



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

Examination, publication and use of cabinet documents by Legislative Council committees



Report 86

February 2022

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Privileges Committee

Examination, publication and use of cabinet documents by Legislative Council committees

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Chair: Hon Peter Primrose MLC



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Terms of reference

1. That:
 - a. the Privileges Committee inquire into and report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry, and
 - b. the Committee report by the first sitting day in 2022.

The terms of reference were referred to the committee by the Legislative Council on 16 November 2021.¹

¹ *Minutes*, NSW Legislative Council, 16 November 2021, p 2710.

Committee details

Committee members

The Hon Peter Primrose MLC	Australian Labor Party	(Chair)
Revd the Hon Fred Nile MLC	Christian Democratic Party	(Deputy Chair)
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Don Harwin MLC*	Liberal Party	
The Hon Shayne Mallard MLC	Liberal Party	
The Hon Taylor Martin MLC**	Liberal Party	

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* The Hon Don Harwin MLC replaced the Hon Natasha Maclaren-Jones MLC as a member on the committee from 24 January 2022.

** The Hon Taylor Martin MLC became a substantive member of the committee on 24 January 2022 following the resignation of the Hon Trevor Khan MLC on 6 January 2022.

Chair's foreword

This inquiry has its origins in a recommendation by the Public Accountability Committee (PAC) in its *Special report on the examination, publication and use of cabinet documents by Legislative Council committees* as part of an inquiry, dated November 2021. The Special Report stated that, during a public hearing by PAC concerning the Transport Asset Holding Entity, a member of the committee had tabled certain documents which were later published by PAC on its website. Subsequently, PAC received correspondence from the Department of Premier and Cabinet (DPC) asserting that three of the documents were subject to Cabinet confidentiality and should be removed from the website and not used or disclosed in the inquiry. The Special Report stated that PAC had not resolved to agree to this request pending consideration by the Privileges Committee. It recommended that the Privileges Committee inquire into the examination, publication and use of Cabinet documents by Council committees as part of an inquiry.

In conducting its inquiry the Privileges Committee received six submissions: from the Hon Keith Mason AO QC, Mr Richard Pye, Clerk of the Senate, the Department of Premier and Cabinet, the Hon Daniel Mookhey MLC, Mr John Evans PSM, Parliamentary Ethics Adviser, and Mr David Blunt, Clerk of the Parliaments. 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. Further, 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.

Drawing on suggestions put forward in submissions the committee has developed a set of procedures that are designed to guide committees in relation to the process of evaluating whether it is in the public interest for a Cabinet document that comes into the committee's possession to be published or used in its inquiry. These procedures are intended to apply to Cabinet documents that meet the test articulated by Spigelman CJ in *Egan v Chadwick* (1999) 46 NSWLR 563 namely documents that disclose Cabinet deliberations or documents the disclosure of which would be otherwise inconsistent with ministerial responsibility. The procedures are set out in Recommendation 1 which appears in chapter 2 of this report.

The report notes that these procedures would only be applicable in extremely rare circumstances, that is, where a Cabinet document that meets the test set out by Spigelman CJ and is relevant to a committee's inquiry is obtained by the committee. The report further notes that if the House disagreed with a committee's decision to publish and use a Cabinet document the House would have the right to overturn that decision by instructing the committee to remove the document from its website and return the documents to DPC.

The procedures recommended by the committee give recognition to two constitutional principles of fundamental importance to the system of government: collective ministerial responsibility and executive accountability to Parliament. They will assist in striking an appropriate balance between these two principles in the rare instances when Cabinet documents are obtained by committees. I commend the recommended procedures to the House.

I thank all inquiry participants for their submissions to the inquiry. I also thank the committee secretariat for their work and professionalism.

Hon Peter Primrose MLC
Committee Chair

Recommendation

Recommendation 1

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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.

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- (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.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 16 November 2021.

The committee received six submissions.

Inquiry related documents are available on the committee's website, including submissions.

Chapter 1 Introduction

Origin of this inquiry

- 1.1 On 1 October 2021, at a hearing by the Public Accountability Committee during its inquiry into the Transport Asset Holding Entity (TAHE), the Hon Daniel Mookhey MLC tabled a number of documents concerning the establishment and operation of TAHE. Following the hearing the committee resolved to accept the documents tabled by Mr Mookhey and publish them on the committee's website.²
- 1.2 On 22 October 2021 the Public Accountability Committee received correspondence from Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, advising that three of the documents published on the committee's website were subject to cabinet confidentiality:
- Cabinet submission, Establishment of a TAHE, May 2016 (Transport Tender 002 and Treasury Tender 003)
 - TAHE, Treasury update (Treasury Tender 001)
 - KPMG, TAHE: Long-term operating model assessment, 8 November 2020 (TAHE Tender 003, Transport Tender 003, Treasury Tender 004).³
- 1.3 In that correspondence Mr Coutts-Trotter stated that the disclosure of the documents to the committee 'directly or indirectly, was not authorised by the Premier or the Cabinet'. He also requested that the committee remove the documents from its website, that all digital copies be destroyed, that hard copies be returned to the department and that the documents not be used or disclosed in the committee's inquiry.
- 1.4 On 26 October 2021 the Public Accountability Committee wrote to Mr Coutts-Trotter inviting the department to provide further detail in relation to his request. In his response, dated 2 November 2021, Mr Coutts-Trotter provided a more detailed submission in support of the proposition that the three documents are Cabinet documents and should be removed from the committee's website and not used or disclosed in its inquiry.⁴
- 1.5 On 8 November 2021 the Public Accountability Committee resolved to:
- respond to Mr Coutts-Trotter, noting the request to remove the documents from the committee's website
 - prepare a special report to the House, recommending that the matter be referred to the Privileges Committee for inquiry and report as to the right or otherwise of committees of

² The contents of paragraphs 1.1 to 1.5 of this report are drawn from Public Accountability Committee, *Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry*, Report 9, November 2021, pp 1-2.

³ Correspondence from Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, 22 October 2021, reproduced at Appendix 2 of this report.

⁴ Correspondence from Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, 2 November 2021, reproduced at Appendix 2 of this report.

the Legislative Council to examine, publish and use cabinet documents as part of an inquiry.

1.6 In its Special Report, which was tabled on 12 November 2021, the Public Accountability Committee noted that:

While there are clearly matters of principle regarding the importance of the cabinet process that the committee is alert to, there is a parallel and compelling requirement on the committee to address its terms of reference and to undertake this inquiry independently of the government of the day.⁵

1.7 The committee went on recommend:

That the House refer to the Privileges Committee, for inquiry and report by the end of the calendar year, the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry.⁶

1.8 On 15 November 2021 at a further hearing of the Public Accountability Committee, the following additional documents marked as Cabinet documents were tabled and published on that committee's website:

- PWC, TfNSW Structure Considerations - 'TAHE' Business Model Assessment, Transport for NSW, December 2019
- KPMG, TAHE: Assessment of assumptions used for accounting estimates, 3 November 2020.⁷

1.9 On 16 November 2021 the Legislative Council referred the current inquiry to this committee in terms similar to those recommended by the Public Accountability Committee in its Special Report.⁸ The terms of reference agreed to by the House are set out on page iv of this report.

1.10 The committee agreed to call for submissions from members of the Legislative Council and relevant stakeholders. The committee received six submissions which are listed in Appendix 1 to this report and available on the committee's website.

Correspondence from Portfolio Committee 4

1.11 On 9 December 2021 the chair of Portfolio Committee No 4 wrote to this committee concerning a document that was referred to at a hearing during PC 4's inquiry into the timber industry. The Chair advised that PC 4 understands that the document, the Natural Resources Commission's final report, *Coastal IFOA operations post 2019/20 wildfires* dated June 2021 is cabinet-in-confidence and has never been publicly released, although its content has been reported in the media. The chair stated that during the hearing a member of PC 4 had sought

⁵ Public Accountability Committee, *Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry*, Report 9, November 2021, p 2.

⁶ Public Accountability Committee, *Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry*, Report 9, November 2021, p 3.

⁷ Correspondence from Mr David Shoebridge MLC, Chair of the Public Accountability Committee, to the Chair, 17 November 2021.

⁸ *Minutes*, NSW Legislative Council, 16 November 2021, p 2710.

responses from government witnesses to questions based on this document, which they subsequently refused to answer based on cabinet-in-confidence reasons.⁹ This issue has not been referred to the Privileges Committee by the House, although the principles recommended in Chapter Two of this report are clearly relevant to the situation as guidance for the committee.

Scope of this inquiry

1.12 The power of Legislative Council committees to order the production of government documents is contested.¹⁰ However, this is not the focus of the current inquiry. This inquiry is tasked with considering how a committee should respond if Cabinet documents come into its possession, rather than on the nature of any power a committee may have to require that Cabinet documents be produced. The inquiry is therefore concerned with a narrow range of situations: while Cabinet documents are disclosed from time to time, such instances are rare.

⁹ Correspondence from the Hon Mark Banasiak MLC, Chair of Portfolio Committee 4, to the Chair, 9 December 2021.

¹⁰ See Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice*, 2nd edition (Federation Press, 2021), pp 783-787.

Chapter 2 Issues addressed in the inquiry

The six submissions to this inquiry addressed two key questions: should committees be able to use Cabinet documents in their inquiries; if so, what procedures are appropriate to assist committees in determining whether or not a particular Cabinet document should be used. This chapter outlines the views expressed by inquiry participants in relation to these questions and sets out the committee's conclusions.

Should committees be able to use Cabinet documents?

2.1 In its submission the Department of Premier and Cabinet submitted that Cabinet documents should not be used in committee inquiries. However, other submissions were consistent with the position that a committee in possession of a Cabinet document should be able to use the document if it is in the public interest to do so. The matters discussed by inquiry participants in relation to this issue are outlined below.

Cabinet confidentiality in legal proceedings

2.2 In support of its view that cabinet documents should not be used by committees, the Secretary of the Department of Premier and Cabinet (DPC) Mr Michael Coutts-Trotter stated that the paramount importance of protecting the confidentiality of 'Cabinet documents' is firmly established.¹¹ The DPC submission went on to cite passages from the judgements in *Sankey v Whitlam* (1978) 142 CLR 1 and *Conway v Rimmer* [1968] AC 910 which refer to the importance of protecting Cabinet documents as a class.¹²

2.3 For example, the cited passage from *Sankey v Whitlam* included the following comment by Gibbs ACJ:

[T]he law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments ... papers brought into existence for the purpose of preparing a submission to cabinet ... and indeed any documents which which relate to the framing of policy at a high level.¹³

2.4 However, a paper published in *Public Law Review* in 2018 noted that the High Court in *Sankey v Whitlam* rejected the principle that Cabinet documents as a class should be absolutely immune from disclosure:

In [*Sankey v Whitlam*] the High Court maintained, consistent with *Conway v Rimmer*, 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

¹¹ Submission 2, Department of Premier and Cabinet, Annexure B, p 1.

¹² Submission 2, Department of Premier and Cabinet, Annexure B, p 1.

¹³ *Sankey v Whitlam* (1978) 142 CLR 1 at 39 per Gibbs ACJ, quoted in Submission 2, Department of Premier and Cabinet, Annexure B, p1.

expounded in *Conway v Rimmer* that cabinet documents as a class should be absolutely immune from disclosure in the public interest...¹⁴

2.5 Further, the notion that ‘Cabinet documents’ are immune from disclosure in legal proceedings is at odds with the views expressed by other inquiry participants.

2.6 The Hon Keith Mason AO QC is the former President of the Court of Appeal of New South Wales, a former Solicitor-General and in recent years has been the independent arbiter appointed to advise the Legislative Council regarding disputes of privilege claims for returns made under standing order 52. In his submission, the Mr Mason stated that an aspect of responsible government is the collective responsibility of ministers of the Crown and the confidentiality of Cabinet deliberations. The rationale for this confidentiality has been stated by the High Court as follows:

It has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decisions which may be made.¹⁵

2.7 Mr Mason advised that these principles may generate a public interest immunity that will be recognised by the courts in an appropriate context:

after weighing the possible harm to the public interest from disclosure against the possible harm to the public interest in suppressing information relevant to the specific legal proceedings.¹⁶

2.8 Mr Mason stated that the immunity may prevent Cabinet documents that disclose deliberations from being the subject of subpoena or production in litigation. However, he specified that the immunity ‘does not offer an absolute protection to Cabinet documents’ and that a claim to protect such documents from disclosure ‘must be weighed against competing public interests’.¹⁷

2.9 Mr John Evans PSM, Parliamentary Ethics Adviser, drew attention to comments by Justice Wigney in *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd (No 3)* [2020] FCA 1766 which illustrate the matters to be considered by a court when assessing the strength of the public interest in protecting documents from disclosure.¹⁸ These matters included:

- whether the documents are formal records of Cabinet deliberations or documents used for the purpose of providing advice to Cabinet such those prepared by external consultants
- whether the subject matter of the documents is still current or controversial

¹⁴ S Ohnesorge and B Duffy, ‘Evading Scrutiny: orders for papers and access to Cabinet information by the New South Wales Legislative Council’, *Public Law Review*, Vol 29, 2018, p 122.

¹⁵ *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615, quoted in Submission 4, the Hon Keith Mason, p 1.

¹⁶ Submission 4, the Hon Keith Mason, p 1.

¹⁷ Submission 4, the Hon Keith Mason, p 2.

¹⁸ Submission 5, Mr John Evans, Parliamentary Ethics Adviser, p 2.

- the extent to which the documents disclose Cabinet’s consideration of government policy as opposed to specific commercial or contractual considerations.

2.10 The Hon Daniel Mookhey MLC noted comments by Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 which suggest that the harm to the public interest which will justify an immunity from disclosure in court needs to go beyond merely exposing the government to criticism:

It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.¹⁹

Implications of *Egan v Chadwick*

Overview

2.11 In *Egan v Chadwick* (1999) 46 NSWLR 563 the New South Wales Court of Appeal unanimously held that the power of the Legislative Council to order the production of State papers extends to documents with respect to which the executive government claims public interest immunity or legal professional privilege. However, the members of the court 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’.
- Priestley JA held that the Council’s power to order the production of documents extends to Cabinet documents including those that reveal Cabinet deliberations.

2.12 The position articulated by Spigelman CJ defines the current state of the law with respect to the Council’s power to order the production of Cabinet documents, although its interpretation has been the subject of considerable disagreement between the Legislative Council and the Executive since 2018.²⁰

Power to use Cabinet documents

2.13 Mr Coutts-Trotter in the DPC submission suggested that the majority decision in *Egan v Chadwick* supports the proposition that Cabinet documents disclosed to a committee should not be used:

¹⁹ Submission 3, the Hon Daniel Mookhey MLC, p 4.

²⁰ Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice*, 2nd edition (Federation Press, 2021), pp 702-713.

Neither the House nor any of its committees has the power to call for production of Cabinet documents. If Cabinet documents are disclosed to a committee without the authorisation of the Premier or Cabinet, they should be immediately returned to the Department of Premier and Cabinet as the custodian of the official Cabinet records of the State.²¹

2.14 However, the Hon Daniel Mookhey MLC submitted that the decision in *Egan v Chadwick* does not affect the matter this committee is inquiring into. Mr Mookhey pointed out that in the inquiry into the Transport Asset Holding Entity (TAHE) the Public Accountability Committee did not obtain Cabinet documents by exercising the power to order the production of a state paper but that he, Mr Mookhey, obtained the documents independently of committee processes and then used them in the inquiry.²²

2.15 In addition, Mr Mason stated that the matters decided in *Egan v Chadwick* are not the context of the present inquiry although he noted that the Court's reasoning touched on broader principles:

... *Egan v Chadwick* (1999) 46 NSWLR 563 established (by majority) that the Legislative Council does not have the power to compel the production of certain Cabinet documents. That is not the context of the present issue. However, the Court's reasoning points to more general constitutional principles touching the relationship between the legislative and executive arms of government.²³

Broader constitutional principles

2.16 As the Hon Keith Mason suggested the broader constitutional principles touched on in *Egan v Chadwick* are germane to this inquiry. A number of submissions noted that legal experts and members continue to debate whether the majority view gives appropriate weight to the constitutional role of the Legislative Council to secure executive accountability and thus for the Council be able to call for all documents including 'true' Cabinet documents.

2.17 Mr David Blunt, Clerk of the Parliaments, drew attention to a paper which examined the views of legal experts who maintain that the Council should have access to all Cabinet documents on constitutional grounds.²⁴ These experts contest the proposition that Cabinet confidentiality has priority over securing the accountability of government activities which the High Court has described as the 'very essence' of responsible government.²⁵ Mr Blunt also stated that questions have been referred to in debate in the Council as to whether the House should assert a right to require the production of all Cabinet documents (the Priestley position) or all documents excluding those which disclose the actual deliberations of Cabinet (the Spigelman position). This question remains unresolved.²⁶

²¹ Submission 2, Department of Premier and Cabinet, p 1.

²² Submission 3, Hon Daniel Mookhey MLC, p 2.

²³ Submission 4, the Hon Keith Mason, p 1.

²⁴ S Ohnesorge and B Duffy, 'Evading Scrutiny: orders for papers and access to Cabinet information by the New South Wales Legislative Council', *Public Law Review*, Vol 29, 2018, referred to in Submission 6, Mr David Blunt, p 2 and Attachment.

²⁵ S Ohnesorge and B Duffy, 'Evading Scrutiny: orders for papers and access to Cabinet information by the New South Wales Legislative Council', *Public Law Review*, Vol 29, 2018.

²⁶ Submission 6, Mr David Blunt, Clerk of the Parliaments, p 2.

2.18 Mr John Evans, Parliamentary Ethics Adviser, noted a recent ruling concerning the use of Cabinet documents by the Independent Commission Against Corruption,²⁷ and argued that if the Commission has power by statute to order the production and disclosure of Cabinet documents then as the ‘grand inquest of the nation’ the Council must have a concomitant power.²⁸ Mr Evans also referred to comments by Mr Bret Walker SC casting doubt on the majority reasoning in *Egan v Chadwick* on the basis that it fails to accord to a parliamentary chamber the kind of control over its proceedings as the courts have pronounced that they have over their own.²⁹

The significance of the *Expense Reduction Analysts* case

2.19 The submission of DPC drew the committee’s attention to a case in 2013 in which the High Court considered the appropriate action to be taken where privileged documents had been mistakenly produced to the opposing side during court-ordered discovery: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46.³⁰ In that case the High Court concluded that a court should ordinarily permit such a mistake to be corrected and order the document’s return. DPC submitted that:

An analogy may be drawn to the present case, in which the [Public Accountability Committee] has received confidential Cabinet documents in circumstances where the disclosure of those documents was not authorised.³¹

2.20 However, the Hon Daniel Mookhey MLC expressed the view that the court’s decision in the *Expense Reduction Analysts* case does not affect the matter this committee is inquiring into. Mr Mookhey stated that in the Public Accountability Committee’s inquiry into TAHE the executive did not produce Cabinet documents by mistake and that his actions were not analogous to the questions the court in the *Expense Reduction Analysts* case had to decide.³²

2.21 Other inquiry participants did not discuss this issue. However, it is relevant to note that the *Expense Reduction Analysts* case concerned the disclosure of documents subject to legal client privilege³³ rather Cabinet confidentiality.

²⁷ Independent Commission Against Corruption, Operation Keppel, Assistant Commissioner Ruth McColl AO SC, *Ruling regarding the course that should be taken in the public inquiry in relation to Cabinet documents and Cabinet deliberations*, 17 October 2021.

²⁸ Submission 5, Mr John Evans, p 4.

²⁹ Submission 5, Mr John Evans, p 1, citing Bret Walker, ‘Justified immunity or unfinished business? The appropriateness of parliamentary and executive immunities in the 21st century’, paper presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 1 December 2017, p 9.

³⁰ Submission 2, Department of Premier and Cabinet, Annexure B, p 2.

³¹ Submission 2, Department of Premier and Cabinet, Annexure B, p 2.

³² Submission 3, the Hon Daniel Mookhey MLC, p 2.

³³ *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46, paragraphs 8-14.

Legal constraints

2.22 A number of submissions canvassed the issue of whether there are any legal constraints which prevent the House or a committee from using or publishing Cabinet documents.

2.23 Mr Mason advised that it is a matter for the House to determine whether it is in the public interest to publish a Cabinet document which comes into the House's control and that if the House decides to publish or use the document then it may do so:

[A]bsent any legislation on the topic, the House must itself determine where the public interest lies if there is a call to restrict publication of Cabinet document that has come into its control...

[I]f the House determine to use or publish the document that is in its control then it may do so.³⁴

2.24 Mr John Evans, Parliamentary Ethics Adviser, expressed the view that there no legal impediments to a committee of the Council making use of a leaked Cabinet document:

I do not believe there is any legal impediment to a committee making use of a leaked Cabinet document that comes into its possession. Cabinet 'leaks' are sometimes published in the media without consequences. Committee proceedings and documents that come into its possession are protected by absolute privilege under the *Defamation Act 2005*, as well as Article 9 of the Bill of Rights 1688.³⁵

2.25 Mr Evans also advised that a committee 'has power to summon witnesses and ask lawful questions concerning a Cabinet document'.³⁶

2.26 Mr Richard Pye, Clerk of the Senate, made it clear that there are no legal constraints on the ability of the Senate or its committees to call for or use Cabinet documents when exercising their functions. Mr Pye advised that the Senate takes the view that that it is for the Senate, not the government, to determine claims to withhold documents in the public interest and that a continuing order of the Senate applies similar principles to committees.³⁷ While he noted that different constitutional arrangements apply in the Commonwealth and New South Wales Parliament, Mr Pye submitted that the power of the Senate to require information has its genesis in the same principle as in New South Wales, namely:

that a parliament cannot effectively perform its legislative and accountability functions without access to information about legislative proposals and the operations of government.³⁸

³⁴ Submission 4, the Hon Keith Mason, p 2.

³⁵ Submission 5, Mr John Evans, p 4.

³⁶ Submission 5, Mr John Evans, p 4.

³⁷ Submission 1, Mr Richard Pye, Clerk of the Senate, pp 1-2.

³⁸ Submission 1, Mr Richard Pye, p 1.

Committee comment

- 2.27** All inquiry participants acknowledged the need to uphold the principle of collective ministerial responsibility. However, they also acknowledge that this needs to be balanced with the constitutional role of the Legislative Council as a House of review. For most inquiry participants, there is no legal or constitutional impediment to a committee of the Legislative Council using a Cabinet document in an inquiry. However, given the importance of ministerial collective responsibility, several participants have proposed procedures to ensure that the determination of the public interest in such cases gives sufficient weight to this central principle of responsible government. These are discussed in the next section of the report

Possible procedures to assist committees to determine the public interest

- 2.28** Submissions to the inquiry which supported the view that committees may use Cabinet documents in their inquiries included discussion of the procedures that could be adopted to assist committees in determining whether it is in the public interest for a Cabinet document to be used. The views expressed by inquiry participants in relation to this issue are summarised below.

The Hon Keith Mason

- 2.29** Mr Mason stated that if the House was called on to consider whether it was in the public interest to publish a Cabinet document in the House's control, the House would be expected to 'weigh the impact of its actions on the effective maintenance of the principles of responsible government'.³⁹
- 2.30** The weighing process described by Mr Mason has similarities to the process followed by the courts when determining public interest immunity claims. However he notes:

Like all privileges, the onus of persuasion rests upon the party asserting the privilege. But if established in the specific context, the immunity may prevent Cabinet documents that disclose deliberations from being the subject of subpoena or production in litigation. However, merely because a Cabinet document discloses a policy decision taken by Government will not suffice to engage these principles: see *Prineas v Forestry Commission of New South Wales* (1984) 53 LGRA 160.⁴⁰

- 2.31** However, Mr Mason stated that given the nature of the Council's constitutional role it would be harder to justify a claim of non-disclosure in parliamentary proceedings than in the courts:

... the constitutional role of the Upper House extends to maintaining the accountability of the Executive and consideration of legislative change (see generally *Egan v Willis* (1998) 195 CLR 424). This is a broader focus than that of a court with jurisdiction in a specific criminal or civil trial. It follows that it will in practice be harder to show (as an aspect of the balancing exercise) the unimportance of information in a disputed document to the matter at hand than will occur in a curial setting.⁴¹

³⁹ Submission 4, the Hon Keith Mason, p 2.

⁴⁰ Submission 4, the Hon Keith Mason, p1.

⁴¹ Submission 4, the Hon Keith Mason, p 2.

- 2.32** As to the procedures which could be followed to facilitate the balancing exercise, Mr Mason noted that it would be open to the House to establish in advance some process whereby there was consultation with DPC before publication of a document that truly revealed recent Cabinet deliberations. He also noted that there could be an independent evaluation and report.⁴²
- 2.33** However, Mr Mason pointed out that as Cabinet documents seldom ‘arrive’ in the House there may be little need for a sessional or standing order to deal with such matters.⁴³

Mr David Blunt, Clerk of the Parliaments

- 2.34** Mr David Blunt, Clerk of the Parliaments, elaborated on Mr Mason’s idea of an independent evaluation process by proposing an option for the use of an arbiter to assess Cabinet documents received by committees. Under this proposal:
- The arbiter would assess whether any of the documents disclosed the actual deliberations of Cabinet, using the test applied by Spigelman CJ in *Egan v Chadwick*, to identify documents that are beyond the power of the House to order the executive to produce.
 - The arbiter’s role 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 was essential for the purposes of the inquiry. However, if the House were to adopt the position articulated by Priestley JA in *Egan v Chadwick*, that the Council has the power to call for Cabinet documents whether or not they record deliberations, this presumption would not be required.⁴⁴
- 2.35** Mr Blunt advised that such a process could be addressed in a sessional order or a new clause in the resolutions establishing committees but suggested that a sessional order may not be required given that cases in which Cabinet documents come into the possession of committees are ‘extremely rare’.⁴⁵ In the alternative he advised that a committee in receipt of Cabinet documents could make a special report to the House requesting the House to authorise the appointment of an independent legal arbiter by way of an instruction to the committee.⁴⁶

Mr John Evans, Parliamentary Ethics Adviser

- 2.36** Mr John Evans, Parliamentary Ethics Adviser, submitted that the process a committee should follow when it comes into the possession of Cabinet documents involves:
- a balancing act in determining the public interest against disclosure and the public interest in publishing information relevant to its inquiry and terms of reference.⁴⁷

⁴² Submission 4, the Hon Keith Mason, p 2.

⁴³ Submission 4, the Hon Keith Mason, p 2.

⁴⁴ Submission 6, Mr David Blunt, pp 1-3.

⁴⁵ Submission 6, Mr David Blunt, p 3.

⁴⁶ Submission 6, Mr David Blunt, p 3.

⁴⁷ Submission 5, Mr John Evans, p 4.

- 2.37** Like Mr Blunt, Mr Evans suggested that an independent evaluation process could assist with the assessment of whether Cabinet documents should be disclosed. However, Mr Evans's proposal was for a process that could be applied in relation to both the House and committees:

In a greater scheme of the House and a Committee dealing with issues of public interest immunity over Cabinet documents, I would suggest that an appropriate mechanism could be a resolution of the House or sessional order, comprising a procedure involving contesting a claim of public interest immunity confidentiality through an Independent Arbiter in a similar manner to that which applies to claims of privilege under [standing order] 52.⁴⁸

- 2.38** Mr Evans submitted that such a scheme would allow the executive to make submissions to the arbiter in determining whether Cabinet deliberations or Cabinet documents should be publicly disclosed.⁴⁹

The Hon Daniel Mookhey MLC

- 2.39** The Hon Daniel Mookhey MLC submitted that a committee should only refrain from publishing a Cabinet document if it decides that publication will do overriding harm to the 'proper functioning of the executive arm and of the public service'.⁵⁰ In support of the adoption of a test of overriding harm Mr Mookhey stated:

This is a standard that is modelled on the 'harm test' the High Court first honed in *Sankey v Whitlam*. Australian courts have since used it to determine a wide variety of public interest immunity claims that involve the same tensions between executive oversight and the executive's need to function as the TAHE inquiry triggered. As a prevailing House standard, it should prevail in committees too.⁵¹

- 2.40** While other inquiry participants suggested that an independent arbitration process could assist committees in assessing the public interest in relation to the use of Cabinet documents, Mr Mookhey suggested that there would be value in committees accessing the reports of the independent arbiters appointed under standing order 52 when assessing overriding harm.⁵²

- 2.41** Mr Mookhey went on to apply the test of overriding harm to the decision by the Public Accountability Committee to publish Cabinet documents concerning the Transport Asset Holding Entity (TAHE). Mr Mookhey submitted that this decision did not create overriding harm to the proper functioning of the executive arm or public service and did not damage the State's power to set a budget or ability to safely operate a rail service. Rather, Mr Mookhey submitted, by inspecting the documents and examining government witnesses concerning their contents the Public Accountability Committee had furthered its inquiry, especially considering that 'the documents were more candid about the reasons why the Government established the

⁴⁸ Submission 5, Mr John Evans, p 4.

⁴⁹ Submission 5, Mr John Evans, p 4.

⁵⁰ Submission 3, the Hon Daniel Mookhey MLC, p 3.

⁵¹ Submission 3, the Hon Daniel Mookhey MLC, p 4.

⁵² Submission 3, the Hon Daniel Mookhey MLC, p 4.

TAHE than the Government's own submissions were', and witnesses gave evidence 'which was ... contradicted by the story the documents were revealing'.⁵³

- 2.42** Mr Mookhey acknowledged that the decision to publish the documents may have led to embarrassment for the executive which might have grown more acute with media attention being given to the TAHE controversy. However, Mr Mookhey submitted that:

... 'embarrassment' is not a species of harm which should lead the House, or its committees, to volunteer to curb its own powers. After all, we are a house of review: embarrassment is a by-product from our labour.⁵⁴

Mr Richard Pye, Clerk of the Senate

- 2.43** Mr Richard Pye, Clerk of the Senate, advised that where a Senate committee receives a Cabinet document indirectly, the committee may seek information from the relevant minister to help it determine whether it is in the public interest to publish the document. However, it is a matter for the committee whether it wishes to seek the views of the government before weighing the competing interests and determining whether to use or publish a document.⁵⁵

- 2.44** In weighing these matters Senate committees are frequently advised that the Senate has previously been persuaded to accept that there is a significant public interest in the confidentiality of documents which would reveal Cabinet deliberations, but not necessarily in relation to documents which might be considered inputs to Cabinet processes. Mr Pye advised that this approach:

no doubt seeks to prevent government overreach in categorising administrative documents to attempt to put them beyond parliamentary scrutiny.⁵⁶

- 2.45** Mr Pye stated that there are few acknowledged instances of Senate committees receiving and considering the publication of documents which would reveal Cabinet deliberations. However, he referred to one example in 2012 where the Legal and Constitutional Affairs Legislation Committee refused to allow such a document to be received during a budget estimates hearing. In that case the committee sought the minister's views before meeting privately to determine that the document should not be tabled. Mr Pye pointed out that as estimates hearings must be conducted in public a decision by the committee to receive the document would have necessitated its publication.⁵⁷

Committee comment

- 2.46** While Cabinet documents are afforded protections in the courts by virtue of their status, this protection is not absolute: a range of factors may be taken into account in determining whether the public interest in protecting the principle of Cabinet confidentiality is outweighed by the

⁵³ Submission 3, the Hon Daniel Mookhey MLC, p 4.

⁵⁴ Submission 3, the Hon Daniel Mookhey MLC, p 4.

⁵⁵ Submission 1, Mr Richard Pye, p 3.

⁵⁶ Submission 1, Mr Richard Pye, p 3.

⁵⁷ Submission 1, Mr Richard Pye, p 3.

importance of revealing information that is relevant to particular legal proceedings. A similar balancing exercise is applicable to a committee in receipt of documents that reveal Cabinet deliberations. However, submissions to the inquiry suggest that it will be harder to show the need for Cabinet deliberations to be kept confidential in the context of a committee inquiry than in the courts given the nature of the Council's constitutional role.

2.47 A variety of suggestions were proposed in the inquiry as to how a committee should undertake the process of evaluating whether it is in the public interest for a Cabinet document to be published or used in its inquiry. Drawing on these suggestions the committee has developed a set of procedures to guide committees in relation to the process. The proposed procedures are intended to apply to Cabinet documents that meet the test articulated by Spigelman CJ in *Egan v Chadwick* namely documents that disclose Cabinet deliberations or documents the disclosure of which would be otherwise inconsistent with ministerial responsibility. Under this proposal:

- A committee in possession of such a document would assess whether it is in the public interest to publish or use the document having regard to both the importance of Cabinet confidentiality and the constitutional functions of the Legislative Council
- The committee would take account of all relevant circumstances including the importance of the document for the committee's inquiry and whether the document had already been published
- The committee would have the option of consulting with DPC before making a determination
- If needed, the committee would have the option of referring the question of *whether* the document reveals Cabinet documents to an independent arbiter for evaluation and report
- If needed, the committee would also have the option of referring to the arbiter the question of whether the public interest in protecting the document's confidentiality outweighs the public interest in allowing the document to be used.

2.48 One issue to consider is at what point the House has an opportunity to override a decision by a committee in its decision-making on the use of Cabinet documents, in the extremely rare instances that a committee has access to such documents. When the committee makes a special report in a situation where it has decided it wants an arbiter appointed, the House could then decide that rather than appoint an arbiter it could instruct the committee to take down the documents from its website and/or return them to DPC. If the committee proceeds without determining it requires assistance from an arbiter a member would need to give a notice of motion in the House for such an instruction. However given the tight time frames of many current inquiries it is possible that an inquiry may report prior to the House having such an opportunity.

2.49 The committee proposes that these procedures be followed only in relation to Cabinet documents which meet the test articulated by Spigelman CJ. The committee does not believe there is a need for additional procedures to regulate the publication or use of other 'Cabinet documents'. The committee notes that there are already procedural safeguards in place concerning the conduct of inquiries by Council committees. These include procedures which

allow inquiry participants to make claims of public interest immunity which are considered by the committee concerned as part of procedural fairness to witnesses.⁵⁸

2.50 The issue of Cabinet leaks is a matter for the executive rather than the Parliament to address. It is not the responsibility of the Legislative Council or its committees to limit the damage which accrues to the government when confidential Cabinet documents are disclosed by preventing wider publication of the documents.

2.51 The committee therefore recommends:

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

⁵⁸ *Procedural Fairness for Inquiry Participants*, Minutes, NSW Legislative Council, 25 October 2018, pp 3138-3140.

- (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.

Statutory powers and questioning of witnesses on Cabinet documents

- 2.52** While the committee understands that committees have power to summon witnesses and ask lawful questions concerning Cabinet documents, the inquiry did not explore in detail the question of the relationship between Cabinet confidentiality and committees' statutory powers under the *Parliamentary Evidence Act 1901*, as this was not an issue covered extensively in submissions. The committee recognises that parliamentary committees have the power to compel public servants to attend and answers questions on Cabinet documents in the possession of a committee, but also recognises the extremely difficult position such witnesses are placed given the legal advice they will be required to follow from DPC. The punitive powers under the *Parliamentary Evidence Act 1901* should be invoked very cautiously in such situations, and due consideration given to the *Procedural Fairness for Inquiry Participants* resolution of the House.⁵⁹

⁵⁹ *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138 – 3140.

Appendix 1 Submissions

No.	Author
1	Department of the Senate
2	Department of Premier and Cabinet
3	The Hon Daniel Mookhey MLC
4	The Hon Keith Mason AC QC
5	Mr John Evans PSM, Parliamentary Ethics Adviser
6	Mr David Blunt, Clerk of the Parliaments

Appendix 2 Correspondence from Department of Premier and Cabinet to the Chair of the Public Accountability Committee



Ref: A5152927

The Hon David Shoebridge MLC
 Chair, Public Accountability Committee
 Legislative Council
 Parliament House
 Macquarie Street
 SYDNEY NSW 2000

By email: public.accountability@parliament.nsw.gov.au

Dear Chair

It has come to my attention that Cabinet documents have been used and disclosed in connection with the Public Accountability Committee's inquiry into the Transport Asset Holding Entity (the Inquiry).

In particular, the following Cabinet documents, tabled by the Hon Daniel Mookhey MLC, have been published on the NSW Parliament's website for the Inquiry:

- draft Cabinet submission entitled 'Establishment of Transport Asset Holding Entity' dated May 2016 (described on the Committee's website as 'Transport Tender 002' and 'Treasury Tender 003');
- Treasury presentation entitled 'Transport Asset Holding Entity ("TAHE") – Treasury update' (described as 'Treasury Tender 001'); and
- KPMG report entitled 'TAHE: Long-term operating model assessment' dated 8 November 2020 (described as 'TAHE Tender 003', 'Transport Tender 003' and 'Treasury Tender 004').

The collective responsibility of Ministers for government decisions is a convention at the core of the Cabinet system. The unauthorised disclosure of Cabinet documents, including draft Cabinet documents, undermines collective ministerial responsibility and the convention of Cabinet confidentiality.

Each of the documents identified above is subject to Cabinet confidentiality. I understand that their disclosure to the Committee, directly or indirectly, was not authorised by the Premier or the Cabinet.

I therefore request that you arrange for the Cabinet documents identified above to be immediately removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department. I also request that the Cabinet documents not be further used or disclosed as part of the Inquiry.

I would be grateful if you could confirm that these steps have been taken by return letter as soon as possible.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Mr Mark Hare, A/Deputy Secretary, General Counsel on

Yours sincerely

Michael Coutts-Trotter
 Secretary

22 October 2021



Ref: A5159073

Mr David Shoebridge MLC
Chair, Public Accountability Committee
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: public.accountability@parliament.nsw.gov.au

Dear Chair

Thank you for your letter dated 26 October 2021, received on 27 October 2021, inviting the Department to provide further information by way of written submissions in relation to the Department's request that certain Cabinet documents be removed from the Committee's website and not used or disclosed any further by the Committee.

In addition to the matters set out in my letter of 22 October 2021, the Department makes the following observations.

Each document identified in my letter of 22 October 2021 contains Cabinet information and is subject to Cabinet confidentiality.

I am advised that their disclosure to the Committee, directly or indirectly, was not authorised by the Premier or the Cabinet, who are the only persons who may authorise the disclosure of Cabinet documents.

The paramount importance of protecting the confidentiality of Cabinet documents is firmly established. In *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 at 39, Gibbs ACJ stated:

[T]he law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments . . . papers brought into existence for the purpose of preparing a submission to cabinet . . . and indeed any documents which relate to the framing of government policy at a high level. According to Lord Reid, the class would extend to 'all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies': *Conway v Rimmer* [1968] AC 910 at 952.

In *Conway v Rimmer* [1968] AC 910 at 952, Lord Reid said:

I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest . . . To my mind the most important reason is that such disclosure would create or fan ill-informed or capricious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those with some axe to grind. And that must, in my view, apply to all documents concerned with policy making within departments . . .

In *Egan v Willis* (1998) 195 CLR 424 at 453-454, the High Court found that the Legislative Council had the power to order State papers based on constitutional principles relating to responsible government, the separation of powers and the rule of law. However, the majority judgment of Spigelman CJ and Meagher JA in *Egan v Chadwick* (1999) 46 NSWLR 563 found that the power of the Legislative Council to order the production of documents does not extend to ordering the production of Cabinet documents, as this would directly undermine the constitutional principle of collective Ministerial responsibility.

I note that Cabinet confidentiality, unlike legal professional privilege, cannot be waived.

In 2013, the High Court considered the appropriate action to be taken where privileged documents had been mistakenly produced to the opposing side during court-ordered discovery (*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46). The High Court concluded that a court should ordinarily permit that mistake to be corrected and order the document's return. The High Court noted that the Australian Solicitors' Conduct Rules contain a duty of a solicitor to return material, which is known or reasonably suspected to be confidential, where a solicitor is aware that its disclosure was inadvertent. It concluded that such a rule should not be necessary, but provides "an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice".

An analogy may be drawn to the present case, in which the Committee has received confidential Cabinet documents in circumstances where the disclosure of those documents was not authorised.

In your letter, you mentioned that similar issues of Cabinet confidentiality were recently considered by the Independent Commission Against Corruption (ICAC), which I understand to be a reference to the Assistant Commissioner's ruling in relation to the use of Cabinet documents in the ICAC's Operation Keppel investigation. The Department respectfully submits that these are not comparable circumstances, given that the ICAC has the power to compel the production of Cabinet documents and information.¹ The Legislative Council does not.

For these reasons, the Committee should arrange for the relevant documents to be immediately removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department. The Committee should also ensure that the Cabinet documents not be further used or disclosed as part of its inquiry. I would be grateful if you could confirm that these steps have been taken by return letter as soon as possible.

This submission is made in the Department's capacity as custodian of official Cabinet records of the State. The submission is not confidential and may be published.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Ms Kate Boyd, Deputy Secretary, General Counsel on

Yours sincerely



Michael Coutts-Trotter
Secretary

2 November 2021

¹ Sections 24(3) and 37(2) of the *Independent Commission Against Corruption Act 1988*.

Appendix 3 Minutes

Minutes no. 25

Wednesday 24 November 2021

Privileges Committee

Room 1136, 1.30 pm

1. Members present

Mr Primrose (*Chair*)

Mr Donnelly

Ms Faehrmann

Mr Farlow

Mr Khan

Mr Mallard.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay.

2. Apologies

Mrs Maclaren-Jones, Reverend Nile

3. Draft minutes

Resolved, on the motion of Mr Farlow: That draft minutes no. 24 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

4.1 Received

- 17 November 2021 – Correspondence from Mr David Shoebridge MLC, to the Chair of the Privileges Committee, identifying additional cabinet documents published on the committee's website.

5. Inquiry into the Examination, publication and use of cabinet documents by Legislative Council committees

5.1 Terms of reference

The committee noted the following terms of reference referred by the House on Tuesday 16 November 2021:

(1) That:

- (a) the Privileges Committee inquire into and report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry, and
- (b) the Committee report by the first sitting day in 2022.

5.2 Proposed inquiry timeline

Resolved, on the motion of Mr Donnelly: That the committee agreed to the proposed inquiry:

- Thursday 17 November 2021 – inquiry referred by the House
- Wednesday 24 November 2021 – meeting to adopt terms of reference and agree to invite submissions
- Friday 14 January 2022 – submissions due
- Week of 14-18 February 2022 – deliberative meeting to consider draft report
- Tuesday 22 February 2022 – report tabling date.

5.3 Submissions

Resolved, on the motion of Mr Donnelly: That the committee seek submissions from the following stakeholders:

- Mr Richard Pye, Clerk of the Senate
- Mr David Blunt, Clerk of the NSW Legislative Council
- All LC members
- Department of Premier and Cabinet
- Professor Anne Twomey
- Laureate Emeritus Professor Cheryl Saunders, AO
- Professor Gabrielle Appleby, (academic specialising in public law, has also spent time working for the Queensland Crown Solicitor and the Victorian Government Solicitor's Office)
- The Hon Keith Mason AC QC, and
- Mr John Evans, Parliamentary Ethics Adviser

6. Consideration of President's submission to the ICAC regarding Operation Witney

Resolved, on the motion of Mr Khan: That the Privileges Committee endorse the response prepared by the President on behalf of the Legislative Council.

7. Other business

Resolved, on the motion of Mr Khan: That the Clerk and Deputy Clerk offer, on behalf of the committee, a briefing and question and answer session for Legislative Council members and members' staff on the proposal for a Compliance Officer/Independent Complaints Officer currently on the Notice Paper.

8. Adjournment

The committee adjourned at 1.46 pm.

Steven Reynolds

Committee Clerk

Draft Minutes no. 26

Friday 18 February 2022

Privileges Committee

Via Webex, 2.00 pm

1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Farlow

Mr Harwin

Mr Martin.

In attendance: Steven Reynolds and Taylah Cauchi.

2. Apologies

Mr Mallard

3. Draft minutes

Resolved, on the motion of Revd Nile: That draft minutes no. 25 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 8 December 2021 – Correspondence from the Chair of the Senate Standing Committee of Privileges, to the Chair of the Privileges Committee, advising a new memorandum of understanding regarding investigations where parliamentary privilege may be involved was signed and tabled on 23 November 2021.
- 9 December 2021 – Correspondence from the Hon Mark Banasiak MLC, Chair of Portfolio Committee No. 4 – Regional NSW, Water and Agriculture, to the Chair of the Privileges Committee, regarding a cabinet-in-confidence document tabled at a hearing for the inquiry into the long term sustainability and future of the timber and forest products industry.
- 14 February 2022 – Correspondence from the Director, Government and Regulatory Affairs, KPMG Australia to the Chair in regards to a document published by the Public Accountability Committee in the course of the inquiry into Transport Asset Holding Entity.

Resolved, on the motion of Mr Donnelly: That, the committee write to the Chair of the Senate Privileges committee thanking them for bringing the new protocol to its attention, and, noting the explicit mention that the AFP will use the revised protocol for search warrants for all Australian parliaments, not just the Commonwealth Parliament, will consider the new protocol further in the context of its current inquiry into the execution of search warrants (No. 3).

Resolved, on the motion of Revd Nile: That the committee write to the Director, Government and Regulatory Affairs noting that he has written to the Chair of the Public Accountability in relation to the same manner and advising that the matters raised are a matter for that committee, unless referred to the Privileges Committee by the House.

5. Inquiry into the Examination, publication and use of cabinet documents by Legislative Council committees

5.1 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submissions nos 1-6.

5.2 Consideration of Chair's draft report

The chair tabled a revised Recommendation 1, and draft foreword, which having been previously circulated, was taken as read.

The chair then tabled his draft report **The Examination, publication and use of cabinet documents by Legislative Council committees**, as amended.

Mr Farlow moved: that paragraphs 2.46 to 2.50 be omitted.

Question put.

The Committee divided.

Ayes: Mr Farlow, Mr Martin, Mr Harwin

Noes: Mr Primrose, Mr Donnelly, Revd. Nile, Ms Faehrmann.

Question resolved in the negative.

Mr Farlow then moved: That recommendation 1 be omitted and insert instead “Documents subject to Cabinet confidentiality should not be published by committees, unless their disclosure is authorised by the Premier or Cabinet.

Any documents subject to Cabinet confidentiality as identified by the Department of Premier and Cabinet, whose use has not been authorised by the Premier or the Cabinet, should be removed from the Parliament’s website, all digital copies destroyed and hard copies returned to the Department.”

Question put.

The Committee divided.

Ayes: Mr Farlow, Mr Martin, Mr Harwin

Noes: Mr Primrose, Mr Donnelly, Revd. Nile, Ms Faehrmann.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly That:

The draft report be the report of the committee and that the committee present the report to the House;

The submissions and correspondence relating to the inquiry be tabled in the House with the report;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;

Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting

6. Meeting with the Ethics Adviser

The committee noted the requirement for the annual meeting with the Parliamentary Ethics Adviser and requested the secretariat circulate suitable dates during a sitting week.

7. Briefing on Independent Complaints Officer

The Chair reported that the Clerk and Deputy Clerk had provided a briefing to members and members' staff on 17 February 2022, as resolved at the last meeting of the Committee.

The Deputy Clerk provided further information on three questions raised by a member at the briefing on 17 February, and indicated the Clerk would circulate members with this further information.

8. Adjournment

Sine die

Steven Reynolds
Committee Clerk

Appendix 4 Dissenting Statement

From the Hon Scott Farlow MLC, the Hon Don Harwin MLC and the Hon Taylor Martin MLC, Liberal Party

There is a long standing tradition in the Westminster system of Government that the deliberations of Cabinet should remain confidential. This principle supports collective ministerial responsibility and the conventions of Westminster Government.

Neither the Legislative Council, nor its committees, has the power to compel the production of Cabinet documents.

Spigelman CJ and Meagher JA held in *Egan v Chadwick* (1999) 46 NSWLR 563 that "in respect of Cabinet documents their immunity from production is complete." This is the last authority on this topic and the majority held that the Legislative Council did not have the power to order the production of Cabinet documents as it would undermine collective Ministerial responsibility.

It is our position that Cabinet documents that are obtained by a committee, without authorisation of the Premier or Cabinet, should be immediately returned to the Department of Premier & Cabinet as the custodian of the official Cabinet records of the State.

Documents that attract Cabinet confidentiality should certainly not be published on the Committee's website, digital copies should be destroyed and hard copies returned to the Department of Premier & Cabinet. Committees of the Parliament should also ensure that Cabinet documents are not used further or disclosed as part of inquiries.

