Do I suspect that reports are generated and marked as for a cabinet committee for the purposes of protecting these documents? Yes I do, I believe that is accurate."[66] A member of the Legislative Council, the Hon Catherine Cusack, frustrated by repeated instances of supposed cabinet documents being excluded from returns, said in 2004:

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[62] Submission 11 to Privileges Committee, *Inquiry into the 2009 Mt Penny Return to Order*, August 2013, 12 (Clerk of the Parliaments).

[63] Privileges Committee, n 55, 107.

[64] Email from Mr Andrew Bryan (Acting Executive Director Policy and Governance, Sydney Catchment Authority) to Emanuel Sklavounos (NSW Premier's Department, Standing Order 52 – Tallowa Dam), 14 September 2004.

[65] L Foley, Transcript of Key Note Address to the *C25 Seminar*, Parliament of New South Wales, 20 September 2013, 14 <https://www.parliament.nsw.gov.au/lc/seminars/Documents/C25%20Seminar%20-%20Uncorrected.pdf>.

[66] J Hannaford, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick: A Commemorative Monograph* (2017) 40.

> The Executive must not be allowed to escape accountability by stapling photocopies to the back of a Cabinet Minute ... it is a deliberate attempt by a Minister to fetter the powers of this House to perform its duty in making the Executive accountable. It is a serious matter and our responsibility to pursue it is crystal clear.[67]

In 2009, the then Clerk of the Parliaments, Lynn Lovelock, observed:

> There are also occasionally signs that appear to validate suspicions that the Executive Government may have used Cabinet confidentiality as a cloak against the production of documents to the Council. In September 2005, the Director General of the Premier's Department issued a memorandum to all departmental chief executive officers advising that all documents prepared for the 2005-2006 Budget Estimates hearings should be prepared for submission to and consideration by the Cabinet Standing Committee on Public Administration.[68]

In 2017, her predecessor, John Evans, said:

> Lots of reports and documents are prepared by public servants that end up as submissions to cabinet. The Department of Premier and Cabinet seem to think that you could put all those things in a wheelbarrow and claim them as being part of the deliberations of cabinet.[69]

These members and former clerks were referring to the alleged practice, parodied by the television series *The Hollowmen*, whereby documents are put into a wheelbarrow (or indeed a tea trolley) and wheeled through a cabinet room so that the government can claim that the documents are cabinet-in-confidence. Lovelock suggested that the practice may have been first observed in Queensland:

> ... with reference to the former freedom of information legislation in Queensland, it has been claimed that 'boxes of documents [were] wheeled in and out of the Cabinet room on trolleys to give them protected status', 'that the "Cabinet tea trolley exemption" ... allow[ed] a document to be exempted as a cabinet document if it had even been in the cabinet room' ...[70]

Twomey is sceptical about such stories, which she has described as "apocryphal":

> There were allegations that during Joh Bjelke Petersen's time they used to wheel documents through the cabinet room but at least that was while cabinet was sitting. In The Hollowmen they wheeled them through the room when no-one was in it. Personally, I have never actually known it to happen.[71]

While the practice is unlikely to be as brazen as that presented in *The Hollowmen*, there is sufficient anecdotal evidence to suggest that it is not a complete fiction, further exemplifying the gulf between the Executive and the Council with regards to the definition of a cabinet document.

The Requirement to Provide an Index

The Council would be in a better position to gauge the volume of documents *not* provided on cabinet grounds if the Executive provided an index of *all* privileged documents, including cabinet documents.

Under Standing Order 52, where a document is considered to be privileged an index is to be prepared showing the date of creation of the document, a description of the document, the author and the reasons for the claim of privilege. However, as adverted to above, governments not only withhold supposed cabinet documents, but information in relation to these documents is rarely, if ever, provided. Noting in 2005 the increasing frequency with which the government was withholding documents from orders for

[67] New South Wales, *Parliamentary Debates*, Legislative Council, 28 October 2004, 12188 (Catherine Cusack).

[68] L Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On" (2009) 24(2) *Australasian Parliamentary Review* 209.

[69] D Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan and Chadwick: A Commemorative Monograph* (2017) 40.

[70] Answer to Question on Notice, Finance and Public Administration References Committee, *Independent Arbitration of Public Interest Immunity Claims*, 18 December 2009, February 2010 (Ms Lynn Lovelock, Clerk of the Parliaments).

[71] Finance and Public Administration References Committee, Australian Senate, *Independent Arbitration of Public Interest Immunity Claims* (2010) 27.

papers on the basis of cabinet confidentiality, the Legislative Council attempted to address this trend by resolving that an index be provided of *all* documents *not* returned,[72] as can be seen from the following paragraph in a further order relating to grey nurse sharks in 2005:

> 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.[73]

In response, DPC advised that the index would not be provided, based on legal advice that the Council did not have the power to impose such a requirement – a view that has been vigorously disputed by the Council.[74] A year later, in May 2006, a notice of motion from an Opposition member listed instances over the past eight months where documents were not provided on cabinet grounds and asserted the need for the Council to be informed of the nature of any document claimed to be a cabinet document:

> [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.[75]

The notice was interrupted by prorogation and never moved.[76]

And so with neither the documents nor an index being provided, the Executive is withholding from the Council a broad range of so-called cabinet documents, true or otherwise, as acknowledged by the New South Wales Privileges Committee in 2013:

> ... there is no mechanism for assessing the validity of the Cabinet immunity claimed over documents *as this judgement is made within the context of the departments' internal processes* – the documents are simply not provided to the Parliament.[77]

WHAT CAN BE DONE TO ADDRESS THE SCRUTINY GAP?

For more than a decade, the Legislative Council has exercised its powers to order state papers in a way few other jurisdictions could ever contemplate. But what is to be done about the most "obvious and glaring gap" in executive accountability in New South Wales – the withholding of cabinet documents from parliamentary scrutiny, contrary to the current state of the law?[78] This part looks at how the Council could fill the scrutiny gap, beginning with a brief overview of the arbitration process used by the Council to determine executive claims of privilege.

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[72] New South Wales, *Procedural Highlights No 20*, Legislative Council, January–June 2005, 5.

[73] New South Wales, *Minutes*, Legislative Council, 1 December 2005, 1813 (Grey Nurse Shark). The same paragraph was also included in notices of motion under Standing Order 52 regarding the CBD and South East Light Rail Project (New South Wales, *Notice Paper*, Legislative Council, 6 November 2014, 1258) and the Inquiry into Museums and Galleries (New South Wales, *Notice Paper*, Legislative Council, 24 May 2017, 8803).

[74] Lovelock, n 68, 215.

[75] New South Wales, *Minutes*, Legislative Council, 1813 (Grey Nurse Shark).

[76] L Lovelock and J Evans, *NSW Legislative Council Practice* (Federation Press, 2008) 485.

[77] Privileges Committee, NSW Legislative Council, *Possible Non-compliance with the 2009 Mt Penny Order for Papers* (2013) 10 (emphasis added).

[78] Walker, n 11, 11.

The Arbitration Process Under Standing Order 52

In accordance with Standing Order 52, a claim of privilege may be made by the Executive over documents returned in response to an order for papers. Documents subject to a claim of privilege are kept in the custody of the Clerk and made available for inspection by members of the Legislative Council only. If a member disputes a claim of privilege, the President authorises the Clerk to appoint an independent legal arbiter to report on the validity of the claim. The arbiter's report informs members, but the ultimate decision as to whether the claim of privilege should be overturned is made by the Council. Since the *Egan* decisions, a total of four independent arbiters have reported on 52 disputes in relation to more than 360 returns to order.[79] Over this time, there has not been a single breach of the confidentiality of privileged documents.[80] As noted above, the arbiter is rarely called on to arbitrate privilege claims in relation to cabinet documents because neither the documents, nor an index of the documents, are provided. The following section makes some preliminary suggestions about how to address this situation, noting that these options themselves raise complex issues that go beyond the remit of this article.

Arbitration Process for Cabinet Documents

The first resolutions passed by the Legislative Council setting out procedures for orders for papers in the wake of *Egan v Willis* envisaged a role for the arbiter in adjudicating cabinet exemption claims, but did not propose for members to have access to these documents prior to such adjudication. For example, the first resolution, passed in October 1998, included the following provision:

> Any document for which privilege is claimed and which is identified as a Cabinet document shall not be made available to a Member of the Legislative Council. *The legal arbiter may be requested to evaluate any such claim.*[81]

The wording was varied slightly in a subsequent resolution passed in November 1998, but still assumed a role for the adjudicator and reiterated that members would *not* have access to cabinet documents:

> Where any documents for which privilege is claimed is identified as a Cabinet document the document must not be made available to a Member of the Legislative Council. The Clerk is authorised to release the documents to the independent arbiter for evaluation and report under paragraph 5.[82]

By 2003, following the 1999 decision in *Egan v Chadwick*, the sessional order preceding Standing Order 52 omitted any reference to cabinet documents and the role of the arbiter in assessing claims based on cabinet confidentiality, as does the current Standing Order.[83] Therefore, in future, the Council could consider asserting the requirement under the Standing Order that cabinet documents be produced in just the same way as other privileged documents.

If this is a bridge too far, consideration could be given to reverting to the procedure originally envisaged in 1998, which involved an arbiter being asked to adjudicate on whether a privilege claim on cabinet documents should be upheld. The arbiter would receive the actual documents in order to make an assessment of whether the document was a "true" cabinet document and should therefore, in accordance with *Egan v Chadwick*, be excluded from the return.

Presumably, the idea that only an arbiter (and not members) would access supposed cabinet documents is based on the particular sensitivity of this class of documents and the risk of leaks, but it would not be difficult to see why some members may object to such a proposal: members are able to access other documents over which a claim of privilege is made, many of which are highly sensitive, and none of which have been leaked since the resurgence of orders for state papers in the

[79] Clune, n 69, Appendices 2, 3.

[80] J Moore, "The Challenge of Change: A Possible New Approach for the Independent Legal Arbiter in Assessing Orders for Papers?" (Paper presented at the *2015 ANZACATT Conference*, 2015) 2.

[81] New South Wales, *Minutes*, Legislative Council, 13 October 1998, 745 (emphasis added).

[82] New South Wales, *Minutes*, Legislative Council, 26 November 1998, 953.

[83] *Annotated Standing Orders of the NSW Legislative Council*, forthcoming.

late 1990s. And, as discussed above, the courts regularly inspect cabinet documents in determining public interest immunity claims. So why should members of the Legislative Council not be similarly entrusted? One response to this is that, unlike courts and independent arbiters, members have a political interest in the resolution of disputes about cabinet documents and so political factors will come into play, as opposed to a dispassionate assessment of the nature and significance of the document concerned.

Whatever approach the Council takes to the current scrutiny gap, it should at the very least continue to insist on receiving an index of all documents withheld on cabinet grounds, as emphasised in the 2005 and 2014 resolutions and notwithstanding the refusal of the Executive to provide details of cabinet documents to date. However, the limitations of such an index should also be kept in mind. Several commentators have noted that access to *documents* over which a claim of privilege has been made, rather than just an *index*, is fundamental to adjudicating claims of privilege. For instance, in 2010, Lovelock told the Senate Finance and Public Administration References Committee:

> I cannot see how the arbiter can make a valid assessment solely on the basis of the claim that the executive put forward. I think that it is impossible to do that without seeing what the documents are. I think it could end up with formulaic responses by the executive that would be impossible to dispute because they are formulated in such a way that they fall within any definition of what would be legal professional privilege.[84]

According to the former Clerk of the Senate, Harry Evans, it may not be necessary to look at documents over which a claim of privilege has been made; that could be left to the judgement of the arbiter, but "[i]f the arbiter comes back and says 'I'm not able to determine this matter because I really can't tell whether the claim is justified without seeing the documents', then the Senate could order the production of documents to the arbiter".[85] Of course nothing in the above discussion should be taken to suggest that the current practice, whereby privileged documents are provided to all members, should in any way be changed.

Articulating the Legislative Council Position

For Walker, the long-term solution to the "obvious and glaring gap" in the accountability of the Executive to Parliament lies in dispensing with the "fiction" of cabinet solidarity, which in his view will continue to be eroded by governments of the future – "fractious and internally divided" coalitions "where the rough welds are very obvious".[86] However, absent the Executive giving up its secrecy, he believes the disclosure of all cabinet documents to the Council is unlikely to be effected in the courts or by legislation. The best hope, Walker suggests, is for members to "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'.[87]

Fifty years on, says Walker, someone will pull all of those statements together so that the position by the Legislative Council will be recognised as the "true state of affairs … 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".[88]

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[84] Finance and Public Administration References Committee, n 71, 34.

[85] Finance and Public Administration References Committee, n 71, 36.

[86] Walker, n 11, 9.

[87] Walker, n 11, 14.

[88] Walker, n 11, 9.

CONCLUSION

While *Egan v Chadwick* is the current state of the law, Mason and Walker present a compelling case on constitutional grounds for the Council to have access to *all* cabinet documents. It is, however, also important to acknowledge that this is an issue on which reasonable minds differ; there will be many, particularly outside the institution of Parliament, who believe that cabinet confidentiality as an application of the principle of collective responsibility should prevail over Parliament's role scrutinising the Executive.

For this issue to be resolved, either politically or through litigation, it would need to be pursued by a majority of members who feel their ability to scrutinise the Executive is being compromised by the withholding of a cabinet document. To this end, the Council should consistently assert its position regarding cabinet documents, which should arguably go as far as that articulated by Priestley JA.

In the meantime, the test articulated by Spigelman CJ in *Egan v Chadwick* as to which cabinet documents should be withheld from the Council's scrutiny should be followed; the test under the GIPA Act employed by the Executive is inconsistent with the law and is creating a significant scrutiny gap.

The Council should continue to assert that the arbitration process under Standing Order 52 encompasses cabinet documents. Alternatively, the Council could consider implementing a procedure where, in the first instance, only the arbiter receives cabinet documents. Whatever approach the Council adopts, it should press the Executive to provide an index of *all* documents subject to a claim of privilege, with sufficient detail to enable an assessment of whether the government's claim that a document in question is a "true" cabinet document is valid.

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ORDERS FOR PAPERS AND PARLIAMENTARY COMMITTEES: AN UPDATE FROM THE NEW SOUTH WALES LEGISLATIVE COUNCIL

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[1] With thanks to Ms Monica Loftus and Ms Teresa McMichael for drafting the material on orders for papers and parliamentary committees respectively.

INTRODUCTION

The 24 sitting days during the first half of 2018 have seen a number of significant developments in the role of the New South Wales (NSW) Legislative Council as an effective House of Review. 20 years after the High Court decision in *Egan v Willis*[2] and the Court of Appeal decision in *Egan v Chadwick*,[3] for the first time the Legislative Council has seriously grappled with the question of its powers to require the production of a class of documents which have been classified by the executive government as "cabinet information." A series of business cases on significant capital projects have ultimately been produced and the House has asserted its position in relation to its powers to require the production of such documents. At the same time, two new parliamentary committees designed to enhance legislative scrutiny have been trialled, and two new "super committees" concerned with Public Accountability and Public Works have been established. Finally a private members bill introduced by a Member of the Legislative Council, including provision for a joint statutory committee on modern slavery, has been enacted.

ORDERS FOR PAPERS AND "CABINET INFORMATION"

In 1998 the High Court of Australia confirmed the power of the NSW Legislative Council to order the production of state papers, because such a power was reasonably necessary for the House to fulfil its functions of making laws and holding the executive government to account.[4] In 1999 the NSW Court of Appeal confirmed that this power extends to requiring the production of state papers notwithstanding the making by the executive government of claims of public interest immunity or legal professional privilege. What the 1998 decision in *Egan v Chadwick* left in the view of some observers unsettled, however, was the situation with regards to "cabinet documents," with the three judges making different statements on this point, which may be summarised as follows:

(a) Spigelman CJ held that:
   (i) a distinction has been made between documents which disclose the actual deliberations within Cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet;
   (ii) 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"; and
   (iii) however, 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.

[2] [1998] HCA 71.
[3] [1999] NSWCA 176.
[4] For an account of the parliamentary proceedings leading up to two so called Egan cases, see David Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick. Part Three of the Legislative Council's History Project*, September 2017.

(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;

(c) Priestley JA noted that:
   (i) a court has "the power to compel production to itself even of Cabinet documents";
   (ii) 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 as in the courts when dealing with documents in respect of which the Executive claims public interest immunity"; and
   (iii) "… 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, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy."[5]

Over the 20 years since the Egan cases there have been over 300 orders for the production of documents complied with by successive NSW Governments. From time to time members have suspected that certain important documents otherwise captured by the terms of an order have not been produced, on the grounds they are deemed by the executive government to be "cabinet documents" or "cabinet information." In a very small number of cases this has been made explicit, mostly it has been supposition. On a couple of occasions in that time one or more members have been interested in testing the issue but they have never garnered enough support to pursue the matter. In other instances, whilst disappointed for instance that "business cases" or other consultant reports known to exist have not been produced, members have found enough information of interest in the other documents produced.[6] However, all that changed in early 2018.

Sydney Stadiums

On 15 March 2018, the House ordered, under standing order 52, that the Government produce documents relating to the Government's Sydney stadiums redevelopment strategy (which includes proposals announced in November 2017 to demolish and rebuild Allianz Stadium and to reconfigure ANZ Stadium at Olympic Park.) The motion was agreed to on the voices without a division being called. Documents returned included public documents as well as documents over which claims of privilege were made.[7]

[5] This is the summary adopted in the resolution of the house of 21 June 2018, discussed below: Legislative Council, *Minutes of Proceedings*, 21/6/2018, p 2796.

[6] For a detailed discussion of the question "Are only *true* cabinet documents being withheld from the Legislative Council?" see Sharon Ohnesorge & Beverly Duffy, "Evading Scrutiny: Orders for papers and Access to Cabinet Information by the New South Wales Legislative Council, (2018) 29 PLR 118.

[7] A dispute regarding the claims of privilege over several of the documents was lodged by the Leader of the Opposition, the Hon Adam Searle. Under standing order 52, an Independent Legal Arbiter, the Hon Keith Mason AC QC was appointed to evaluate and report on the claims of privilege. The arbiter did not uphold the claims of privilege over most of the disputed documents. Of particular relevance to the question of the status of cabinet

The return did not include the business cases for redevelopment of the two Sydney stadiums, even though in March 2018 Infrastructure NSW had published summaries of these business cases on its website. In response to queries from members regarding the business cases and other documents, the Government confirmed that it had enquired into whether the relevant agencies or ministers "hold any additional documents that are lawfully required to be provided in accordance within the terms of the resolution" and advised that "no agency or minister's office named in the resolution has identified any additional documents for production."[8]

Powerhouse Museum

On 12 April 2018, the House again used its powers under standing order 52 to order documents, this time relating to the proposed relocation of the Powerhouse Museum from Ultimo near the Sydney CBD to Parramatta. (This was a project announced during the 2015 NSW election campaign and since that time the Government has been preparing detailed business cases and planning its implementation.) The terms of this resolution were narrow in scope, requesting only the draft and final business case for the project. The motion was passed by one vote (19-18) on division.

On the due date for the return, the Government did not produce the business cases. Instead, it provided correspondence from each of the agencies named in the order stating that they held no documents covered by the terms of the resolution. This was despite a "summarised business case" being published by Infrastructure NSW on its website.

The Leader of the Government in the Legislative Council, the Hon Don Harwin, argued that the Government had complied with the order and indicated (though did not confirm) that the documents were Cabinet documents. He stated:

> " … the power of the House to compel the production of documents does not extend to Cabinet information. Accordingly, even if otherwise covered by the terms of an order, Cabinet documents are neither identified nor produced in response to an order."[9]

Furthermore, he argued the Government is not required to state the reason for non-production, citing a precedent set by the previous government in responding to an order for papers in 2005 relating to grey nurse sharks. He referred to the Government's position on the decision of the Court of Appeal in *Egan v Chadwick* and also cited the practice of the previous and current governments not to provide, or even acknowledge the existence of, Cabinet documents.

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documents, at the request of the Government, the Clerk sought confirmation from the Independent Legal Arbiter about the status of a document provided by Venues NSW. The agency had subsequently argued that it should not be made public as it "was a document prepared for the consideration of the Expenditure Review Committee of Cabinet" and was therefore claimed to have "a powerful public interest against its further disclosure". The arbiter responded in correspondence dated 31 May 2018, stating "This document was not claimed to reveal internal deliberations of Cabinet as per Spigelman's analysis in Chadwick. Nor did it disclose same in my evaluation. I intended and intend that it be covered by my general reasons rejecting PII [public interest immunity] privilege as claimed in this return."

[8] Correspondence, Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet, 16 May 2018, p. 1.
[9] *Hansard*, Legislative Council, 1/5/2018, p 14.

Tune report on out-of-home care

On 17 May 2018, the House ordered the Government to produce the Tune Report on the out-of-home care system. (This report by former senior public servant Mr David Tune examining the out-of-home care system for vulnerable and at risk children and young people had been provided to the Government in 2016.) The resolution was agreed to on division (20-19).

On the due date for the return, once again, no documents were received. Correspondence from the Department of Premier and Cabinet stated that no agencies held documents covered by the terms of the resolution which were "lawfully required to be provided".

In debate in the House, the Opposition questioned the Government's compliance with the order, including inquiring into whether the document was truly a Cabinet document and, if so, whether the Government had waived Cabinet confidentiality by reportedly offering to make a copy of the report available to one crossbench member of the House.[10]

Censure of the Leader of the Government

On 5 June 2018, the Leader of the Opposition in the Legislative Council moved that the House note the failure of the Government to comply with the previous three orders for papers. The motion again ordered that the Powerhouse Museum business case and Tune Report be produced, as well as explicitly ordering the production of the Sydney Stadiums business cases, by 9.30 am the next day. The motion also censured the Leader of the Government and ordered that, if the resolution was not complied with, the Leader of the Government be required to attend in his place at the Table at the start of the next sitting day and provide an explanation. The motion was debated throughout the day and eventually agreed to later that evening, on division (21-20).

At the start of the next sitting day, the President tabled correspondence received that morning from the Department of Premier and Cabinet advising that there were "no further documents for production" and attaching advice from the Crown Solicitor to this effect. It was widely anticipated that standing orders would be suspended that morning to enable a motion to be moved holding the Leader of the Government to be in contempt of the House for failing to comply with the orders, and for his suspension from the House in order to compel compliance. However, when the Leader of the Government was then called on to address the House in compliance with the order of the House of the previous day as to his reasons for continued non-compliance, he stated that the documents would be provided by the Department of Premier and Cabinet (DPC) by 5.00 pm on Friday 8 June 2018.

Business cases and consultant report produced and subsequent resolution of the House

On Friday 8 June 2018, the documents were produced. The draft and final Tune Reports were provided in full and made public. Redacted copies of the Sydney Stadiums and Powerhouse Museum draft and final business cases were made public and unredacted copies were provided on a confidential basis and made available to members only. Correspondence accompanying these documents noted:

[10] *Hansard*, Legislative Council, 17/5/2018, p 28; 22/5/2018, p 17; 5/6/2018, p 34.

> "all of the documents referred to in the resolution are Cabinet documents, and that the Legislative Council has no power to require such documents to be produced. On this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production."

Despite the correspondence advising the documents had been produced on a voluntary basis, they were received under Standing Order 52 and treated as documents produced under compulsion in response to the orders of the House.

On 21 June 2018, the House agreed to a motion noting the Government's previous non-compliance with orders for papers, the actions that had subsequently occurred and rejecting the claim that the documents had been provided voluntarily. The motion noted that the documents had been provided and received under Standing Order 52 as that is the only established mechanism by which the Clerk may receive documents directly from the DPC. The motion also rejected the Government's use of the *Government Information (Public Access) Act 2009* definition of "Cabinet information", noting that the Government's reliance on such a definition "is likely to have led to a much broader class of documents being withheld from production to this House". The motion further stated that the House does have the power to require the production of Cabinet documents such as those produced on this occasion (ie business cases for capital projects and consultant reports on areas of government administration) and that the test to be applied in determining whether a document falls within this category is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick. This motion was agreed to on division (21-20).

FIVE NEW PARLIAMENTARY COMMITTEES

Trial committees to enhance legislative scrutiny

In 2018 the Legislative Council established two trial committees – a Regulation Committee and a Selection of Bills Committee.

Both committees were established in response to recommendations from a 2016 select committee inquiry into the Legislative Council Committee System, which found that while the Council's committee system was working well, the Legislative Council should play a greater role in scrutinising bills and delegated legislation.[11]

The select committee recommended the establishment, on a trial basis, of a Selection of Bills Committee to ensure more draft legislation is referred to committees for detailed consideration, and a Regulation Committee to focus on delegated legislation.

The recommendations were agreed to by the House on the last sitting day in 2017, with both trial committees commencing on the first sitting day in 2018 and concluding on the last sitting day in November 2018.[12] Both committees are to table a report evaluating their trial.

[11] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), p vi.
[12] *Hansard,* Legislative Council, 23 November 2017, p 2221-2225.

Regulation Committee

History of regulation review in New South Wales

All bills introduced in the NSW Parliament must be considered by the joint statutory Legislation Review Committee. The committee, administered by the Legislative Assembly, is required to report to both Houses as to whether any bill:

(i) trespasses unduly on personal rights and liberties, or

(ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

(iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

(iv) inappropriately delegates legislative powers, or

(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[13]

The committee must also consider all regulations subject to disallowance by resolution of either or both Houses of Parliament.[14]

From 1960 to 1987 all regulations were reviewed by a Legislative Council committee. In 1987 a Legislative Assembly select committee recommended that this role be undertaken by a joint parliamentary committee. The bill to enact this recommendation and establish a joint Regulation Review Committee was met with resistance in the Council from members of the Opposition and crossbench. The Hon Max Willis argued that the Council committee had 'been doing its job just a little too effectively and [was] causing some embarrassment to the government'.[15] He suggested that 'it might be convenient to bury its role in a new committee totally dominated by the lower house and the government control that involves'.[16] Nevertheless, the bill passed the Council, and the joint Regulation Review Committee was established in 1987. It remained in operation until 2003 when its role was subsumed by the current Legislation Review Committee.

The creation of the Legislation Review Committee stemmed from a 2001 recommendation from the Standing Committee on Law and Justice that a joint legislation review committee be established to work alongside the joint Regulation Review Committee.[17] The Law and Justice Committee recommended that a joint committee should undertake this role as it is 'important that the protection of rights and liberties be the responsibility of the whole Parliament'.[18] The Government supported the establishment of a joint committee but argued it was unnecessary to have separate committees to review legislation and regulations and combined both functions into the present Legislation Review Committee.

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[13] *Legislation Review Act 1987*, s 8A.
[14] *Legislation Review Act 1987*, s 9.
[15] *Hansard*, NSW Legislative Council, 23 November 1987, p 16799 (Max Willis).
[16] *Hansard*, NSW Legislative Council, 23 November 1987, p 16799 (Max Willis).
[17] Standing Committee on Law and Justice, NSW Legislative Council, *A NSW Bill of Rights* (2001), p 132.
[18] Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), p 132.

During the early years of the committee, concerns were raised that the joint functions of scrutinising bills and regulations was proving ineffective. This was raised in a 2003-2004 report by the committee itself,[19] which recommended that it appoint a sub-committee to deal with regulations. The matter was again raised in 2006 by the then Legislative Council Opposition Whip, who noted that the committee's function relating to regulations was gradually diminishing.[20] The importance of reviewing regulations was also raised by the Hon Elizabeth Kirkby during C25, the commemoration of the 25th anniversary of the modern committee system in the Legislative Council:

> the devil lies in the regulations. So unless the regulations are being fully policed, you will never know whether that legislation is going to work. If it is necessary to strengthen the[Legislation] Review Committee, perhaps that is something that should be done.[21]

Remit of the Legislative Council Regulation Committee

In the 2016 select committee inquiry into the Legislative Council Committee System, stakeholders referred to the current joint Legislation Review Committee and submitted that combining the regulation and bill review functions within the one committee was ineffective and that the scrutiny of regulations was gradually diminishing.[22]

In recommending the establishment of a Regulation Committee, the select committee proposed that rather than replicating the work of the joint Legislation Review Committee, which reviews *all* disallowable regulations, the new committee would take an innovative approach to its role by focusing on the substantive policy issues regarding a small number of regulations of interest as well as trends relating to delegated legislation.[23]

This is reflected in the resolution appointing the committee, which states that the committee may inquire into and report on:

(a) any regulation, including the policy or substantive content of a regulation, and

(b) trends or issues that relate to regulations.[24]

This remit reflects an increasing perception in the academic literature that the 'old divide' between technical scrutiny of regulations – checking for violations of civil liberties and rule of law principles (as performed by the joint Legislation Review Committee) – and reporting on the policy or substantive content of a regulations, is no longer valid. As Aronson argues:

> As substantive legislation is increasingly to be found not in primary acts but in subordinate legislation, one must question how much meaning will remain in the standard scrutiny criterion that certain matter is not appropriate for subordinate legislation. The whole point of skeleton acts is that they do indeed leave for subordinate legislation many rules that will fundamentally change the law, or which

[19] Legislative Review Committee, Joint parliamentary committee, *Operation, Issues and Future Directions: September 2003-June 2004 (2004),* p 11.
[20] *Hansard*, NSW Legislative Council, 5 April 2006, p 22060 (Don Harwin).
[21] Hon Elizabeth Kirkby, Proceedings of the C25 Seminar Marking 25 years of the committee system in the Legislative Council, 20 September 2013, p 52.
[22] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), p 4.
[23] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), p 4.
[24] Resolution appointing the Regulation Committee, paragraph 2.

> are lengthy and complex, or which are designed to effect radical attitudinal or relationship changes.[25]

Inquiry activities

Since its establishment the committee has conducted one inquiry, into the examination of the impact and implementation of the Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018. This statutory instrument is not disallowable.

The inquiry was initiated by the committee. However, the committee does not have a self-referencing power, therefore it resolved that the Chair move a motion in the House to refer the Order to the committee for inquiry and report. The Chair's motion was agreed to by the House.

The committee held one half-day hearing and received five submissions over an 11-day period. The unanimous report contained two recommendations regarding the need for improved stakeholder consultation. Committee members expressed positive feedback regarding the value of the inquiry process and the committee's role in scrutinising regulations.

Selection of Bills Committee

During the select committee inquiry into the Legislative Council Committee System there was broad consensus that the Council's committees should also play a greater role in the substantive review of bills. This is distinct from the technical review of all bills introduced in the NSW Parliament as to whether they trespass unduly on personal rights and liberties, which is undertaken by the joint statutory Legislation Review Committee administered by the Legislative Assembly.[26]

The select committee recommended that a trial Selection of Bills Committee be appointed to consider all bills introduced into the Council or received from the Assembly in order to recommend to the House which bills should be referred to a committee and the duration of each inquiry. The select committee suggested that the referral of approximately 10 bills per year might be an appropriate goal.[27]

The Legislative Council Selection of Bills committee is based to a large extent on a Senate committee of the same name which has been operating since 1990 and which was also set up with the same objective: to increase the scrutiny of bills by the House and therefore enhance the quality of legislation enacted.

The committee meets each Tuesday of a sitting week to consider whether to recommend that particular bills be referred to a standing committee, and if so:

- which committee to which the bill is to be sent
- the stage in the consideration of the bill at which it should be referred, and
- the inquiry reporting date.

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[25] Mark Aronson, 'Subordinate legislation: lively scrutiny or politics in seclusion', *Australasian Parliamentary Review*, Spring 2011, Vol 26 (2) p 11.
[26] Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System* (2016), pp 1-2.
[27] Ibid., p 3.

Following the tabling of the committee's report on a Tuesday afternoon, the Chair (the Government Whip) or other member moves a motion without notice for the House to implement the committee's recommendations. On a number of occasions this motion has been the subject of debate, and the moving of amendments. These debates have been indicative of the level of interest members have in the process and their commitment to see the trial succeed and process develop.

Inquiry activities

Since its establishment the Selection of Bills Committee has referred the provisions[28] of one bill, the Forestry Legislation Amendment Bill 2018, to a committee for inquiry and report.

The provisions of the bill were referred to the Standing Committee on State Development with a two week reporting date.

The State Development committee received 52 submissions, one supplementary submission and conducted one hearing. The committee recommended that the Legislative Council proceed to debate the bill, and that the NSW Government address certain concerns raised during the inquiry during the second reading debate in the Council. During the second reading debate on the bill a number of members commented on the usefulness of the committee's inquiry in assisting members in their detailed consideration of the bill.[29]

"Super committees" dealing with public accounts and capital works

On 15 March 2018 the Legislative Council resolved to establish two new standing committees – a Public Accountability Committee and a Public Works Committee. The motions were each moved by the Hon Robert Brown, of the Shooters, Fishers and Farmers Party, and agreed to on division (21:18). The media immediately described these committees as "super committees."

The role of the Public Accountability Committee is to inquire into and examine the public accountability, financial management, regulatory impact and service delivery of government departments, statutory bodies or corporations. The committee is modelled on the Legislative Assembly Public Accounts Committee, and – like its lower House counterpart – may examine consolidated financial statements and general government sector financial statements, financial reports of statutory bodies and Auditor General's reports to Parliament. The terms of reference replicate the statutory functions of the Legislative Assembly Public Accounts Committee.

The role of the Public Works Committee is to inquire into and report on any public works to be executed (including works that are continuations, completions, repairs, reconstructions, extensions or new works) where the estimated cost of completing such works exceeds $10 million.

Both committees have a non-government majority and a non-government chair, and a wide reaching self-referencing power to inquire into and report on the expenditure, performance or effectiveness of any government department, statutory body or corporation. The resolutions appointing the committees also include a requirement to inquire into future arrangements for ongoing scrutiny by the Legislative Council of the matters covered by their remit.

[28] The provisions of the bill were referred to the committee as the bill had only been introduced to the Legislative Assembly at the time of referral.
[29] *Hansard*, Legislative Council, 19/6/2018, pp 92, 95, 98.

Public Accountability Committee

A Public Accounts Committee has existed in New South Wales since 1902. The current committee is a statutory committee of the Legislative Assembly formed under the *Public Finance and Audit Act 1983*.

The membership of the committee has always been restricted to members of the Assembly, which has been a significant point of contention. In 1981 the Joint Committee on the Public Accounts and Financial Accounts of Statutory Authorities recommended that the Public Accounts Committee should be a joint committee comprising five members of the Assembly and three members of the Council; however, this recommendation was not implemented when the new *Public Finance and Audit Act* was introduced. In the second reading debate the Leader of the Government in the Council, the Hon Paul Landa, asserted that it was not appropriate for Council members to sit on the committee due to the limited role of the Upper House in considering money bills and financial matters.

This view was challenged in 2001 by the Hon Doug Moppett, who suggested that the reason the Public Accounts Committee was restricted to members of the Legislative Assembly was 'based on the mistaken view that the budget papers presented each year are the province of the lower House only.'[30] Mr Moppett moved a motion in the Council seeking the concurrence of the Assembly to appoint three Council members to the committee, arguing:

> … if we are to scrutinise public administration more effectively – particularly from a financial point of view – it is vital to expand the composition of the Public Accounts Committee to include members of the Legislative Council. That is not a revolutionary brainwave that I had one night; the idea has grown steadily in areas of responsible administration ... it is all very well to have fond aspirations and pious hopes and to dwell in the land of easy platitudes, but ultimately, if we are to face the reality of governance, we must be responsible for funding programs and reporting in an informed, clear and transparent manner to the people whom we represent and who contribute to the public coffers.[31]

Mr Moppett's motion was agreed to on division. However, the order of the day for consideration of the Council's message remained on the Assembly's Business Paper until the end of the parliamentary session, and then lapsed at prorogation.

The matter was not raised again until the motion to appoint the Legislative Council's Public Accountability Committee was moved on 15 March 2018. During debate on the motion, Revd the Hon Fred Nile referred to the earlier attempts to appoint Council members to the Public Accounts Committee and stated:

> Government opponents of the motion pointed to budgetary matters being the traditional purview of the lower House, as were reports of the Auditor-General, which at the time were tabled only in the Legislative Assembly. Today, the Auditor-General's reports are tabled in both Houses, but there is no ready mechanism for their review by the Legislative Council.

[30] *Hansard*, Legislative Council, 26 September 2001, p 17172.
[31] *Hansard,* Legislative Council, 26 September 2001, p 17172.

> The establishment of the Public Accountability Committee will finally address this oversight and ensure proper accountability, which as members know is a key role of an upper house of review and which this House carries out thoroughly and zealously.[32]

Government members opposed the motion, arguing that the proposed committee was unnecessary as it duplicated the jurisdiction and functions of the Council's existing committees,[33] particularly the portfolio committees and trial Regulation Committee[34] and had not been recommended by the Select Committee on the Legislative Council Committee System. The motion was agreed to on division (21:18).

Inquiry activities

The first inquiry adopted by the Public Accountability Committee is to consider future arrangements for the ongoing scrutiny of public accounts by the Legislative Council. It is anticipated that the self-referenced inquiry will consider matters such as whether the Public Accountability Committee should be reappointed in the next parliament (and if so whether it's existing remit and functions are adequate), or whether there should be joint membership of the statutory Public Accounts Committee.

The committee has also commenced self-referenced inquiries into the impact of the CBD and South East Light Rail project on the community within the vicinity of the light rail route, including compensation and support for affected local businesses, and into the costs of the WestConnex project. Both are highly contentious, high-profile projects that have been the subject of considerable media attention.

Further developments

Before the Public Accountability Committee had even held its first hearing to consider future arrangements for the ongoing scrutiny of public accounts by the Legislative Council, the opportunity to consider the establishment of a joint Public Accounts Committee presented itself on 6 June 2018 when the Government Sector Finance Bill 2018 and cognate Government Sector Finance Legislation (Repeal and Amendment) Bill 2018 came before the House.

The bills reform the existing legislative framework for public sector financial management in New South Wales, including the *Public Finance and Audit Act 1983* under which the Legislative Assembly's Public Accounts Committee is appointed.

In the committee stage, The Greens moved four amendments to the Government Sector Finance Legislation (Repeal and Amendment) Bill to reconstitute the Public Accounts Committee as a joint committee, comprising four members from each House. Speakers in support of the motion again argued that the Legislative Council, as a House of Review, should be represented on the Public Accounts Committee to participate in its important oversight work. Speakers opposed to the amendments argued against pre-empting the findings of the Upper House committee's current inquiry. The Hon Matthew Mason-Cox, however, urged members to

[32] *Hansard,* Legislative Council, 15 March 2018, p 14.
[33] *Hansard,* Legislative Council, 15 March 2018, pp 15-19.
[34] The Regulation Committee was established on 23 November 2017 on a trial basis to commence on the first sitting day in 2018 and conclude on the last sitting day in November 2018. The committee may inquire and report on: (a) any regulation, including the policy or substantive content of a regulation, and (b) trends or issues that relate to regulations.

seize the opportunity provided by the bill before the House to address this long standing issue of contention:

> The reality is that we are in a position now to do what needs to be done to hold the Government and the Executive to account through the appropriate mechanisms of a public accounts committee that is jointly between the two Houses. I note, in particular, the nature of a public committee inquiry. It would probably be a few months before we could complete an inquiry, and I noted with the Treasurer that then the Government would have six months to respond to the recommendation of the committee and we would end up with some sort of resolution of this issue after Parliament has been prorogued and we would be into the next Parliament before we get to it.
>
> By the nature of these things, we get a chance perhaps once every 10 years or so to revisit these issues. I am not confident that any new administration is going to look again at revolutionising the relationship between the Houses, let alone coming back and having a look at amending the Public Finance and Audit Act. The reality is that we have an opportunity now to put in place what should have been put in place 40 years ago and what was in place 40 years ago in one form or another. I urge members to take this opportunity tonight and I certainly believe it is a strong matter of conscience personally—and I put that on the record. We started today with a very important change in this place in terms of the practice of this House and the way this House operates. This is another important change.[35]

The amendments were agreed to on division (18:17). The bill, as amended, is currently in the Legislative Assembly awaiting consideration.

Public Works Committee

Part 2 of the *Public Works and Procurement Act 1912* requires the appointment of a joint standing committee on public works. Section 7(1) of the Act states:

> In every Parliament, a committee of members of the Legislative Council and Legislative Assembly, to be called the "Parliamentary Standing Committee on Public Works", shall be elected in manner hereinafter provided. Three of the persons so to be elected shall be members of the Legislative Council, and four shall be members of the Legislative Assembly.

Even though the appointment of a joint Public Works Committee is mandated under the Act, such a committee has not been active since the first session of the 29th Parliament commencing on 25 November 1930.[36]

The motion to appoint a Legislative Council Public Works Committee was also moved on 15 March 2018 and agreed to on division (21:18). The committee is modelled on the joint statutory committee, with the terms of reference adopting much of the language of the 1912 Act.

In opposing the motion the Leader of the Government in the Council, the Hon Don Harwin, cited the same rationale used during the Government's objection to the Public Accountability

[35] *Hansard*, Legislative Council, 5/6/2018, p 117.
[36] It should be noted that in previous parliaments the Legislative Assembly has, by resolution, appointed a Standing Committee on Public Works, however that is a different to the joint standing committee required under the *Public Works and Procurement Act 1912*.

Committee, declaring: 'A portfolio committee can do right now everything that is being suggested for the proposed public works committee.'[37]

Crossbench member, Dr Mehreen Faruqi, supported the motion on the basis of increasing concerns about the transparency of government decisions regarding major infrastructure projects:

> … unprecedented amounts of public money are being used for infrastructure projects. But as the level of expenditure has risen, so has public concern – and rightly so, because there is a chronic culture of secrecy… All information is hidden from the public – the business cases and the massive cost blowouts – and the environmental impact statements are often flawed. Inflated benefits are often found to be skewed towards predetermined, favoured alternatives… It is evident that the problems associated with the current crop of public works projects in New South Wales are not just road bumps, but point to systemic and colossal failures in the planning and carrying-out of infrastructure projects … we need this committee finally to undo this culture of secrecy, cover-ups and billions of taxpayer dollars squandered.[38]

Inquiry activities

The Council's Public Works Committee adopted its first two inquiries, both self-referenced, on 10 April 2018. The first inquiry, into Sydney stadiums, will examine a highly controversial government policy to knock down and rebuild Allianz stadium at Moore Park and refurbish the ANZ Stadium at Sydney Olympic Park.

The second inquiry mirrors the Public Accountability Committee's inquiry by considering future arrangements for the ongoing scrutiny of public works by the Legislative Council. Similar to the Public Accountability Committee's inquiry, it is expected that one of the issues the committee will consider will be whether the Public Works Committee should be re-appointed in the next Parliament (and if so whether the existing remit and functions of the committee are adequate), or whether the joint statutory Public Works Committee set out under the *Public Works and Procurement Act* should be appointed.

A new statutory joint standing committee on Modern Slavery

On 9 November 2016 the Legislative Council established a Select Committee into Human Trafficking in New South Wales, chaired by the Hon Paul Green MLC from the Christian Democratic Party.

The key recommendations of the committee's report, tabled in October 2017, were to establish a national Modern Slavery Act, similar to 2015 United Kingdom legislation, and for independent Anti-Slavery Commissioners to be appointed both nationally and in NSW to facilitate a coordinated approach between levels of government.[39]

In March 2018 the Committee Chair, Mr Green, introduced the Modern Slavery Bill 2018 into the Legislative Council. The bill made provisions with respect to slavery, slavery-like practices and human trafficking and established an Anti-Slavery Commissioner.

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[37] *Hansard,* Legislative Council, 15 March 2018, pp 15-19.
[38] *Hansard,* Legislative Council, 15 March 2018, p 28.
[39] Select Committee on Human Trafficking in New South Wales, *Human Trafficking in New South Wales* (2016), p ix.

Before being passed the bill was amended in the Legislative Council to establish a joint parliamentary committee to monitor and review the functions of the Anti-Slavery Commissioner.

As there is no member of the Christian Democratic Party in the Legislative Assembly, in a highly unusual move, the Premier, The Hon Gladys Berejiklian MP, agreed to take carriage of the bill in that House on behalf of Mr Green. The bill passed the Assembly in June 2018 with a number of amendments, including changing the remit of the committee to a broader remit to inquire into and report on 'matters relating to modern slavery'.

The legislation provides that the Modern Slavery Committee will consist of four members of each House, have a non-government Chair, operate under the Standing Orders of the Legislative Council and be administered by the Department of the Legislative Council.

The bill was assented to on 28 June 2018, and is only the second private members' bill to have passed both Houses since the beginning of the 56th Parliament in 2015.

CONCLUSION

A great deal has happened in the NSW Legislative Council in 24 sitting days or eight sitting weeks. The House has, or at least a majority of members in the House have, asserted the power of the House to require the production classes of documents previously withheld by governments on the grounds they were "cabinet information." As a consequence, and having followed a cautious and carefully mapped path, the House has been provided with business cases on two significant capital works projects, as a well as a consultant report on a significant area of government administration. Further, the House has now expressed a view about the test to be applied in determining whether or not a document is required to be produced where the question of cabinet-in-confidence arises. Five new committees have been established. Two committees have been established on a trial basis to enhance legislative scrutiny, and two "super committees" have been established to enhance public accountability and the parliamentary scrutiny of public works. It will be interesting to see what ongoing committees are established in those spaces in the new Parliament following the 2019 NSW general election. And finally, a new committee on Modern Slavery has been established, involving a new model (at least for NSW) of how a statutory joint committee could be constituted. It has been an eventful period. The Legislative Council, already an assertive House of Review, will never be the same as it was a few short months ago.

30 COMPLIANCE WITH ORDERS FOR PAPERS

Mr Searle moved, according to notice:

1. That this House notes that, on 5 June 2018, this House:

    (a) censured the Leader of the Government as the representative of the Government in the Legislative Council for the Government's failure to comply with orders for the production of documents under standing order 52 dated 15 March 2018, 12 April 2018 and 17 May 2018,

    (b) ordered that, under standing order 52, there be laid upon the table of the House by 9.30 am on 6 June 2018 certain of those documents not previously provided to the resolutions dated 15 March 2018, 12 April 2018 and 17 May 2018, and

    (c) ordered that, should the Leader of the Government fail to table the documents by 9.30 am on 6 June 2018, the Leader of the Government was to attend in his place at the Table at the conclusion of prayers to explain his reasons for continued non-compliance.

2. That this House notes that on 6 June 2018:

    (a) the Leader of the Government failed to table documents in compliance with the resolution of 5 June 2018,

    (b) the Clerk tabled correspondence from the Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet in relation to the order of 5 June 2018, which stated that "after considering advice from the Crown Solicitor, a copy of which is enclosed, I advise that there are no further documents for production", and

    (c) on the President calling on the Leader of the Government to explain his reasons for continued non-compliance, in accordance with the resolution of 5 June 2018, the Leader of the Government stated that "further to the earlier advice of Ms Karen Smith, the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday".

3. That this House notes that, on 8 June 2018, the Clerk received:

    (a) correspondence from the Secretary, Department of Premier and Cabinet, noting that:
        (i) "all of the documents referred to in the resolution are Cabinet documents",
        (ii) "the Legislative Council has no power to require such documents to be produced",
        (iii) "on this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production",

    (b) redacted documents relating to Sydney Stadiums and unredacted documents relating to the Tune Report on the out-of-home-care system, and

    (c) a submission identifying documents relating to Sydney Stadiums and the Powerhouse Museum relocation business case which have been "provided on a confidential basis for inspection by members of the Legislative Council only."

4. That this House notes that on 12 June 2018, the Clerk published redacted documents relating to the Powerhouse Museum relocation business case, received on 8 June 2018, which had been treated as confidential until separated by representatives of the Department of Planning and Environment.

5. That this House notes that:

    (a) the only established mechanism by which the Department of Premier and Cabinet may lodge documents with the Clerk directly, or by which ministers and government agencies may make a claim of privilege, is under standing order 52, in response to an order for the production of documents,

    (b) in response to the House ordering the Leader of the Government to stand in his place at the Table to explain his reasons for non-compliance with the order of 5 June 2018, the Leader of the Government advised the House that "the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday", and

    (c) the correspondence and documents provided by the Department of Premier and Cabinet and received by the Clerk on 8 June 2018 and 12 June 2018 were administered by the Clerk in accordance with, and under the authority of, the provisions of standing order 52, including by treating the documents "provided on a confidential basis" in the same manner as documents subject to a claim of privilege.

6. That this House rejects the statement made by the Secretary of the Department of Premier and Cabinet on behalf of the Government that the documents provided on 8 June 2018 and 12 June 2018 were provided voluntarily.

7. That this House notes with concern the following statements made by the Government regarding the power of the Legislative Council to order the production of documents:

    (a) on 1 May 2018, in response to a question without notice regarding the non-production to the House of the full business case in relation to the Powerhouse Museum, the Leader of the Government informed the House of the Government's position that "no Cabinet information will be produced or referred to in responding to a resolution made under standing order 52",

    (b) on 5 June 2018 during debate on the motion to censure the Leader of the Government, the Leader of the Government stated:
        (i) "I represent the Government's view as it relates to the order for production of Cabinet documents",
        (ii) "The majority judgement in Egan v Chadwick did decide the matter: the law is settled and it is well established",
        (iii) that the Government's view is based on "the very clear position at law that the Legislative Council cannot compel the [Government] to hand over Cabinet documents", and

    (c) in correspondence received by the Clerk on 8 June 2018, the Secretary of the Department of Premier and Cabinet stated that "the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production".

8. That this House notes that in the judgements of Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in Egan v Chadwick (1999), in relation to Cabinet documents:

    (a) Spigelman CJ held that:

        (i) a distinction has been made between documents which disclose the actual deliberations within cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet,
        (ii) 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",
        (iii) however, 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 noted that:
        (i) a court has "the power to compel production to itself even of Cabinet documents",
        (ii) 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 as in the courts when dealing with documents in respect of which the Executive claims public interest immunity", and
        (iii) "… 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, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy".

9. That this House notes that:

    (a) the Government apparently relies on the broad definition of "Cabinet information" adopted in the Government Information (Public Access) Act 2009,

    (b) the Legislative Council rejects the proposition that the test in the Government Information (Public Access) Act 2009 of what constitutes Cabinet information is applicable to Parliament,

    (c) the Government's apparent reliance on the definition in the Government Information (Public Access) Act 2009 is likely to have led to a much broader class of documents being withheld from production to this House than that articulated by the majority of the NSW Court of Appeal in the judgments of Spigelman CJ and Priestly JA in Egan v Chadwick, the provision of which is necessary for the Legislative Council to fulfil its constitutional role, and

(d) the true principle from Egan v Chadwick concerning the power of the House to order the production of Cabinet documents is, at a minimum, that articulated by Spigelman CJ, and that the Government has failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ.

10. That this House asserts that it has the power to require the production of Cabinet documents such as those produced on 8 June 2018 and 12 June 2018 and that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick.

Debate ensued.

Question put.

The House divided.

Ayes 21

Mr Borsak	Mrs Houssos	Mr Secord
Mr Brown	Mr Mason-Cox	Ms Sharpe
Mr Buckingham	Mr Mookhey	Mr Shoebridge
Mr Donnelly *	Mr Moselmane *	Mr Veitch
Dr Faruqi	Mr Pearson	Ms Voltz
Mr Field	Mr Primrose	Ms Walker
Mr Graham	Mr Searle	Mr Wong

* Tellers

Noes 20

Mr Amato	Mr Franklin	Mr Martin
Mr Blair	Mr Green	Mrs Mitchell
Mr Clarke	Mr Harwin	Revd Mr Nile
Mr Colless	Mr Khan	Dr Phelps
Ms Cusack	Mr MacDonald	Mrs Taylor
Mr Fang *	Mrs Maclaren-Jones *	Ms Ward
Mr Farlow	Mr Mallard	

* Tellers

Question resolved in the affirmative.