

## ANZACATT Professional Development Seminar 2023

### Syndicate 1B: *Emerging challenges*

*Examination, publication and use of Cabinet documents by Legislative Council committees*, Beverly Duffy, Clerk Assistant – Committees.<sup>1</sup>

#### Introduction

In February 2022, the Legislative Council Privileges Committee published a report on the use of Cabinet documents by Legislative Council committees, following the leaking of several Cabinet documents to another upper house committee.<sup>2</sup>

The report concluded that a committee may decide to publish and use a 'true' Cabinet document that comes into its possession, if it is in the public interest to do so. It recommended the adoption of procedures to ensure that a decision to use a Cabinet document is afforded due consideration and noted that the House could override a committee's decision.<sup>3</sup> The Government members submitted a dissenting statement, arguing that 'Neither the Legislative Council, nor its committees, has the power to order Cabinet documents' and highlighting the longstanding Westminster convention that Cabinet deliberations should remain confidential.<sup>4</sup>

The Privileges Committee's conclusion that adherence to the principle of Cabinet secrecy is **not absolute**, is significant. This is especially so in light of the House's approach to Cabinet information in the context of orders for State papers.

*Egan v Chadwick* (1999) confirmed the power of the NSW Legislative Council to call for documents subject to claims of privilege, other than those that would reveal the deliberations of Cabinet.<sup>5</sup> To date, the House has not challenged this aspect of the judgment. Eminent legal commentators and at least one former Clerk have argued, however, that the Legislative Council should have access to all Cabinet documents.<sup>6</sup>

While acknowledging that committee procedures to deal with leaked Cabinet documents and the power of the House to call for State papers are distinct scenarios, both involve consideration of two fundamental principles of responsible government: Cabinet confidentiality and the role of the Council to scrutinise the Executive.

---

<sup>1</sup> This paper draws heavily on the Privileges Committee report drafted by my colleague, Velia Mignacca, Principal Council Officer, NSW Legislative Council.

<sup>2</sup> Legislative Council Privileges Committee, *Examination, publication and use of cabinet documents by Legislative Council committees*, Report No 86, February 2022.

<sup>3</sup> Ibid, p viii

<sup>4</sup> Ibid, p 29. The Government members argued that Cabinet documents received by a committee should be returned to the Department of Premier and Cabinet and not used in any way in a committee inquiry. It is unusual although not unprecedented, for dissenting reports to be included in a Privileges Committee report.

<sup>5</sup> *Egan v Chadwick* (1999) 46 NSWLR 563

<sup>6</sup> See S Ohnesorge and B Duffy, 'Evading scrutiny: Orders for Papers and Access to Cabinet Information by the NSW Legislative Council', *Public Law Review*, volume 29, 2018, p 124-125, which includes the views of Sir Anthony Mason and Bret Walker SC on this issue; see also submission No 5 to the Privileges Committee inquiry from John Evans PSM, former Clerk of the NSW Legislative Council.

By concluding that Cabinet secrecy is not absolute, the Privileges Committee has tipped the balance in favour of accountability. It will be interesting to see what influence, if any, this has on the House's approach to orders for papers and Cabinet documents in future.

### **Background - the Privileges Committee report**

In mid-2021, the Legislative Council's Public Accountability Committee (PAC) commenced an inquiry into the Transport Asset Holding Entity (TAHE), a controversial state-owned corporation established to manage the rail network assets of NSW.<sup>7</sup>

At one of the inquiry hearings, a committee member tabled several documents identified as Cabinet in confidence which were subsequently published on the Committee's webpage. Soon after, the Secretary of the Department of Premier and Cabinet requested the Committee to remove the documents from the webpage, destroy all digital copies, return any hard copies to the Department and refrain from using or disclosing the documents.<sup>8</sup> The Committee did not accede to the request, but instead resolved to prepare a special report to the House, recommending that the matter be referred to the Privileges Committee.<sup>9</sup>

In February 2022, the Privileges Committee published its report on the *Examination, publication and use of Cabinet documents by Legislative Council committees*.<sup>10</sup> In its report, the Privileges Committee discussed two often competing principles or conventions of responsible government: collective ministerial responsibility and executive scrutiny.

Collective ministerial accountability requires that ministers share responsibility for major decisions, particularly those made by the Cabinet, even if they do not personally support them. Cabinet confidentiality is a fundamental aspect of collective ministerial accountability:

*If records of Cabinet meetings or copies of Cabinet minutes were made available and used to show that a particular minister had argued against the ultimate decision of Cabinet this would undermine the collective responsibility of Ministers.*<sup>11</sup>

While traditionally great weight has been afforded to Cabinet secrecy, the trend in modern democracies in recent decades has been towards more open and transparent government. The long-held view that Cabinet documents, as a class, should be immune from disclosure is under challenge, with developments in relation to public interest immunity claims in common law jurisdictions a good example of this.<sup>12</sup> The challenge for the Privileges Committee in dealing with the situation before it was how to balance these often competing principles, as noted by the Hon Peter Primrose MLC in his Chair's Foreword:

---

<sup>7</sup> Legislative Council Public Accountability Committee, *Transport Asset Holding Entity*, Report 13, April 2022.

<sup>8</sup> *Ibid*, p xi.

<sup>9</sup> *Ibid*, p 88. Government members of the Public Accountability Committee sought to have the documents removed from the website, but this motion was not agreed to by the majority.

<sup>10</sup> Legislative Council Privileges Committee, n 2.

<sup>11</sup> Twomey, A., *The Constitution of NSW*, The Federation Press, Sydney 2004, p 694

<sup>12</sup> Ohnesorge and Duffy, n 6, p 121-123. In his submission to the Privileges Committee inquiry the former Clerk of the Parliaments, Mr John Evans also noted the enlightened approach taken by the ICAC in relation to Cabinet documents. See submission 5, p 3.

*All inquiry participants acknowledged the need to uphold the principle of collective ministerial responsibility which is protected by Cabinet confidentiality. However, inquiry participants also acknowledged that this needs to be balanced with the constitutional role of the Legislative Council as a House of review.*<sup>13</sup>

While acknowledging the importance of Cabinet confidentiality, the committee did not conclude that this convention should outweigh the constitutional role of the Council to scrutinise the government:

*... most inquiry participants saw no legal or constitutional impediments to a committee using a Cabinet document which comes into its possession in an inquiry. However, given the importance of collective ministerial responsibility, several participants proposed procedures to ensure that the determination of the public interest in such cases gives sufficient weight to this central principle of responsible government* [emphasis added].<sup>14</sup>

The sole recommendation of the Committee's report sets out the proposed procedures to assist committees to determine whether it is in the public interest to use a leaked Cabinet document.<sup>15</sup>

The recommendation is reproduced at the end of this paper. The Privileges Committee's conclusion that adherence to the principle of Cabinet secrecy is **not necessarily absolute** is highly significant. The following overview of Cabinet documents and orders for papers in the Council over the past 20 years should give a sense of why this is such a landmark development in the Council's approach to its scrutiny role.

### **Cabinet documents and orders for papers in the NSW Legislative Council**

Three legal decisions in the late 1990s, referred to as the 'Egan cases', confirmed the common law power of the New South Wales Parliament to order papers from the Executive. The final case: *Egan vs Chadwick* (1999), confirmed that this power extends to documents over which a claim of legal professional privilege or public interest immunity has been made.<sup>16</sup> However, members of the Court of Appeal reached different conclusions in relation to Cabinet documents.

In summary:

- Spigelman CJ held that it is not reasonably necessary for the proper exercise of the Council's functions to call for documents which disclose **the actual deliberations of Cabinet** as the revelation of such documents is inconsistent with the doctrine of ministerial responsibility. He also held that **documents prepared outside Cabinet for submission to Cabinet may, or may not**, depending on their content, **manifest a similar inconsistency**.
- Meagher JA held that the immunity of Cabinet documents from production is **'complete'**.

---

<sup>13</sup> Legislative Council Privileges Committee, n 2, p vi

<sup>14</sup> Ibid, p vi. As noted earlier, Government members of the Privileges Committee submitted a dissenting statement, arguing that neither the Legislative Council nor committees have the power to call for Cabinet documents; that disclosing Cabinet documents would offend the principle of Cabinet confidentiality and that the documents should be returned to the Department of Premier and Cabinet.

<sup>15</sup> Ibid, p viii

<sup>16</sup> *Egan v Chadwick* (1999) 46 NSWLR 563

- Priestley JA held that the Council’s power to order the production of documents extends to Cabinet documents **including those that reveal Cabinet deliberations**.<sup>17</sup>

The position articulated by Spigelman CJ defines the current state of the law regarding the Council’s power to order the production of Cabinet documents,<sup>18</sup> although this interpretation has been the subject of considerable disagreement between the Legislative Council and the Executive since at least 2018.<sup>19</sup>

A flashpoint in the conflict between the Executive and the Council post *Egan v Chadwick* is the definition of a Cabinet document. The Government relies on the definition contained in the *Government Information (Public Access) Act 2009*. It is far broader than that proposed by Spigelman CJ and has been rejected by the Legislative Council.<sup>20</sup> Consequently, the Council has argued that there are certain documents that it ought to have access to under the order for papers process, which the Government refuses to provide by relying upon the broader definition of a Cabinet document. The extent of this practice is difficult to measure:

*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.*<sup>21</sup>

Occasionally it has become apparent that a particular document ordered by the Council has been characterised by the Executive as a Cabinet document and thus not produced. Several such instances have occurred since 2018. Most involved business cases for major infrastructure projects. Generally, in making the claim, the Government has failed to provide any evidence to support the contention that the documents meet the Spigelman test, i.e. they disclose the actual deliberations of Cabinet or otherwise offend the principle of Cabinet confidentiality. As such the House has resorted to successive strongly worded motions and threats of censure over weeks or months to secure the documents. When produced, the Government usually seeks to table them 'voluntarily' as 'confidential documents' rather than documents produced under the relevant standing order (Standing Order 52). This characterisation is routinely rejected by the House and they are generally received under Standing Order.<sup>22</sup>

While members have become increasingly frustrated by the Government's overly expansive characterisation of Cabinet information and are becoming more assertive about their right to receive documents that are inappropriately characterised as Cabinet in confidence, it is likely that they are only aware of a fraction of the instances where documents are withheld on this basis. A 2018 paper

---

<sup>17</sup> Legislative Council Privileges Committee, n 2, p 7 emphasis added.

<sup>18</sup> Ohnesorge and Duffy, n 6, p 120.

<sup>19</sup> S Frappell and D Blunt, *New South Wales Legislative Council Practice*, 2nd edition (Federation Press, 2021), see pp 702-713.

<sup>20</sup> Ohnesorge and Duffy, n 6, p 126.

<sup>21</sup> Submission 11 to Privileges Committee, Inquiry into the 2009 Mt Penny Return to Order, August 2013, (Clerk of the Parliaments).

<sup>22</sup> Frappell and Blunt, n 19, pp 705-709.

on the issue proposed involving the Independent Legal Arbiter to adjudicate Cabinet exemption claims.<sup>23</sup> Such a proposal has not been pursued to date.

Notwithstanding their increasing assertiveness regarding documents that don't meet the Spigelman test, members have not actively questioned the fundamental premise of the majority judgement in *Egan v Chadwick*, i.e. **that the House does not have the power** to call for documents that reveal the deliberations of Cabinet as this is a class of documents for which it is never in the public interest for the House to compel. This is despite developments in how common law courts and statutory commissions approach the task of weighing the competing principles and priorities at play when Cabinet material is at issue. The principles of transparency and accountability are given more weight than they were in the past. Eminent legal scholars and former jurists such as Sir Anthony Mason and Bret Walker SC, as well as former Clerk of the Legislative Council, John Evans PSM, are firm supporters of the Council having the power to call for all documents including those that reveal Cabinet deliberations.

## Conclusion

The Privileges Committee's inquiry pertains to documents that are provided to a committee, admittedly a different context to the House exercising its common law power to call for State papers. While the contexts are distinct, two fundamental conventions of responsible government are relevant to both scenarios: executive accountability and Cabinet confidentiality. Up until now, the House has seemingly accepted the majority view in *Egan v Chadwick* that it is not reasonably necessary for the proper exercise of the Council's functions to call for documents which disclose the actual deliberations of Cabinet or documents the disclosure of which would be inconsistent with the doctrine of ministerial responsibility.

The position of the Privileges Committee, that it may not be in the public interest to guarantee absolute secrecy to a leaked Cabinet document, is significant. The Committee's report challenges the primacy traditionally afforded to the principle of Cabinet confidentiality over the role of the Council as a House of Review. By refusing to adhere to the orthodox position that Cabinet documents are sacrosanct, the Committee has adopted an approach a little closer to that of other eminent legal commentators and jurists, including Priestley JA regarding this unresolved aspect of the Council's common law power:

*... 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.*<sup>24</sup>

This will be a fascinating space to watch as the 58<sup>th</sup> Parliament unfolds.

---

<sup>23</sup> Ohnesorge and Duffy discuss possible ways to address the scrutiny gap created by the inappropriate withholding of Cabinet documents on Cabinet in confidence grounds.

<sup>24</sup> *Egan v Chadwick* (1999) 46 NSWLR 563 at 595 per Priestley.

## Attachment A

### **Recommendation 1 of the Privileges Committee report into the *Examination, publication and use of Cabinet documents by Legislative Council committees***

#### **Recommendation 1**

That the following guidance be adopted concerning the use of Cabinet documents in committee inquiries:

1. A committee that receives a Cabinet document which is relevant to its inquiry may publish and use the document or parts of the document subject to paragraph 2.
2. A committee may decide to publish and use:
  - (a) a document, or parts of a document, that reveals the deliberations of Cabinet
  - (b) a document, or parts of a document, prepared outside Cabinet for submission to Cabinet the disclosure of which would be inconsistent with collective ministerial responsibility  
if the committee determines that on balance it is in the public interest to do so.
3. In evaluating the public interest under paragraph 2,
  - (a) the committee will have regard to:
    - (i) the importance of Cabinet confidentiality as an incident of collective ministerial responsibility
    - (ii) the role of the Legislative Council and its committees in securing accountability of government decision-making and in considering legislative change,
  - (b) the committee will take account of all relevant factors which may include:
    - (i) the importance of the document to the committee's inquiry
    - (ii) whether the document concerns a matter that is currently before Cabinet
    - (iii) whether the subject matter of the document or the document itself has already been ventilated in public, including in the media
    - (iv) whether disclosure of the document would tend to damage the decision-making processes of Cabinet in a particular way,
  - (c) the committee may wish to consult with the Department of Premier and Cabinet in determining these factors.
4.
  - (a) A committee may resolve to make a special report to the House to refer a Cabinet document to an independent legal arbiter for evaluation and report as to:
    - (i) whether the document discloses the deliberations of Cabinet or is a document the disclosure of which would otherwise be inconsistent with collective ministerial responsibility
    - (ii) whether the public interest in protecting the confidentiality of the document outweighs the public interest in allowing the document to be used in the committee's inquiry.
  - (b) Where the House so resolves, the Clerk of the Parliaments is authorised to release the disputed document or documents to an independent legal arbiter for evaluation and report.
  - (c) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
  - (d) A report from the independent legal arbiter is to be lodged with the Clerk of the Parliaments and:
    - (i) made available only to members of the committee, and
    - (ii) not published or copied without an order of the committee.
5. Where a committee decides that it is in the public interest to publish part of a document that reveals the deliberations of Cabinet, or part of a document the disclosure of which would be inconsistent with collective ministerial responsibility, the committee should adopt suitable measures to protect the confidentiality of the rest of the document as far as practicable.