

*Standing Committee on Estimates and Financial Operations — Sixty-second Report —
“Provision of Information to the Parliament” — Motion*

Resumed from 7 September on the following motion moved by Hon Alanna Clohesy —

That the report be noted.

The CHAIR: Hon Sue Ellery has seven minutes left to speak on the motion moved by Hon Alanna Clohesy that the report be noted.

Hon SUE ELLERY: If I may, I think that might be incorrect. It was actually Hon Alanna Clohesy who was on her feet.

The CHAIR: The other way around—thank you very much.

Hon ALANNA CLOHESY: Last week I spoke fairly extensively on the sixty-second report of the Standing Committee on Estimates and Financial Operations and I have a few minutes left to me. I want to bring this report to members’ attention. It is a fundamentally important report because it goes to the heart of not only what the standing committee is about, but also what is good governance. I recommend that members read this report quite closely.

The Standing Committee on Estimates and Financial Operations considers all matters relating to the financial operations of the state. That is a fairly broad brush. The standing committee particularly looks at the mechanisms that are working and those that require closer attention. One area the committee looked at was the way in which information is being provided to Parliament and whether that is consistent with the aims of good governance. The committee found that several reasons were given over time, by various ministers, for not providing requested information to the committee and therefore to Parliament. The reasons included that the requested information was cabinet-in-confidence or commercial-in-confidence. They were the two main areas that the committee examined in great detail.

It is fair to say that not providing information to Parliament based on cabinet-in-confidence was fairly cloudy in both the reasons and what kind of information the government was prepared to provide to Parliament. It is a cabinet convention that deliberations of cabinet and documents that cabinet is immediately considering to inform their decision have a “pre-eminent claim to confidentiality”. As I mentioned, cabinet dictates that documents affecting immediate decision-making are not disclosed. However, when the committee sought to request certain information—for example, strategic asset management plans—on a number of occasions, the government, through the minister and/or the agency, refused to provide that information on the grounds that those plans were cabinet-in-confidence in the sense that they were part of cabinet deliberations. The committee sought some guidance on this by examining case studies. It concluded that there needs to be a number of suggested changes to cabinet processes in order to clearly articulate what exactly “cabinet-in-confidence” means and particularly what sort of documents constitute informing those deliberations. The committee identified that case law sets out or establishes what some of those documents might constitute. It includes notes recording discussions of the cabinet meeting; documents prepared by public servants considered by cabinet, so the immediate documents in front of cabinet; papers brought into existence for the purpose of preparing a submission to cabinet; and documents and communications passing between a minister and the head of department relating to cabinet proceedings. That is a fairly clear direction about what constitutes documents for cabinet-in-confidence consideration. Documents relating to planning in a broad sense, of which one section might inform a cabinet recommendation or submission, would not necessarily constitute cabinet-in-confidence. Those sorts of things need to be considered in a broader context by the government.

The committee recommended that the Premier develop a memo for ministers to be clear about what constitutes cabinet-in-confidence and what constitutes commercial-in-confidence or commercial sensitivity as a reason not to disclose information. In relation to commercial sensitivity or commercial-in-confidence, the committee recommended the document that provided the framework as a guidance measure include the disclosure of the information that would likely result in harmful effects and then go into detail about what those harmful effects would be, who would experience those harmful effects and why they would be substantial; that is, not a minor reason why there might be some harmful effect, but the substantial effect on the person claiming commercial-in-confidence.

The CHAIR: The question is that the report be noted. Hon Alanna Clohesy has spoken only twice; she has another 10 minutes if she would like to use it.

Hon ALANNA CLOHESY: Thanks, Madam Chair. It is useful to know that.

Hon Stephen Dawson: It is good news.

Hon ALANNA CLOHESY: It is good news and useful to know.

For both commercial-in-confidence and cabinet-in-confidence reasons for information not being disclosed, the government should provide clearer examples for people preparing information or preparing a response to a committee about why information should not be provided.

The third part relating to commercial-in-confidence was an explanation of the causal relationship between disclosure and its harmful effects. Why would disclosing a certain piece of information have this particular harmful effect? What is the harmful effect? What is the relationship between the information and the harmful effect? That would provide any government—not just this government—with a clear understanding about the type of information that can be provided. A little frustration was experienced by some members of the committee in understanding what commercial-in-confidence claims could mean when they could not access the information and had no clear explanation in front of them about why the information was commercial-in-confidence. For some members, this particularly related to details of contracts, for example. It was important to understand the detail of the contract, what the state was committed to financially and other aspects of the contract so that we could understand the way in which the state had committed to the project now and into the future. Not having access to that became particularly frustrating.

The committee also recommended that the Premier develop for ministers a ministerial office memo with guiding principles for deciding whether the information that was requested was commercial-in-confidence or commercially sensitive. That recommendation was made because, again, there was no clear definition of “commercial-in-confidence” and agencies had no real understanding of what constituted commercial-in-confidence. In effect, there is no consistency across agencies about what constitutes commercial-in-confidence. Some agencies might claim that something is commercial-in-confidence, but other agencies might not. Again, that recommendation was made to assist in understanding these quite slippery definitions, but also to be consistent across all agencies so that they understand the requirements.

The committee also looked in a fair amount of detail at the uniqueness of the Western Australian Financial Management Act and its requirements for the provision of information to Parliament or the provision of a notice to Parliament when information will not be provided, and that is the section 82 notice that I mentioned earlier. The committee compared Western Australia’s legislation with legislation in other jurisdictions, including federal legislation and, specifically, the legislation in New South Wales, Queensland and the Australian Capital Territory. I will quote the well-known former Clerk of the Senate, Harry Evans, who wrote that the coercion of governments is difficult. He was talking about that in the context of trying to receive information when requested. As stated in the committee report, he wrote —

The law of parliamentary power, like other legal powers, in practice works very well against the ordinary citizens, where it is not needed, but is less effective against the great and the powerful, where it is needed, and governments are the greatest and most powerful.

He posed the question: what are parliamentary committees and the houses of Parliament to do when governments flatly refuse to provide documents? For Mr Evans, other than imposing some sort of penalty on individual agencies or ministers, there was no response to that other than a purely political one. So the battle continues between Parliament and individual ministers over what information they will provide and at what point and which reason they will use under section 82 not to provide that information.

I think that is a fair summary of the report. As I said, the report provides strategic and important information for not only this government—although a number of things in the report could immediately be applied by this government—but also for future governments, particularly around the requirements of section 82 of the Financial Management Act. I commend the report to members to read.

I would also like to put on record my thanks to the staff of this inquiry. The staff changed over time, because the inquiry continued for a long period. The staff included Michael Ryan, Andrew Hawkes, Mark Warner, Alex Hickman and Anne Turner, who all provided information and a lot of support in the conduct of this inquiry, and I thank them personally for that.

Hon PETER KATSAMBANIS: As a member of the committee that delivered this report, I rise to speak on the report and commend it to the chamber for interesting reading and for its findings and recommendations. The report is about the provision of information to Parliament by the executive arm of government. As a result, it inquires into the longstanding issue of what responsibilities the executive has to Parliament and what responsibilities the Parliament has to the executive. It really gets to the heart of the separation of powers doctrine; however, it applies in our Westminster-style of democracy, between the executive government and Parliament. It highlights that that relationship has never been absolutely crystal clear, as it might be in some other non-Westminster democratic institutions. The executive, after all, is derived from Parliament, in our case, but is charged with executive responsibilities in the day-to-day running of government. Parliament’s *raison d’être*—its whole reason for being—is to inquire into the work of the executive and also to make laws for the good government of our state.

It is inevitable that when there is an executive government, there will be tensions and issues about how much information is provided to Parliament—not Parliament as an institution or the members of Parliament, but through Parliament—as the information is provided through Parliament for the public record because Parliament is completely transparent. There is no right and wrong; there is not even anything cut and dried about this. It is almost a case-by-case assessment, and I think that is what this report highlights. Ministers, acting in good faith, make decisions for the good governance of our state and, in the main, provide information about that decision-making to Parliament, except when it may not be in the public interest to do so. I think that is a longstanding axiom. Through the conduct of the inquiry and the report, the committee was able to establish that, in the main, the information flow is very good.

There are times when the executive chooses to withhold information. We have procedures in this state that are pretty good—better than in most other places—to help guide how the executive will operate if it decides that information ought not to be provided to Parliament, and therefore through Parliament to the public. However, there is room for some improvement and some transparency. That is what this report highlights. It highlights that although we are doing well, we can probably do a bit better. That is more in the case of consistency and ensuring that the information that is provided by individual agencies is provided on a consistent basis so that there is not a great variation between agencies. That is worth taking up.

I particularly want to highlight finding 14 of the report, which states —

The Committee finds that it is inappropriate for any Government department, agency or statutory authority to enter into contracts that prevent the disclosure of the existence of the contract, the name of the contract, or with whom the contract is held.

In an open, transparent and democratic Parliament, that finding ought to be absolutely non-controversial. I think all governments, irrespective of their political persuasion, should bear that in mind. There are good reasons why information contained in government agreements, government contracts and government decision-making may need to be kept from the public realm, commercial-in-confidence being one of those. However, obviously the non-disclosure of the existence of a contract probably goes one step beyond any form of justification. That does not happen very often. I think it has happened once or twice in the history of this state. It is not something that happens every day-, for good reason. That is just something to bear in mind.

As I have said, in the main the committee found that the information flow between the executive and Parliament, and through Parliament to the public of Western Australia, whom we are here to serve, is excellent—it is really, really good. These recommendations are not earth-shattering, and none of them recommend a major change to existing arrangements. What they recommend is a tidying up and clarification, and better guidelines and a better framework, to ensure greater consistency. I hope these recommendations will be taken up in time so that we can continue to have this good relationship between the executive arm of government and the parliamentary arm of government for the betterment of the state of Western Australia.

I, too, would like to thank all the staff of the committee who worked on the inquiry and report. There was a turnover of staff, as Hon Alanna Clohesy mentioned, simply because of how long it took to conduct this report. I should point out also that there was a bit of a turnover of members in that period. That was probably beneficial for this report, because each member of Parliament comes to the table with a slightly different view about how much information ought to be made available, and the fact that a broader range of those views was represented on the committee from time to time helped the committee decision-making process. I thank all the members and committee staff who participated in the inquiry and report. I would also like to thank the executive. Generally, I think the executives of Western Australia over a significant period of time have done very well and continue to do well. I recommend the report and the recommendations in the report to make our good system even better.

Hon LIZ BEHJAT: I rise to speak briefly on the sixty-second report of the Standing Committee on Estimates and Financial Operations, “Provision of Information to the Parliament.” Members will note if they look at the members of the committee at the time of the inquiry that I served on the estimates committee between 18 August last year and 10 May this year. At that time, I was also chair of the Standing Committee on Public Administration. It is interesting that at the time I was serving on estimates, the public administration committee was conducting its inquiry into the transport of persons in custody. This inquiry by the estimates committee was about the frustration of committees in not being able to receive information. Therefore, I was sitting there with two hats on. As members know, the deliberations of committees are kept separate, for good reason. Therefore, although I was not able to elucidate properly the frustrations that I was experiencing, I was very glad to have some small input into it.

This also demonstrates that it is not just the public administration committee that experiences frustration about the provision of information to Parliament. That goes to the heart of what we do as members of Parliament. I have spoken in the past about the importance of the committee structure and the Westminster system, or the style of the Westminster system—although these days we seem to be adopting more the style of “Washminster” in the way that executives and Parliament speak with each other. This is a very important issue. We need to do

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something to stop the executive from saying, “You cannot have that information, because we cannot trust you.” That is partly because, under our standing orders, if information is provided in confidence or in camera to a committee, that committee cannot give an ironclad guarantee that it will not share that information, because the house itself has the right to make that information public. However, in previous inquiries that I have been involved with—the inquiry into Peel Health Campus springs to mind—information was provided that the committee undertook to keep in the possession of the Clerk at the time, and members could access that information only at the Clerk’s office. Only the members of the committee went to look at that information, and that information was handed back when the inquiry was finished. That information was never made public by the house. I am not aware of any occasion on which information that has been given to a committee in confidence has been made public by the house. This is one of those things that we need to look out for with future governments in particular. We need to look at what we are saying no to. Yes, I am sure some things should remain cabinet-in-confidence. However, it is a bit like the boy who cried wolf. If we say it too often, committees will not believe it, and when something comes along that really is commercial-in-confidence or cabinet-in-confidence, the committee will not treat it in that way.

I think this is a very good report. I note that it was one of the final reports of a former member of this house, Hon Ken Travers. I would like to place on the record my appreciation for his chairing of that committee over the years. He did a great job. It is a very good report.

Progress reported and leave granted to sit again, pursuant to standing orders.