PARLIAMENT OF TASMANIA

Legislative Council
HANSARD

Tuesday 22 August 2023

[excerpt]

MOTION

Legislative Council Select Committee Production of Documents - Report - Referral to Standing Orders Committee

[12.14 p.m.]

Ms WEBB (Nelson) - Mr President, I welcome the opportunity to speak on this timely motion. I thank the member for Murchison for bringing this important matter forward for our consideration today.

This motion does not ask us to note the Legislative Council Select Committee Report on Production of Documents, nor discuss its content in any great detail. In fact, that report was noted by this Chamber on Thursday 1 July 2021. However, I was a member of that inquiry along with other members, including the member for Elwick; the member for Prosser, who participated in the early stages; and the member for Murchison, the committee Chair.

I will quickly revisit observations I made at the time it was formally noted in this Chamber, as these comments remain relevant to today's debate.

Just over two years ago, on July 2021, in that noting debate, I said:

> It is easy to pay lip service to transparency and accountability or open government, but the rubber only hits the road when you see it in action. When you see that it is not just in the talk, but also in the walk. Certainly, New Zealand is leading most jurisdictions in Australia and nationally, releasing Cabinet documents within 30 days, and it is an incredibly accountable and open way to conduct your business.

Further, I noted:

> Fundamentally, under the system of responsible government, parliament is supreme. The executive government is answerable to it. We know that is the case on paper, but that only plays out in reality if parliament is prepared and willing to exercise that power in holding government to account and where the government is prepared to be a participant in the process.

Those challenges still stand today. We have recently seen non-Government members seeking to exercise parliament's powers - expressed by numbers voting on the Floor, as well as through committee meetings - to hold government to account on matters of current and serious public interest.

Yet, we have not seen quite so much of the executive being prepared to participate in the process of being willingly answerable. Instead, since 2021 we have seen a number of further instances of similar tension, conflict or even outright staring-down regarding formal, voted-on requests, between the executive and both Chambers and their respective committees, usually with the executive claiming some form of immunity.

It is worth noting that the select committee report acknowledges there can be appropriate and reasonable claims of immunity relating to the production of documents, in limited circumstances. However, the lack of remedy and resolution to those denied requests have escalated into political conflict - unedifying conflict at best; and at worst, actively hindering parliamentary work in the public interest.

A recent example is the conflict over claims of immunity arising in the other place regarding the release of documents related to the AFL stadium. This conflict has led to the extraordinary and unsatisfactory option of viewing said documents while being sworn to secrecy about the contents and prevented from discussions with other members who may have also viewed the documents through that confidential mechanism.

It is in this current and volatile context that we now consider the motion before us. This motion seeks to provide an avenue towards resolution, beyond the piecemeal consideration of each claim of immunity by the executive. We have heard, and I am sure we will continue to hear, justifications for executive privilege to outweigh that of the parliament on the basis of Cabinet confidentiality and the need to keep Cabinet deliberations confidential, due to commercial-in-confidence, sovereign risk arguments et cetera.

Mr President, these will be further wrapped up in the language of parliamentary precedent and convention and the like. The degree to which recent, related debates have seen concepts such as parliamentary convention and responsible government principles and precedents thrown around like two-dimensional confetti, is deeply concerning.

Too often it appears this language is used, not in an attempt to understand or provide a workable framework but instead, to block, to confuse and shut down consideration even of the necessity for the current debate - let alone the debate itself. I can imagine the disingenuous use of convention from some quarters to justify ongoing inaction, prompting the ghost of Mr Thomas Erskine May to throw his arms up in disgust while yelling, 'Bah! Humbug!'

As stated in the Select Committee's Production of Documents report:

> According to the Australian Senate's *Guides to Senate Procedures, No. 12 - Orders for production of documents*, the power to require the production of information is one of the most significant powers available to a legislature to enable it to carry out its functions of scrutinising legislation and the performance of the executive arm of government.
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> The Tasmanian Houses of Parliament and committees established by them have an inherent and unequivocal power to order members and witnesses to produce documents and the authority to treat refusal to produce documents as a contempt of the House. This reflects a fundamental principle of parliamentary democracy, that is the people elect representatives, members

> of parliament to advocate and inquire on their behalf without impediment. This is especially important in an upper House which has the key role as a House of Review.

The bottom line, and fundamental line is that additional to federal parliamentary procedures, and unlike some of our interstate parliamentary counterparts, Tasmania has a relevant act in this space, the Parliamentary Privilege Act 1858. We do not need to rely on arguments of convention - whether humbug or genuine - when it comes to the why and wherefores of the Tasmanian Parliament's precedence over the Executive of the day.

Section 1 of the Parliamentary Privilege Act 1858 states very clearly and unequivocally, and I quote:

> Power to order attendance of persons. Each House of Parliament and any committee of either house duly authorized by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be. Also, to produce to the House or committee any paper, book, record or other document in the possession or power of such person. All persons are hereby required to obey any such order.

This is not just my interpretation of the act. Learned submissions to the select committee also pointed to this act including former solicitor-general, Leigh Sealy, who stated the following in his submission, and I quote:

> The Tasmanian Parliament possesses an express power to call for the production of documents, that power having been conferred by section 1 of the Parliamentary Privilege Act 1858.

However, Mr Sealy's submission goes on to emphasise that due to the lack, and inappropriateness, of having a court-based intervention into the operations of the parliament. Just as these stand-offs tend to result from political decisions, any solution will also need to be political rather than legal, presuming the parliament does not wish to exert its power to imprison or inflict some other form of punishment on those committing acts of none compliance.

Two years later that is where this parliament still finds itself, at an impasse between the legal interpretation of the powers conferred to the parliament by the act and the political will to apply, implement and enforce those powers because the parliament, inclusive of the Executive, needs to arbitrate itself. Put simply, this motion seeks to request the Standing Orders Committee to set up a workable mechanism to breach that impasse consistent with the provisions of section 1 of the Parliamentary Privilege Act 1858, while presumably seeking an alternative enforcement mechanism to doors being broken down in the pursuit of warrants issued by either Speaker or President as provided for under section 9 of the act or even imprisonment as provided for under section 3 of the act. I do not think we are heading down those paths, but looking for better solutions.

Ms Forrest - It depends how far you are willing to push.

Ms WEBB - Indeed, if a workable solution is not put in place as a palatable measure for this place those powers are there, imprisonment and other sorts of punishment. I will briefly touch on the Department of Premier and Cabinet's Production of Cabinet Documents Report to

Parliament, mentioned by the member for Murchison also in her contribution, which was tabled in this place on Tuesday August 15 last week.

I also raised it briefly during an adjournment speech on that same day. I do not intend to revisit in detail that contribution now. However, in the context of my earlier comments for the need for the government of the day to participate in both forming, instead of blocking, the most transparent processes, reflecting the intent of the Parliamentary Privilege Act, and then abiding by and implementing those processes there are some additional points to be made in relation to that DPAC document. Namely, there is a key difference between participating within an agreed process and being the deciding entity of that process. I cannot stress enough that any process entered into to resolve this impasse between the parliament's legal rights and the Executive's political will should not be driven, nor determined by, the Executive.

If it is to have any coherent credence across the parliament and amongst the broader community, formulating an agreed process must be driven by parliament and conducted transparently. To do so will actually benefit both the Government and public confidence in our system of government. Any process established to determine which Cabinet documents or information are to be wholly or partially released to parliament that is driven either by the Executive itself or by government departments, such as DPAC, will always run the gauntlet of public suspicion and distrust that the decision-making process has been gerrymandered, if you will, in the interests of the government of the day at the expense of the public interest.

There is much more that I could say about the quasi process established for the other Chamber of our parliament by the Premier but now is not necessarily the time for that.

While I said at the outset that I welcome debate on this motion before us, I am going to note that it does have some inherent limitations. This is not, per se, a fault of the motion. Instead, it reflects the actual and established principles shared across parliaments, based on the Westminster model. That is, that each House is a master of its own destiny. This Chamber cannot vote to bind the other place without its expressed consent nor vice versa. Therefore, this motion can only apply to decisions which have bearing on this Chamber and the committees for which it is responsible -

Ms Forrest - Which is the case in New South Wales and other jurisdictions.

Ms Webb - Indeed. I am just reflecting on that, I am getting somewhere with the points. I will get there.

[…]

Ms WEBB - There are two reasons why I belabour this point. The first, as I mentioned when I raised, last week, my queries arising from the tabled DPAC Production of Cabinet Documents report to Parliament, is the problematic scenario of having two different sets of expectations and processes working concurrently across the Parliament. This is especially absurd in light of the fact that schedule 1 of the Parliamentary Privilege Act 1858 does not distinguish between the two Chambers, it solely refers to parliament. In contrast to a Government and DPAC-driven process, this motion does present the positive aspect of clearly placing the decision-making ball within the parliamentary court, where it should be.

The second reason I am concerned about the confined scope, not only of this specific motion but also reflecting that under which each Chamber must operate, is that any agreed

recommendation arising from this particular potential reference to the Legislative Council Standing Orders Committee can only apply to this Chamber, naturally. Further, any potential resulting amendments to this Chamber's Standing Orders could only apply to members of this Chamber, naturally.

It is possible, that current or future governments will argue their Assembly-based ministers must only abide by the Assembly Standing Orders and are not bound by ours. Hence, should the Council vote for a minister elected to the other place to provide documents, in the absence of any corresponding provision in the Assembly's Standing Orders, a form of mutual extradition provision - for want of a more collegial concept - could possibly find ourselves back here where we have started at an impasse. This is not a new argument and nor should it be interpreted as a basis on which to not support the motion currently before us because I do support the motion.

Instead, it serves to highlight that if the concrete first steps can be taken by this Chamber to establish a clear and transparent, accountable process and set that viable example, then we have a responsibility to do so, but with our eyes open to the fact that we may be on our own when taking this step.

Whether this Chamber succeeds in establishing a viable production of documents mechanism or not, recent events have demonstrated loudly and unequivocally that we need a whole of Parliament circuit breaker, a circuit breaker embedded in the fundamental principle that the Executive is answerable to the parliament as a whole. A circuit breaker that operates in a transparent and accountable manner. Former Tasmanian parliaments have availed themselves of established vehicles for such operational circuit breaking discussions, such as joint house committees on the working arrangements of parliament. For members unfamiliar with this former joint house committee, which used to be reappointed after each general election - I will quote this:

> Its principle role is to examine and recommend to both Houses, measures which may improve the performance and efficiency of the Parliament.

That is a quote from a 1998 report into the Delegation of Government Business Enterprises' Scrutiny to Committees.

Some further examples of work that came through that former joint House committee on the working arrangements of parliament include these: a 1998 inquiry into the reinstatement of Assembly budget Estimates scrutiny committee hearings, plus the expansion to include the Legislative Council Estimates scrutiny committee hearings; a 1999 inquiry into changing the opening of parliament process; a 2003 inquiry into the appropriate parliamentary acknowledgment of Tasmania's Traditional Owners; a 2009 inquiry into establishing an agreed process facilitating the attendance of ministers who are members of the Legislative Council at the House of Assembly question time; and, of course, the pivotal 2009 inquiry into the ethical conduct standard and integrity of elected parliamentary representatives and servants of the state, which laid the foundations for the current Integrity Commission and the Standing Committee on Integrity, amongst other developments.

This quick scan of the Joint House Working Arrangements of Parliament committee's former work highlights some key examples of operational provisions established 10 to

20 years ago that we all work with and abide by today, and which are incorporated within each Chamber's respective Standing Orders and procedures from that common origin.

Further, and this goes to my earlier point of the need for the government of the day to be willing to participate in any remedial process, many of these working arrangements of parliamentary inquiries were initiated by governments of the day. There is nothing stopping the current Government from moving a motion, either in this or the other place, to re-establish the Joint House Working Arrangements Committee, instead of setting up an executive and DPAC-driven process, as appears is the Premier's intention, with his DPAC report and subsequent letter to House of Assembly members seeking feedback before he apparently decides to detail the next steps back to them.

I take the opportunity to propose on 5 September, the date on which the Premier has undertaken to provide an update to the other place on the next steps towards formulating a process, he instead announce his intention to seek to establish a joint House committee charged with resolving this impasse and invite the Upper House to participate. Ideally, we could, and should, be voting in this Chamber today on the question of referring the Select Committee Report on the Production of Documents to a Joint House Select Committee on the Working Arrangements of Parliament and seeking both Chambers' input on this motion's clauses (2)(a), (b) and (c). However, we must put to best use the tools we have at hand.

As a member of the committee which produced the Legislative Council Select Committee Report on the Production of Documents, I wholeheartedly agree with its findings and recommendations. However, as I flagged earlier, it also has an inherent limitation in that it is a product solely of this Chamber, rather than the entire parliament. Therefore, despite there not being any convention, precedent nor even any act of parliament preventing the other place from using the report's examples and recommendations to inform its own deliberations, we can only guarantee this report and whatever the Legislative Council Standing Orders Committee recommends can impact only our Chamber's operations. So be it.

I reiterate, it is past time this parliament reconstitutes the former Joint House Committee on Working Arrangements of Parliament or something of its ilk, where representatives across both Chambers can develop coherent, consistent and workable mechanisms by which the intent of section 1 of the Parliamentary Privilege Act 1858 can be implemented and enforced. However, in the reality of here and now, and in the absence of any alternative parliamentary mechanism which is driven by parliament, the proposal contained in the motion before us provides a good and legitimate way forward for this Chamber, at least. While it may present a partial fix in broader parliamentary context, crucially, the proposals set forth in this motion are driven by parliamentarians and public accountable parliamentary processes.

I will be voting in support of the motion.

[end of excerpt]