

**STANDING COMMITTEE ON
ESTIMATES AND FINANCIAL OPERATIONS**

**FINANCIAL MANAGEMENT BILL 2006
FINANCIAL LEGISLATION AND REPEAL BILL 2006
AUDITOR GENERAL BILL 2006**

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 8 NOVEMBER 2006**

SESSION TWO

Members

**Hon Giz Watson (Chairperson)
Hon Ken Travers (Deputy Chairman)
Hon Shelley Archer
Hon Anthony Fels
Hon Nigel Hallett**

Participating Member

Hon George Cash

Hearing commenced at 2.30 pm**MARNEY, MR TIMOTHY****Under Treasurer,****Department of Treasury and Finance, examined:****BARNES, MR MICHAEL****Acting Executive Director (Finance),****Department of Treasury and Finance, examined:****JOLOB, MR MICHAEL****Acting Director, Financial Policy,****Department of Treasury and Finance, examined:**

The CHAIRPERSON: On behalf of the committee, I welcome you to the hearing. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIRPERSON: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record and please be aware of the microphones and try to speak into them. The transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or the disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

The first set of questions relates to the Financial Management Bill 2006.

[2.33 pm]

Hon GEORGE CASH: The definition of "accounts" does not appear in clause 3 of the bill, yet it appears in the Financial Administration and Audit Act. Why is there no need to define "accounts"?

Mr Jolob: My recollection of the issue is that when parliamentary counsel was drafting the provision, we ran into some difficulty in separating out the definition of "accounts" as in terms of an account or an invoice that is presented for payment as against the books of account, and it was felt that if we devolved it to the Treasurer's Instructions - you may be aware that the Treasurer's Instructions are structured on a basis of what we call black-letter law, but it is also preceded by a background and explanatory guidelines for agencies to follow - we could provide a much more comprehensive explanation as to our intent there. It was not seen as something of sufficient moment to warrant being within the act as well.

Hon GEORGE CASH: I am surprised, because, as I understand it, what you have said is that you have not put in the definition of "accounts" because the books of account could be confused with invoices.

Mr Jolob: Yes.

Hon GEORGE CASH: I would have thought that the definition of “accounts” in the FAAA was pretty wide, and I cannot see that it would necessarily be confused with invoices as such.

Mr Jolob: Yes; sorry. I take your point. Could I take that one on notice and then follow up with the instructing officer and come back to you?

Hon GEORGE CASH: Yes, that is fine. I am surprised, because although one of the divisions refers to accounts as such and then nominates a number of accounts, when we get further into the bill, I am not sure that it does not need a wider description, because certainly “accounts” appears to be wider than the particular bank accounts and other accounts that form part of division 1 of part 2.

Hon KEN TRAVERS: If it is open to misinterpretation, I would have thought that is all the more reason to define it.

Mr Marney: If we can take that on notice, we will get back to you on the precise nature of the advice from parliamentary counsel as to why they could not provide that clarity in the bill.

Hon GEORGE CASH: Especially when you say that you will now put it into Treasurer’s Instructions. It seems that you can describe it sufficiently to be put into Treasurer’s Instructions, but it cannot be described sufficiently to be put in the bill.

Mr Marney: I take that on board.

The CHAIRPERSON: Under clause 5(1) of the Financial Management Bill, regulations may provide that the administration of any one of the listed public organisations and office holders is taken to constitute one or more departments for the purposes of the proposed act. Is it intended for the regulations to provide that, for example, the Legislative Council constitutes one or more departments?

Mr Jolob: Yes.

Hon GEORGE CASH: Is it the entity of the Legislative Council or is it in fact the Department of the Legislative Council? All I am saying, Mr Jolob, is that we must distinguish between the two. I think you mean the Department of the Legislative Council rather than the legal entity of the Legislative Council.

Mr Jolob: The current regulation refers to the Legislative Council, the Legislative Assembly and, until recently, the Joint House Committee; it is now Parliamentary Services. I have not looked at the parliamentary services act for some time, but the intention would be that the references in the FAAA, and consequently the FMB, align with the entities that constitute those bodies within Parliament. To my understanding, that is how the appropriations align, bearing in mind that the whole purpose of the Financial Management Act is to provide accountability for the funds and the services under the control of that accountable officer. The accountable officers are the respective Clerks, I think, from memory. Therefore, we would expect that a reference in the act to the Legislative Assembly, the Legislative Council and Parliamentary Services would align with the operational entities within Parliament that align with the budget. Therefore, I think the legal entity and the FMA entity would align. As I said, I have not looked at that act for some time.

Hon GEORGE CASH: The only point I am making is that you talk about the administration of the Legislative Assembly or the Legislative Council. The administration, as I understand it, is the Department of the Legislative Council. It may be worth looking at that later, Madam Chairman, to see whether that is not what should be described.

Mr Jolob: My understanding is that with a number of these other entities that fall within this provision, there is a separate department under the Public Sector Management Act that aligns with the entity. For example, with the operation of the Information Commissioner, you have the statutory person or office holder supported by a department under the Public Sector Management Act. As far as I am aware, we do not have the same correlation for the Parliament. There is not a Public Sector Management Act department underpinning it, so that your operations are conducted

under the authority of the parliamentary services act. I will stand corrected if my memory lets me down on that.

[2.40 pm]

Mr Barnes: If the issue in the clause is with the words “the administration of”, we are happy to take it up with parliamentary counsel and seek clarification.

Hon GEORGE CASH: The issue is that the administration comprises the Department of the Legislative Assembly and/or Council. You have described the Parliamentary Services Department, which is the way it is now described. When it was changed to the Parliamentary Services Department from the Joint House Committee, we formed the Department of the Legislative Assembly and the Department of the Legislative Council.

Mr Barnes: But for the purposes of the Public Sector Management Act? I think that is the issue.

Hon GEORGE CASH: Sure. That is perhaps the issue you might have a look at so that we are in the right ballpark, so to speak.

Mr Barnes: We will seek clarification and get back to you on that.

The CHAIRPERSON: Staying with the clause, was it intended for some of the organisations or officeholders to be amalgamated into one department for the purposes of the bill?

Mr Jolob: No, that is not my understanding. As it stands, we have three departments of Parliament, if I can call them that. There are then the respective officeholders, who are also listed, which include the Parliamentary Commissioner and the Information Commissioner. I understand there are a couple more. The reason they are listed is purely to give effect to the amendments that occur in schedule 1, which modify the reporting linkages for those agencies that seem to be officers of the Parliament. The Office of the Auditor General is another one. We modified the reporting lines so that rather than submitting an annual report through a minister, the tabling requirements are to report directly to the Presiding Officers. The reason they are listed is so that the reporting lines are established and that they are not reporting through the executive but rather direct to the Parliament. It is my understanding that we did not envisage that they would be amalgamated. If at some stage in the future if the Parliament chose to have one appropriation and wanted to report as one entity, that could be accommodated. In preparing this act, it was not envisaged that that would occur.

Hon KEN TRAVERS: I am just thinking of the day that might happen!

The CHAIRPERSON: May I just clarify that? At the end of clause 5(1) are the words “taken to constitute one or more departments”. What is the purpose of that?

Mr Barnes: From my reading it simply says you can have one department or have them all as separate departments. It is just giving some flexibility; it is not specifying.

Mr Jolob: Yes. It also means that we can, by regulation, remove those entities as a department. I think the wording is intended to indicate that we can have all of them or none of them if we so choose by regulation.

The CHAIRPERSON: Why is the deeming of these organisations and officeholders of departments done by regulation and not under the bill?

Mr Jolob: The main reason is to provide a degree of flexibility. This was an issue. If we enshrined the issues purely in the act, we would then have to wait for an amendment to the act in order to make an administrative change. This became a real issue for us when the Parliament chose to combine the Joint House Committee and the Library Committee under the Parliamentary Services Department. Under the FAAA we had the Joint House Committee as a separate house of Parliament. When the Parliament changed its administration following the parliamentary services act we were not able to change the name of the appropriation or of the reporting entity from the

Joint House Committee. It effectively reported as the Joint House Committee operating under the title of the Parliamentary Services Department. The fact that we needed to amend the act in order to make quite a simple change to meet Parliament's needs indicated to us that we needed a more flexible approach.

The CHAIRPERSON: The next question I have relates to part 3, division 5. Do members have questions before that?

Hon GEORGE CASH: Any particular clause, Madam Chairman? There is a question for clause 37.

The CHAIRPERSON: I will start with my question and see how we go.

The committee was informed by the Office of the Auditor General that that office is currently exempt from the administrative requirements to enter into resource agreements because of its need to maintain operational independence. Will this exemption for the Office of the Auditor General continue under the Financial Management Bill 2006?

Mr Marney: As you have pointed out, the Office of the Auditor General is currently exempt. It is a matter for negotiation between the Treasurer and the Auditor General as to whether or not a resource agreement would be applicable under this legislation. It is not required under the legislation. They can agree to not implement a resource agreement arrangement.

The CHAIRPERSON: Will the exemption also extend to organisations listed at clause 5(1) of this bill, which include the departments of the Parliament that we have just discussed? Will it be because they are not accountable to the executive?

Mr Barnes: The bill gives the Treasurer the discretion to nominate which agencies will be subject to the requirement to have a resource agreement. I think it is a reasonable expectation that those agencies that are currently exempt from the administrative requirement to have a resource agreement in the first instance would continue to be exempt under this bill or act from the requirement to have a resource agreement. That would be the starting point.

The CHAIRPERSON: Is it possible to have a copy of the agreement; that is, the form that such an agreement takes? You probably do not have one with you here.

Mr Barnes: I actually have a template of the agreement, which is barebones. I can certainly table that.

The CHAIRPERSON: That would be useful; thank you.

Hon GEORGE CASH: My question is in respect of clause 37, which is titled "Investment by Treasurer". It states -

- (1) The Treasurer may invest any money standing to the credit of the Public Bank Account in a manner prescribed by the regulations.

In some earlier discussions - in fact, we raised the question with the Auditor General's people, who indicated that Treasury would be able to answer the question or perhaps be better equipped. Can you advise us on the methodology and the criteria used in respect of the groups with whom you place public moneys?

[2.50 pm]

Mr Barnes: Currently, the FAAA prescribes the allowance investment classes, which are cash, bank bills and government-backed bonds. They are the only three allowable investment classes under the FAAA.

Hon GEORGE CASH: Is that in section 38 of the FAAA?

Mr Marney: That is what is allowed under the FAAA at the moment.

Mr Barnes: Yes, that is right - section 38. The bill provides for regulation to prescribe the allowable investment classes. Those allowable investment classes are not prescribed in the bill itself, but will be prescribed by way of regulation. The intention at this stage, as the Treasurer indicated in the Assembly debate, is that the three currently allowable investment classes under the FAAA - cash, bank bills and government-backed bonds - will continue. In addition, we propose to include a fourth investment class, which is debt securities of listed corporations with a credit rating of A or better.

Hon GEORGE CASH: Why can that not be prescribed in the bill?

Mr Barnes: Again, it gets back to the point that Mr Jobob raised on a previous issue. It provides a degree of operational flexibility. It avoids the need to have to amend the act each time we might want to make a change in the asset mix or the allowable investment classes. We thought that a regulation was a good balance or compromise between prescribing in the act the allowable investment classes, which we thought was overly prescriptive and too inflexible, and doing it under a Treasurer's instruction, which has no parliamentary scrutiny at all. We thought that a regulation provided a good compromise between flexibility on the one hand and parliamentary oversight on the other.

Hon GEORGE CASH: Can you indicate to us how section 38 of the FAAA in its present form has caused inconvenience?

Mr Barnes: I can. Currently, we have an investment climate that is characterised by what is called an inverse yield curve. The yield or the return that we get on a long-term investment, such as a 10-year government bond, is less than the return we get on a short-term investment, such as a 90-day bank bill. Currently, the long end of the market is bringing down our overall investment return. We would like to have the flexibility to invest in longer-term investments, other than just government bonds, in a bid to try to get a better return at the longer end of the curve. We like to have a bit of a mix of short-term and longer-term investments; it is prudent portfolio management. However, currently the long-term end of the curve is dragging down our overall return. If we had a bit more flexibility with the sorts of long-term investments that we could invest in, we think we could get a better return.

Hon GEORGE CASH: I understand what you have said, but I fail to understand why section 38, in its present form, does not allow you to do that.

Mr Barnes: It does not allow us to invest in debt securities of corporations.

Hon GEORGE CASH: If we were to add debt securities of corporations with a greater than A rating, would that not be sufficient?

Mr Barnes: Right now, yes, it would be; but in five years, I do not know.

Hon GEORGE CASH: How long has section 38 of the FAAA been in its present form?

Mr Barnes: As long as I can remember.

Hon GEORGE CASH: Since about 1985.

Mr Barnes: I suspect so, and that is part of the problem. Ideally, when the inverse yield curve situation emerged a few years ago, we would have liked to have the flexibility at that time to rejig the investment portfolio.

Hon GEORGE CASH: I do not think we are arguing against the need for flexibility. We are saying that if something can be prescribed by regulation, it is a pretty big ask, when section 38 in its present form is fairly descriptive.

Mr Marney: It really comes down to having the flexibility to respond to changes in the market. Although, as Michael described, the yield curve at the moment favours A-rated securities, it may be that down the track A-minus securities will be equally attractive relative to long-term bonds.

Enshrining it in legislation would deny, at least in the short term, the option of taking that investment decision.

Hon GEORGE CASH: However, the extension to that argument is that you could go to the next grade of security and then the next grade and then the next grade down.

Mr Barnes: Yes, it is. However, Parliament could disallow the change to the regulation if it was not happy.

Hon GEORGE CASH: Equally, if you decided that it was not adequate, Parliament could put through an amendment fairly smartly to section 38.

Mr Marney: If the stars were aligned in such a manner that Parliament was willing to do that -

Hon GEORGE CASH: One of the reasons the stars are often not aligned is that Treasury brings its bills in so late in the piece compared with other agencies that there is often insufficient time. That is something that you would be aware of from your experience with Treasury. There may be some difficulties with the Parliament, but, equally, the difficulties emanate from Treasury in its timing.

Mr Marney: I think that relates in part to taxation and revenue legislation, which has critical start dates and decision dates that often do not allow sufficient time between the announcement of the measure and the need for implementation. I can assure you that that is a frustration for us as well.

Hon GEORGE CASH: I am saying to you that one of the problems is Treasury, and you are saying to me that that frustration is with you.

Mr Marney: We experience the frustration ourselves with having to try to progress those issues within certain time frames, such as the time government decisions are taken and the implementation time. I would rather not have people working 16-hour days trying to get legislation through in horrendous time frames. I apologise, but I can assure you that that is not something that we are particularly attracted to. The issue comes down to a trade-off between the degree of flexibility in the portfolio management and the degree of scrutiny by Parliament. We are trying to find an optimal mix between those two. We thought that the specification through regulation was the right sort of balance in that regard.

Mr Barnes: During the Assembly debate, the Treasurer gave an undertaking to report on a quarterly basis the actual public bank account investments made during the preceding quarter. If we purchase any debt securities from a corporation during that quarter, they will be highlighted in those quarterly reports. They would be part of the current whole-of-government quarterly financial results reports that are tabled in Parliament within 60 days of the end of the quarter.

Mr Marney: That is a fairly significant step forward from the current reporting around the investment activity of the public bank account, which we see as a positive move.

Hon KEN TRAVERS: If you had purchased the security and were holding it and it lost its A rating, what would be the situation?

Mr Barnes: We would seek to offload it onto the market. Given the sorts of securities that we are talking about, it is a highly liquid market, so we would have no difficulty selling it.

Hon KEN TRAVERS: If it lost its A rating today, would you immediately go into the market and try to sell it tomorrow, or would you try to manage the sell-off? If it lost its rating, it would lose some value. If you were to put all of yours on the market, that might have a further impact and reduce their value. Would you try to manage that?

Mr Barnes: Yes, we would. We would have to optimally manage that to minimise any adverse implications for the portfolio.

Mr Marney: However, it would be a managed exit from the holding, rather than managing them and hoping that they got the A rating back at some point. It would be a short-term transaction management, but the transaction would be certain.

[3.00 pm]

Mr Barnes: The other salient point is that the credit rating agency would signal this well in advance precisely for this reason. It would put a corporation on negative watch to signal to investors that things might be downgraded 12 months down the track.

Mr Marney: That is when we pull out.

Hon GEORGE CASH: Is there a distinction between a managed exit and an unmanaged exit?

Mr Marney: An unmanaged exit is when the market goes to crap and you just dump your holdings!

Hon GEORGE CASH: You will recall the money that was invested in Rothwells many years ago. Was section 38 of the Financial Administration and Audit Act used at the time to place those investments in Rothwells?

Mr Barnes: Section 38 of the FAAA and clause 37 of the Financial Management Bill relate only to investment of the public bank account. My understanding is that the Rothwells investment was made by the Insurance Commission, or SGIO as it was then.

Hon GEORGE CASH: It did not involve the public bank account?

Mr Barnes: No, it was outside that.

Mr Marney: It was under its own legislation.

Hon ANTHONY FELS: What amounts of money have been invested long term; that is, up to 10 years? Have deposits or securities with a 10-year maturity been bought?

Mr Barnes: We have a proportion of long-term government bonds. Currently the public bank account balance is around \$2.3 billion. The long-term component of that, I think, is about 20 per cent.

Hon ANTHONY FELS: What do you call long term?

Mr Barnes: Up to 10 years.

Hon ANTHONY FELS: How much of that component would be over five years?

Mr Barnes: I could not say; however, I can take that question on notice.

Hon ANTHONY FELS: I would also be interested to know - before coming to Parliament I was involved in an environment in which the government has always had large net debts and no significant funds for long-term investment - why a government would deposit funds out to 10 years when it can either retire short-term debt, reduce taxation or surplus or spend the money?

Mr Barnes: As I said, currently around 80 per cent, perhaps even slightly more, is invested in short-term securities that are highly liquid. We need that cash available for the sorts of reasons you mentioned. We like to have a small long-term component. It is good portfolio management to have a balance of short and long-term investment.

Hon ANTHONY FELS: You can provide that at the moment with government securities and bonds.

Mr Barnes: Yes. I believe that the majority of the long-term component is probably in the three to five year range rather than right out to 10 years. I will get that breakdown for you.

Hon ANTHONY FELS: I am quite concerned about some of these finance companies and whatever is on your list with A-plus credit ratings that might be invested in for 10-year periods.

Mr Marney: The main objective of having a 10-year portfolio option is to trade in and out of that within a year rather than to necessarily hold to maturity. Indeed, the securities are about trading within the period and managing the public account within a financial year as opposed to having long-term bonds that are held to maturity over a 10-year period.

Hon GEORGE CASH: Clause 49 refers to the liability of officer for losses. Subclause (3) states -
The officer is not liable in respect of the loss if the officer shows that he or she took reasonable steps in all the circumstances to prevent the loss.

Why is that provision couched in that way insomuch as it changes the onus of proof because the officer would have to plead that defence rather than the plaintiff pleading that the officer has lost the money because he or she did not take reasonable steps? Normally it is up to the Crown to prove its case by going through the various elements; it is not up to the defendant to prove his innocence. Secondly, can you indicate on how many occasions an officer has been required to refund or make restitution of funds that have been lost?

Mr Jolob: I can answer the second question. I have no knowledge of that provision having ever been used since the FAAA's inception. In terms of the first question, I note that the provision closely mirrors what is in the FAAA. As part of the drafting process, we sought advice from the State Solicitor's Office as to the currency or relevance of the FAAA provisions in the current circumstance. On that advice we have mirrored what was in the FAAA while having regard for the fact that it has never been used.

Hon GEORGE CASH: In that regard, it is surprising that the Crown or the person suffering the loss is not required to prove his case rather than have it written in terms of the onus of proof shifting.

Mr Jolob: Section 46(1) of the FAAA reads -

. . . an officer who by misconduct or performance of duties in a grossly negligent manner causes or contributes to the loss . . .

Hon GEORGE CASH: I understand that. However, clause 46(1) is couched in terms whereby the Crown has to prove that there was misconduct or that an officer performed his duties in a grossly negligent manner.

Mr Jolob: I can only hazard a guess. This provision relates to money in the possession of an officer. Clause 49(4) reads -

Subject to subsection (5), if -

(a) a loss of official money or official property occurs . . .

They are liable to repay the money. The responsibility would be on the officer. I can only hazard that we are talking about a situation in which an officer is a cashier or has a role of collecting moneys on behalf of an agency. It would be reasonable in the event of a loss to have that officer demonstrate why that happened. I know of a case in which a person has gone home with the departmental laptop strapped to the back of his motorbike because he has wanted to do work at home. He has parked in the parking area, gone into a shop to buy something quickly and found on his return to the bike that the laptop has gone.

Hon GEORGE CASH: With respect to your example of the cashier, I will use the analogy of a cashier at Boans, which you and I would remember but probably not too many other committee members would. If a cashier misappropriated money at Boans, Boans would be required to prove all the elements of the theft. This is different. We are saying that the officer has to prove his innocence by showing that he took reasonable steps in the circumstances.

Mr Jolob: As I say, I am only hazarding a guess that it relates to moneys. I am not aware of this provision having been employed. During my career there have been many instances whereby

deficiencies in cash have occurred and the agency concerned has dealt with the issue by talking with the officer concerned. We have never resorted to this provision. Clause 49 would only be used in extreme situations where we could have a significant loss.

[3.10 pm]

Hon KEN TRAVERS: Surely then the case is to place the onus on the officer to take reasonable care of the money and for the government to show that he did not and to be able to prove that, rather than the way you are doing it here where the officer has to prove that he did.

Mr Jolob: I was not privy to the original drafting, and as I say I am only hazarding a guess. I am sure the original drafters would have had a reason for this.

The CHAIRPERSON: Perhaps we could ask for some further clarification and you could provide that to us.

Mr Jolob: It would be very difficult because all the original working papers were retained in the division that I currently manage, and my recollection of the compactus is that they were all removed a few years back as probably no longer having any relevance to this.

Mr Marney: We can clarify the rationale.

The CHAIRPERSON: I was referring to the drafting instructions.

Mr Jolob: All right, we will have a look at that and see what we can come up with. We would be talking about the drafting instructions for the FAAA because these are just provisions that mirror that and we have continued them -

Hon GEORGE CASH: I think Crown Law would be able to explain why it believed there is a requirement for the reversal of an onus of proof rather than have the Crown prove its own case.

Mr Barnes: Just on that, I would have thought you could mount an argument that this burden is an accountability issue, that it sheets home, it makes it clear to officers dealing with public money that the accountability is on them to take every reasonable step to protect that public money.

Hon GEORGE CASH: That is what Ken Travers was saying - that it is not unreasonable to require an officer to be prudent and take care, and if he does not, an argument has to be mounted to say he did not do those things, and as a consequence certain things were lost. This is going the other way by saying it is up to the officer. One of the things in law, as you would be aware, is that an innocent person is entitled to go to court and say nothing. It is up to the Crown to prove its case against him. We are questioning why the officer is required to show that he took reasonable steps, because that would be part of his defence anyway. You are saying he is not liable if he is able to prove this.

Mr Jolob: They are onerous provisions but I hazard a guess that it reflects that there are circumstances where the Crown, or the agency, would not be in a position to be able to mount a case because there would be no evidence available around a circumstance. For example, when this was written it was looking at a mining registrar in an outback town who was the only person in the office. If there is no evidence of a break-in, or whatever, merely that the money has gone, I suspect this provision was written on the basis that that person then has to demonstrate how come the money disappeared and that he or she was not culpable.

Hon GEORGE CASH: I understand the example. That does not get away from the general principle -

Mr Jolob: No, I accept that.

Hon GEORGE CASH: - that where someone is charged there is a requirement for the Crown to prove its case. If there is no evidence, they do not make a lot of progress.

Hon KEN TRAVERS: The officer may still be subject to Public Sector Management Act charges for that loss even though he may not be subject to charges under the FAAA, because I imagine there

are two levels on which action could be taken against an officer. Can you also confirm with parliamentary counsel whether this is a direct transposition or whether there have been some subtle changes from the original FAAA?

Mr Jolob: We can confirm that ourselves.

Mr Marney: I think I get a fair sense of where you are coming from on the issue. It goes to the principle of innocent until proven guilty, as opposed to the other way round.

Hon GEORGE CASH: All about the golden thread of justice!

The CHAIRPERSON: Clause 51(3) provides that the authorised person conducting an investigation into losses of official money or official property has all the powers and protections that are conferred on a special inquirer by the Public Sector Management Act 1994. This includes the power to summon witnesses and documents, the power to examine witnesses on oath or affirmation and the same protection and immunity as a judge. Why is it necessary for the authorised person to have these powers and protections?

Mr Marney: I would have thought those powers and protections were necessary to undertake a full and thorough investigation to ensure that that investigation is not constrained in any way.

The CHAIRPERSON: Sections 12 and 13 and schedule 3 of the Public Sector Management Act 1994 are incorporated in this bill by reference. Why is the substance of these provisions not placed in the bill instead? Why is it by reference to the Public Sector Management Act?

Mr Barnes: I think it is twofold: first, because repeating those provisions verbatim in this bill would unnecessarily lengthen this piece of legislation; and, second, in relation to the conduct of investigations, the Public Sector Management Act has broader application than this bill and were any changes made at that broader level to the Public Sector Management Act, the application of this bill would automatically flow as a result of the way this provision is structured.

Hon GEORGE CASH: Is evidence that is gained as a result of the special inquiry under the Public Sector Management Act able to be used in evidence against the person in any civil or criminal proceedings?

Mr Jolob: I cannot answer that. I will have to take that on notice.

Hon GEORGE CASH: In the Auditor General Bill, clause 36 makes it clear that when it is conducting an inquiry it cannot be used. It is not admissible; it cannot be used in evidence against that person.

Mr Marney: I do not think it is ruled out. That would tend to suggest that it is able to be used, but we will clarify that.

Hon GEORGE CASH: It depends on what sections 12 and 13 and schedule 3 say, but I do not have a copy of that here. If it can be used in evidence against a person, perhaps it would be helpful if you could tell us why that should be different from clause 36 of the Auditor General Bill.

The CHAIRPERSON: These provisions contain three examples of reversal of onus of proof in a criminal context and two examples of abrogation of the privilege of self-incrimination. Why are these departures considered necessary?

Mr Barnes: I think you are getting to legal issues that are beyond the expertise of the Treasury officers in front of you, so again we would need to seek the advice of the legal experts on that.

The CHAIRPERSON: The committee notes the effect of clause 54(1) is very similar to section 52(2) of the FAAA. In practice are the accountable officers for each of the deemed departments - that is, the Legislative Assembly and the Legislative Council, the Parliamentary Services Department, the Parliamentary Commissioner for Administrative Investigations and the Information Commissioner - currently appointed by the Treasurer?

Mr Jolob: In terms of the Parliamentary Services Department, the positions were designated by the Treasurer, so the accountable officers in the Parliamentary Services Department were designated, but the other position holders are statutory position holders and therefore are applied automatically; that is, the Ombudsman and the Information Commissioner. Whoever is the occupant of that statutory office at that point in time automatically becomes the accountable officer for that entity.

Hon GEORGE CASH: Does that apply to the Inspector of Custodial Services?

[3.20 pm]

Mr Jolob: I am trying to get the right terminology. He is actually the chief executive officer of the Department of the Parliamentary Inspector of Custodial Services. The title of the department aligns with his statutory position, and he is the CEO of that department. Because he is underpinned by a department, he automatically becomes the accountable officer. The only ones that differ are with the Parliament.

The CHAIRPERSON: Will this practice be continued under this bill for those that are appointed by the Treasurer?

Mr Jolob: My understanding would be that they would continue automatically under the transition from the FAAA to the Financial Management Act.

Hon GEORGE CASH: Is there any reason that the bill should not provide for the Clerk of the Legislative Assembly and the Clerk of the Legislative Council, and the Executive Manager of the Parliamentary Services Department, to be the accountable officers of the Parliament?

Mr Jolob: I cannot see any reason why not.

Hon GEORGE CASH: The reason I raise the issue is that the Parliament is concerned that regulations may be made that will affect the internal workings of the Parliament. We acknowledge that the current accountable officers are those three people, and that it should be those three people, whoever they might be in the future. The title "Clerk of the Parliament" is probably safe; that will not change. However, the title "Executive Manager of the Parliamentary Services Department" can be couched in such a way that it is the person who holds the position for the time being, or another person who may take over the role of that person. That is what we want.

Mr Jolob: We can take that on board and take whatever administrative steps are needed to clarify that and set it in place before the act comes into being.

The CHAIRPERSON: With regard to clause 54(2), the Office of Auditor General has suggested to the committee that transfer of responsibility for the financial administration of a sub-department away from the department's chief executive officer may pose some challenges in implementation. The OAG suggested that clear guidance about what constitutes "financial administration" should be provided to the departments. What initiatives have been taken or planned to facilitate the formal implementation of sub-departments, particularly with regard to clarifying the roles of the respective accountable authorities for the departments and their sub-departments, if any?

Mr Jolob: We do not have anything contemplated. As far as we are aware, the operation of sub-departments has operated without any difficulties to date.

Mr Barnes: Currently the term "sub-department" is not actually defined in legislation. It is just a term that has practical application, albeit in very limited circumstances. There is only a small handful of sub-departments currently. This bill actually defines that term and sets out the necessary conditions for an entity to be considered a sub-department. Those conditions are spelt out in clause 56. I think that makes it clear that in order for an entity to be a sub-department, the entity has to be a separate division within the budget estimates, and it is the subject of a separate head of expenditure created by a section 25 determination. All those conditions are spelt out in clause 56, which I think provides much more clarity and prescription than we have currently. Currently, as I have said, the term is not even defined in legislation.

Mr Jolob: If I can add to that, sub-departments are not new; they are just a continuation of what we refer to under section 52(4) of the FAAA as an “entity”. What we have done is just give those entities a name. When we talk about a department, it has a common meaning, and when we talk about a statutory authority, it has a common meaning. A sub-department will now also have a common meaning, purely for when people are discussing sub-departments. Nothing is different from what exists under the FAAA. Those sub-departments that exist under the FAAA will continue under the Financial Management Act. That process has worked satisfactorily for 20 years, and we saw no need to change it.

Mr Barnes: But with the clarity that it will now be defined in legislation.

Hon GEORGE CASH: I used the term “accountable officer” a number of times. I should have said “accountable authority”. However, when you responded you obviously recognised it as being the accountable authority.

Mr Barnes: Yes.

The CHAIRPERSON: I have a question about clause 60. Section 3(1) of the FAAA defines the term “financially dependent” as follows -

when used concerning the relationship of a body to a department or statutory authority, means that the body receives more than half of its funding and resources from a department or statutory authority that is obliged to provide funding and resources to the body;

Why is the same term not defined in the Financial Management Bill?

Mr Jolob: Are we talking about an affiliated body?

The CHAIRPERSON: No. The term is “financially dependent”. Sorry. You are right, in that it is within the definition of “affiliated body”.

Mr Marney: It is picked up under “affiliated body”, which is a slightly broader class. That is my understanding.

The CHAIRPERSON: So it is picked up in this bill under that definition?

Mr Jolob: I will take that on notice and come back to you on that, but I suspect it is because “financially dependent” may be defined in the accounting standards and has the same definition as in the FAAA.

The CHAIRPERSON: Thank you. I also have a question on clause 78. How are departments currently informed of Treasurer’s Instructions?

Mr Barnes: The Department of Treasury and Finance maintains a web-based information source for agencies that they register. It is called the WA financial administration bookcase. Every time there is an update to a Treasurer’s Instruction, it is publicised through that web-based vehicle.

The CHAIRPERSON: Is it intended to continue the same practice under this bill?

Mr Jolob: Yes. It is also possible to acquire Treasurer’s Instructions through the State Law Publisher in hard copy form, if people want to acquire them in that way. People have the option of downloading Treasurer’s Instructions from our web site, or they can go to the State Law Publisher and buy the Treasurer’s Instructions, the regulations and the act either as a package or as separate elements.

The CHAIRPERSON: Is it onus on departments to be aware of when there is a change, or are they notified? Where does the onus lie?

Mr Barnes: They are notified by DTF.

Hon GEORGE CASH: In respect of the same matter, clause 78(4) states -

The Treasurer is to cause notice to be published in the *Gazette* . . . but a notice under this subsection does not need to include the text of the instructions or amendments.

Why is that the case, given that the *Government Gazette* is the official publication, so to speak, of the state?

[3.30 pm]

Mr Jolob: We regularly update the Treasurer's Instructions, so they are quite voluminous. Often one or two words are altered in a Treasurer's instruction. If we were to publish the text of the Treasurer's Instructions we could end up with gazettes that are very thick.

Mr Barnes: It would also be costly for us as the customer.

Hon GEORGE CASH: Would you just publish the amendment so to speak to include the new words for a clause within the Treasurer's Instructions.

Mr Jolob: In fact we do not; we merely publish that the following Treasurer's instructions have been amended. It merely identifies which instructions have been amended. If a member of the public were to go to either our web site or to the State Law Publisher web site, and ask for the amendments, we have a covering sheet that explains each of the Treasurer's instructions that have been amended and the basis of the amendments. We provide an explanatory memorandum that assists users to understand what the amendments are about.

The CHAIRPERSON: I refer to clause 82(1). Would ministers be able to rely on this clause to withhold information that would otherwise appear in an annual report? In other words, is there a requirement on ministers to advise Parliament and the Auditor General every time he or she makes a decision to withhold information from Parliament? If that is not the case, why not?

Mr Barnes: The genesis for this provision was parliamentary questions and when a minister is asked a question in Parliament and refuses to provide the information. That is the primary objective of it. I understand though that the provision is framed broadly enough to capture any circumstance in which a minister decides not to provide certain information. It is couched in very broad terms. I think it would capture the scenario you just raised.

Hon GEORGE CASH: Can you tell me what the word "certain" means in line 2 of clause 82(1). Why is it there?

Mr Barnes: It is not defined in the bill. It is intended to mean confidential.

Hon GEORGE CASH: It does not say that at all.

Mr Marney: I read that as specific pieces of information.

Hon GEORGE CASH: I do not think you need it. I am very interested to know what it is intended to mean.

Mr Jolob: It is about particular information within a general question. I will check with parliamentary counsel.

Hon GEORGE CASH: I accept what you are saying. I do not know why there is a need for the word "certain" when we are talking about not providing information to Parliament. If it has a distinct meaning, I would like to know what "certain information" is. If it is meant to mean "specific", I am interested to know what specific information. I do not understand why that word is there.

Mr Marney: We will seek parliamentary counsel's view on whether we can live without that word. As you say, it looks to be superfluous.

Hon GEORGE CASH: I do not think it will cause the whole world to stop, not overnight anyway.

Mr Marney: It may come to a slow and gradual halt.

Hon GEORGE CASH: It probably will, and I am sure we will be told that by the minister. Irrespective of that, there is a good chance the word will not be there anyway, unless you can tell us what it means.

The CHAIRPERSON: Clause 82(2) requires the minister to provide the Parliament with his or her reasons for deciding to withhold certain information from Parliament. Why is there not a similar obligation to provide the Auditor General with the minister's reasons?

Mr Jolob: I understand that, in practice, subclause 82(1) requires the minister to provide written notice to the Auditor General within 14 days. Clause 37 of the Auditor General Bill provides the Auditor General with access to that information. I understand that, in the Auditor General's course of examining the reasonableness or otherwise of the minister's decision, he would liaise with the minister to seek the minister's explanation for not disclosing the information.

Hon GEORGE CASH: Where in the Auditor General Bill does it require the Auditor General to consider the reasonableness or appropriateness of the minister's decision to withhold information?

Mr Barnes: It does not explicitly say so.

Hon GEORGE CASH: That is one of our problems.

Mr Jolob: I think it is implicit.

Hon GEORGE CASH: If it is implicit, it has not been happening. That is one of the issues about confidential information. It must be expressed so that we know that it will be done. You heard the Auditor General himself say that that there have been some changes. However, we have a long way to go.

Mr Marney: If I can add to that direction, the "requirement for the Auditor General to exercise judgment in the public interest" are probably some of the words that should be there.

Hon GEORGE CASH: Yes, the words proposed, taken from clause 24(2) of the Auditor General Bill are that the Auditor General is to include an opinion on whether a decision by a minister not to provide the Parliament information concerning any conduct or operation of an agency is reasonable and appropriate. It is couched in broad terms but, as a consequence of that, he can consider a number of issues.

The CHAIRPERSON: I refer to clause 85, "Review of Act." The word "minister" is defined in clause 3 of this bill by linking the term to the relevant agency in the circumstances. However, that definition does not apply to clause 85. Which minister is proposed to review the bill five years after its commencement as an act? Is it the Treasurer or another minister?

Mr Jolob: The minister in this provision would be the minister to whom the act is assigned under the designation of the department's statutes and votes, which is gazetted periodically by the Department of the Premier and Cabinet. That lists the minister; the agency that is principally responsible for supporting the minister; and the statute. The minister responsible for reviewing the operation of this act will be that minister. Currently, it is the Treasurer but, conceivably into the future it could be the minister for finance or another minister if he were so chosen.

Hon GEORGE CASH: We understand your response, but the definition of minister in clause 3 does not refer to the minister who has responsibility for the carriage of this particular act. I suppose we could go to the Interpretations Act and find what "minister" means. Our question is more one of clarification of whether the definition of minister should include some reference to clause 85 being the minister who has the carriage of this act or responsibility for the administration of it.

Mr Barnes: I understand the issue you are raising and we will take it up with parliamentary counsel.

Hon GEORGE CASH: Clause 85 provides that the minister is to carry out a review at the expiration of five years. One of the matters you raised earlier was that the FAAA, which came into

effect in 1985, had outlived its usefulness particularly in regard to section 38. There was no review provision in the FAAA. Why is there not a rolling five-year review of this act?

[3.40 pm]

Mr Barnes: My only answer to that is that I understand that this review clause is a fairly standard clause that parliamentary counsel now puts in.

Hon GEORGE CASH: Very few review clauses expire after five years. Review clauses generally roll on. They are reviewed every five years.

Mr Jolob: That is actually an issue that we identified when we looked at this. In most instances legislation only requires the statute to be reviewed after five years, and it was something that I was taking on board in our agenda to take up with parliamentary counsel and the Department of the Premier and Cabinet - that is, whether it ought to be a revolving process. On my recollection, in most instances, it is a once-off review after five years.

Hon GEORGE CASH: The Criminal Investigation Bill 2005 that the Parliament just passed, what is the review there?

The CHAIRPERSON: I cannot remember.

Hon GEORGE CASH: I just make the point that it is likely that we will pursue in committee a five-year rolling review of this legislation and the Auditor General Bill, because not to do so would in my view be foolish. It gives an opportunity for acts to come up and instead of being told, as I used to be told that we would look at the amendment to the Land Act in 20 years' time -

Hon KEN TRAVERS: But they are getting very close to doing that now.

Hon GEORGE CASH: They are, in respect of the Land Act, but I was the minister then. That was 10 years ago. There is a benefit to all if this is reviewed on a rolling basis, so you can bring things up.

Mr Marney: We will pursue that matter again with parliamentary counsel and try to identify an appropriate mechanism with which to address that.

Mr Jolob: There is a difference in this case, because it relates to the Public Accounts Committee doing a review, whereas in other statutes it is about the minister having an obligation to review. We have a rolling review of the Financial Administration and Audit Act as a matter of course. This clause is included because it brings an external party into the review process.

Hon KEN TRAVERS: But the first part is that the minister must have a review by an external body and then it is referred to the Public Accounts Committee.

Hon GEORGE CASH: There are some issues that are probably only relevant to the first five-year period, and then you go into a general review situation, so I accept that the words may have to be changed, but there are some members of the Committee of the Whole who are likely to raise this issue.

Hon GEORGE CASH: By way of clarification, schedule 3 on page 63 of the bill states -

After receiving the opinion of the independent auditor appointed in accordance with the *Auditor General Act 2006* section 37, the Auditor General is to transmit copies of the annual report . . .

Is it section 37?

Mr Barnes: I think it should now be section 38. I think we have identified that as an amendment.

The CHAIRPERSON: Is it anticipated that any further amendments to the bill of which you are aware at this stage will be brought forward? It is useful for us to have notice of them.

Mr Barnes: No amendments are proposed for the Financial Management Bill 2006, but for the Financial Legislation Amendment and Repeal Bill 2006, which is the consequential amendments bill, we have put forward some amendments that should be on the notice paper.

The CHAIRPERSON: We already have those. Are there no more as far as you are aware?

Mr Barnes: No.

The CHAIRPERSON: Thank you very much for your time this afternoon. I appreciate it.

Mr Marney: I have a question for the committee.

The CHAIRPERSON: I hope we can answer it.

Mr Marney: It relates to the recruitment of the Auditor General. As you would be aware from the Auditor General Bill, the recruitment process requires consultation with the Public Accounts Committee. As chair of the recruitment panel - at this point I probably need to invoke the code of silence option you mentioned at the outset of the proceedings.

[The committee took evidence in private]

Hearing concluded at 3.49 pm
