REPORT OF THE

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

IN RELATION TO

PARLIAMENT AND COMMERCIAL CONFIDENTIALITY: CONTRACTS BETWEEN THE PUBLIC AND PRIVATE SECTORS

Discussion Paper No. 5

Presented by Hon Kim Chance MLC

Report 17

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

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Terms of Reference:

See Appendix 1

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REPORT OF THE STANDING COMMITTEE ON PUBLIC ADMINISTRATION

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PARLIAMENT AND COMMERCIAL CONFIDENTIALITY: CONTRACTS BETWEEN THE PUBLIC AND PRIVATE SECTORS

1 INTRODUCTION

1.1 This report, in the form of a discussion paper, examines the ability of the Parliament and its committees to scrutinise documents in relation to contracts between the public and private sectors.

1.2 The report is confined to the discussion of commercial confidentiality as it affects information in which the Parliament has an interest, and does not examine the general application of commercial confidentiality.

1.3 It addresses the question: to what degree, if any, of external accountability and parliamentary supervision should the public sector and its contract partners be subject? In particular, should these arrangements be treated as: commercial contracts subject to commercial confidentiality; or as government business and therefore be scrutinised by Parliament; or as a separate class of activity, subject to both?

1.4 The Standing Committee on Public Administration (the Committee) has produced this report for the purpose of generating productive discussion and general interest. The Committee does not provide findings or recommendations on the issues raised.

1.5 The Committee was fortunate to secure the services of Ms Lara Anstie, Articled Clerk, who researched and compiled the research paper upon which this report is based. The Committee thanks her for her contribution.

Definitions

1.6 "Commercial confidentiality" or "commercial in confidence" is usually claimed in the context of a defence to an order of a court for the production or disclosure of information, in reliance on the doctrine of privity of contract. A claim will be granted where it is determined that the party claiming has an interest (in the form of information that would lose its commercial value if publicly disclosed) meriting protection.

1.7 "Contracting out" and "outsourcing" refer colloquially to the practice of government agencies entering contracts with the private sector for the provision of services directly to the public sector, such as information technology, or to the public, as clients or customers of the public sector. On strict interpretation, "contracting out" refers to private sector provision of services to the public; "outsourcing" refers to private provision of services directly to the public sector entity. "Contracting out" is used in its colloquial sense in this paper.

1.8 The typical procedure for contracting out in Western Australia is outlined under the guidelines of Contract and Management Services (CAMS). For contracts valued under $5000, the agency contacts pre-qualified suppliers for verbal quotes; for contracts valued between $5000 and $50 000, the agency issues a written specification inviting written quotes from pre-qualified suppliers; for contracts valued over $50 000, public tenders must be called by advertisement.

2 WHICH ENTITIES SHOULD BE SUBJECT TO PARLIAMENTARY SCRUTINY?

2.1 There is some debate on the issue of whether public sector entities are entitled to claim commercial confidentiality in their own right, as do their private sector contract partners. Distinctions may be drawn between the types of entities. It is arguable on the premise of competitive neutrality that the commercially operating public entities should not be subject to the same level of parliamentary supervision as "traditional" public entities, such as departments of state.

2.2 Public sector entities are structured in various ways in order to fulfil particular functions. Under the Competition Principles Agreement, public sector entities are increasingly divided into three functional groups: operational, regulatory and policy.[1] The Hilmer Report[2] also recommended that operational functions be further divided, in relation to the provision of utilities and services, between asset ownership and service delivery to the public, with each area to be operated on commercial principles, and where possible, open to competition with the private sector.[3]

2.3 A discussion of the basic features of the types of entities is useful in identifying where a right to claim may arise.

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1 See also the 36th Report of the Standing Committee on Government Agencies, *State Agencies – Their Function and Nature*, April 1994.

2 *National Competition Policy: Report by the Independent Committee of Inquiry* (1993), Commonwealth of Australia: Canberra (the Hilmer Report).

3 See Corcoran & MacPherson, "Disclosure and the Public Interest: Confidentiality Claims in Outsourcing Agreements" (2000), 74 ALJ 259 at 265 for a discussion on the motives for contracting out.

Departments of state

2.4 Departments of state are usually created by executive prerogative and perform the function of administration of a particular area of government activity, such as health, education and infrastructure. Departments are headed by Ministers, who are directly responsible to Parliament for the activities of the department.

2.5 This kind of entity will frequently outsource its internal services, such as information technology, or projects, such as road building, and also may make use of Memoranda of Understanding's (MOUs) with other departments. This type is the least likely to claim commercial confidentiality in its own right, but as it frequently contracts with private entities, may make a claim on the private entity's behalf.

Statutory authorities

2.6 Statutory authorities are created by statute, and do not have corporate status. They may operate independently in conjunction with departments, and frequently perform regulatory functions, or a specific function (as opposed to the broad scope of departments). Statutory authorities are usually subject to Ministerial control in the form of Ministerial directions, and to parliamentary supervision by virtue of provisions in the establishing Act.

2.7 Statutory authorities may contract with the private sector for the provision of internal services, but rarely for the provision of services to the public. This type may claim commercial confidentiality on behalf of a private contract partner, but rarely in its own right.

Statutory corporations

2.8 Statutory corporations are incorporated by the establishing Act, and operate commercially, sometimes as a state monopoly or in competition with private businesses. Statutory corporations have full corporate powers in that they have the capacity to hold property, enter contracts, sue and be sued. These entities may also be subject to ministerial directions and parliamentary disclosure provisions under the establishing Act.

2.9 As statutory corporations operate commercially, it is arguable on the basis of competitive neutrality that they should operate on the same terms as private corporations that do not have the benefits or burdens of Crown ownership, including parliamentary supervision. The alternative view is that as statutory corporations are publicly owned, they should be subject to full parliamentary supervision, regardless of the nature of their activities.

Partly privatised entities

2.10 Partly privatised entities are created by the sale to the private sector of a proportion of a statutory corporation by tender or by float. Depending on the proportion of the entity retained, the state may exercise rights as a large or majority shareholder (Telstra is the best example).

2.11 Where the state is a shareholder, it is arguable that the Parliament should at least have the same rights to information as a shareholder of a corporation. Where the state is the majority shareholder, exercising full voting rights, the entity should be subject to parliamentary scrutiny. These arguments may be tempered by the existence of disclosure requirements in the establishing Act, which will usually be imposed on monopolies.

Fully privatised entities

2.12 A fully privatised entity results from the sale of a public entity to the private sector. A fully privatised entity exercises full corporate powers, including the capacity to own property and to contract.

2.13 The state retains no ownership, which gives rise to the argument that the entity should not be subject to parliamentary scrutiny. When the privatised entity provides a core service, such as water, gas or telecommunications, or exercises a monopoly in its field, statutory disclosure to Parliament requirements are usually imposed.

Private entities

2.14 Entities incorporated under the Corporations Law have a prima facie right to operate free of parliamentary supervision, subject to compulsion of law.

Characteristics of entities

2.15 Although the structure of an organisation may be examined to determine the extent to which claims of commercial confidentiality could be made, alternatively there are certain characteristics possessed by entities that should render the entity subject to parliamentary supervision.

Ministerial directions

2.16 Ministerial direction is a statutory power, conferred on the Minister, to direct a statutory authority or corporation to act in accordance with policy.

Treasurer's guarantee on loans

2.17 Treasurer's guarantees are contained in the establishing Act for statutory corporations, and provide for the Treasurer to make guarantees for loans taken by the corporation, essentially undertaking ultimate liability for the commercial operations of the corporation.

Public funds/tied grants/subsidies

2.18 Where an entity, whether public, substantially corporatised, or private, receives funds from the Government Budget or a grants scheme administered by the state or Commonwealth, that entity should be supervised by Parliament as to the use of those funds.[4]

Nature of services provided: core or non-core?

2.19 Where the services provided by the entity are a core service (equivalent to a public good in economic terms), such as electricity production, defence, health or welfare services, the public interest is such that Parliament should supervise the provision of those services.

3 TYPES OF INFORMATION WHICH MAY BE COMMERCIALLY CONFIDENTIAL

3.1 The value (and therefore confidential status) of commercial information depends primarily on the timeframe:

> *"… there should be a very clear demarcation between commercial information which is ex ante, before a decision is made relevant to that information, and commercial information which is ex post – that is, decisions have been made. Tender documents provided before the tender decision is made are particularly commercially sensitive, because a decision has not been made and because the benefits and rights attaching to that information can be usurped by others should that information be given out. After the decision is made, the information is of very little value in a commercially confidential sense."*[5]

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4 This issue has been examined in the 1993 Supreme Court decision in *Aboriginal Legal Service v The State of Western Australia* (1993) 9 WAR 297; 113 ALR 87.

5 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p 55.

Tender documents

3.2 The tender process for contracting out provides a degree of transparency as the tender documents and criteria are publicly available and any member of the public is free to contest to obtain the contract. However, the documents generated in the selection process are confidential. There are strong arguments in favour of all material related to tendering becoming publicly available *after* the contract is finalised, particularly where such a disclosure would not materially damage the relevant commercial interests of the parties.[6] The CAMS disclosure clause contemplates the disclosure of the details of the successful tenderer.[7]

3.3 While the Senate Finance and Public Administration References Committee regarded commercial confidentiality as a legitimate basis on which to restrict information given its economic value, it thought that it should have a "very narrow and clearly limited application"[8]. The Standing Committee on Estimates and Financial Operations recommended that all parties who enter into contracts with public agencies be

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6 Ibid, p 9.

7 **Public Disclosure of Contract Details**

1. The Contract Award information for all contracts above $20 000 will be publicly available and published on the Western Australian Government Contracting Information Bulletin Board after the contract is legally established.
2. Documents and other information relevant to the contract may be disclosed when required by law or under the *Freedom of Information Act 1992* or by tabling of documents in Parliament or under a Court order.
3. The Contractor shall not have, make or bring any action, suit, claim, demand or proceeding against the Principal for any loss, injury, damage, liability, cost or expense resulting from public disclosure of Contract Award information.
4. In this Clause the expression "Contract Award information" means:
    - general description of goods and/or services the subject of the contract;
    - successful Contractor's name(s);
    - total Contract Price(s) or Value(s).
5. Notwithstanding any provisions of this contract to the contrary, the powers and responsibilities of the Auditor General for the State of Western Australia under the Financial Administration and Audit Act 1985 are not limited or affected by the terms of this contract.

CAMS Online: Agencies Guide to CAMS:
www.cams.wa.gov.au/Web/cams.nsf/web/AgenciesGuide

8 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p 8.

informed that commercial confidentiality clauses are ineffective to prevent scrutiny by the Parliament.[9]

3.4 There is an argument to suggest that documents submitted by unsuccessful tenderers should be protected in order to prevent the use of their intellectual property by others in subsequent tenders or in similar tenders in other jurisdictions.[10] For example, an unsuccessful tenderer for a public works project may have a unique design, or an information system or computer program. Similarly, the disclosure of the tender documents of the successful tenderer may enable future tenderers to "ratchet up" an incentive in future contracts.[11]

Contract terms and collateral contracts

3.5 Beyond trade secrets, [12] it is highly unlikely that contract terms are of a commercially sensitive nature warranting protection from disclosure to Parliament. The nature of some contract terms may warrant automatic disclosure, particularly the contract price [see 3.9 below].

3.6 When contracts incorporate terms by reference, or consist of several sub-contracts, there is also very strong (if not overwhelming) public interest in disclosure of the terms to the Parliament.

Documents related to the execution and performance of the contract

3.7 The prime determinant of the effectiveness of the process of contracting out is the performance of the contractor as against the expectations of the public entity contract partner and the public, and the performance of the same services by the public sector and other private entities.

3.8 Public satisfaction with service provision is critical to the electoral performance of the Government, and has significant influence on the prospects of the private contractor in

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9 The 30th Report of the Standing Committee on Estimates and Financial Operations, *Report on the Transport Co-ordination Amendment Bill 1998*, Recommendation 1. See generally Part 6.

10 The 35th Report of the Public Accounts and Estimates Committee (Victoria), *Commercial in Confidence Material and the Public Interest*, March 2000, p 94.

11 See the discussion of Lawson "Outsourcing Accountability: Is it a Political Option?", *Sunrise or Sunset? Reinventing Administrative Law for the New Millennium, Administrative Law Forum*, June 2000, p 8.

12 "The term may have been used more frequently in judicial decisions than in common parlance to describe secrets the confidentiality of which courts of law will protect." *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at 172.

future contracts, including contracts to be performed in other jurisdictions.[13] There is a strong public interest in the disclosure of performance assessments, derived from the electoral significance of the information.

Subject matter – public interest disclosure?

3.9 There is subject matter that would appear to carry a significant if not overwhelming public interest in favour of disclosure to the Parliament or the public. These areas are briefly discussed below:

3.9.1 the names of the parties to the contract, including the ultimate ownership if the parties are subsidiaries or are substantially owned by another entity.

3.9.2 the contract price should be disclosed to enable the Parliament and the public to assess the contract risk, and to encourage competitive tendering in other contracts.

3.9.3 reasons for the success of the tender, and evidence of due diligence in the selection process permit the Parliament and the public to assess the contract risk undertaken by the public sector in light of the benefits, and as an economic benefit, allow other players in the market (for example, in the industrial electricity market) to adapt to the areas of demand and to adjust prices.

3.9.4 in relation to the provision of core services, transfer of control and the removal of accountability mechanisms, including parliamentary supervision without corresponding reduction in the attached governmental risk.[14]

3.9.5 the stability, together with the past and present financial performance of the private entity are particularly relevant in relation to the provision of core services or the operation of state monopolies [see also 3.9.1 above]. This may directly conflict with the entity's assertions that its business plans are commercially confidential.

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13 Examples where performance has had a significant influence in public opinion or confidence are in household garbage collection, frequently contracted out by local government, and the performance of Corrections Corporation Australia, regarding its contract defaults in relation to Victoria's private women's prison.

14 If a private corporation providing a core government service or function, such as water supply, fails, the government will have to fill the gap. Even though the service is contracted out, the ultimate responsibility and contingent liability will always remain with the government: Corcoran & MacPherson, "Disclosure and the Public Interest: Confidentiality Claims in Outsourcing Agreements" (2000), 74 ALJ 259 at 261.

3.9.6 the backgrounds of the directors or operators should be disclosed for reasons of public confidence in the decisions of the elected officials: great importance is placed on good character of the successful tenderer as well as the tenderer being chosen on the basis of merit, rather than (for example) family connections or corruption [see also 3.9.3 above].

3.9.7 terms of performance and performance assessments.

3.9.8 any consultant payments or contingencies paid by either party during contract negotiations.

4 THE NATURE OF THE CLAIM OF COMMERCIAL CONFIDENTIALITY

4.1 Contracts are generally viewed as private agreements between the parties, and unless disclosure is expressly stipulated in the terms,[15] are commercially confidential as against third parties.

4.2 Express clauses, which characterise the entire contract and related material as commercially confidential, have been provided in contracts at the instigation of government agencies in other jurisdictions to prevent the disclosure of information to Parliament, its committees, the Auditor General and the community.[16] However, when challenged in litigation, these clauses are potentially void in the public interest.

4.3 Prima facie, it is the privilege of any person who possesses information to keep the information confidential.[17] If a person conveys information and identifies it as confidential, an equitable cause of action in breach of confidence arises if that information is used or disclosed.

4.4 The claim of commercial confidentiality could possibly arise as a result of the application of confidentiality provisions in statutes, which operate to prevent a public official or employee from divulging information relating to the circumstances of an individual to Parliament or to the public.[18] These clauses do not prevent the provision of an individual's details in an aggregate form, for example, a graph or statistics. It is difficult to conceive that these clauses could apply to commercial contracts between the public sector entity and the private contractor.

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15 See *Contract and Management Services Agency Guide* at http://www.cams.wa.gov.au.

16 The 35th Report of the Public Accounts and Estimates Committee (Victoria), *Commercial in Confidence Material and the Public Interest*, March 2000, p 71. Other jurisdictions (Commonwealth, South Australia and New South Wales) report the same use of these clauses: Seddon, op cit p 9.

17 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426 per Brennan J.

18 For example, s250 of the *Fish Resources Act 1994*.

5 THE CONFLICT BETWEEN PRIVATE RIGHT AND PUBLIC INTERESTS

5.1 A conflict arises when a public sector entity, subject to the supervision of Parliament, enters into a contract with a private entity, which is not subject to such supervision. Commercial confidentiality or commercial in confidence is frequently claimed in defence to compulsion of information by a court on the basis that the private entity is entitled to protection of commercially sensitive information. In the context of Parliament, commercial confidentiality claims may be made in defence to requests, summonses or orders of Parliament or its committees.

5.2 If public sector entities can claim commercial confidentiality, the same as private entities, or do so on their behalf, certain consequences contrary to the common understanding of accountability and parliamentary supervision follow. Any dealings between the public sector and private entities, especially those deemed commercially confidential, stand to be taken outside parliamentary scrutiny, enabling the public sector and the Government of the day to avoid public scrutiny of activity.

5.3 Section 58C of the *Financial Administration and Audit Act 1985* provides:

> *"**58C. Secrecy of operations prohibited***
>
> *The Minister and the accountable officer of every department, and the Minister and the accountable authority of every statutory authority, shall ensure that:*
>
> *no action is taken or omitted to be taken; and*
>
> *no contractual or other obligation is entered into, by or on behalf of the Minister, department or statutory authority that would prevent or inhibit the provision by the Minister to the Parliament of information concerning any conduct or operation of the department or statutory authority in such a manner and to such an extent as the Minister thinks reasonable and appropriate."*

5.4 The section leaves the determination of secrecy to the Minister, which may not be satisfactory to the Parliament; further, as s58C of the *Financial Administration and Audit Act 1985* is phrased in directory terms, there is no sanction, other than under the powers of the Houses of Parliament, to compel parliamentary scrutiny or public disclosure of information relating to such contracts. Public sector entities offering to contract must insert a contract clause relating to public disclosure of contract details.[19]

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[19] See Footnote 7.

5.5 Where government services are contracted out, it is argued that public scrutiny is the major cost of doing so. Contracting out necessarily involves third parties, and parliamentary and public scrutiny of government agencies' service provision is restricted where these entities invoke their rights to commercial confidentiality. Although commercial confidentiality is acknowledged as a legitimate basis on which to restrict information when the parties are private citizens or corporations,[20] it cannot be said that information regarding government services should attract the same protection from disclosure.[21] There is no legal mechanism to defeat parliamentary scrutiny: a claim of commercial confidentiality will succeed only when the composition of the House is such that the majority favours upholding the claim.

5.6 It has been a general parliamentary experience in Australia that most contracts are deemed by governments to be commercially confidential and therefore unavailable for scrutiny by interested parties, including parliamentarians.[22] There have been a number of examples in various state jurisdictions of whole contracts being withheld on the grounds of commercial confidentiality while contracts for similar services have been published in other states. This leads to an apprehension that the contract terms and documents relating to performance are being withheld for other reasons.[23]

6 COMMERCIAL CONFIDENTIALITY CLAIMS BY PUBLIC SECTOR ENTITIES BEFORE THE LEGISLATIVE COUNCIL OR ITS COMMITTEES

6.1 Where a public sector entity has possession of information in which the Legislative Council[24] or its committees have an interest, and the matter is considered by that entity to be commercially confidential, the *Ministerial Guidelines re Evidence to Parliamentary Committees 1987* require the employees of the entity to refer the matter to the Minister.

6.2 The Minister will then claim commercial confidentiality as the reason for refusal to produce documents in response to invitation or summons if she or he determines that the interest in disclosure is not greater than the commercial interests of the entity or its contract partner.[25]

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20 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p 8.

21 Circular to Ministers 7/87 *Guidelines Re: Evidence to Parliamentary Committees.*

22 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p 53.

23 Ibid, p 9.

24 Also referred to as 'the House'.

25 The private entity should be on notice to disclose by virtue of the CAMS disclosure clause.

6.3 The Minister is the only person vis a vis the House capable of making the claim in relation to information in the possession or power of a public sector entity, and may make the claim to protect the interest of the contract partner as well as claiming in right of the public sector entity.

7 THE LEGISLATIVE COUNCIL'S POWER TO COMPEL THE PRODUCTION OF PAPERS

7.1 The Legislative Council has an interest in information relating to the administration of the state, and has various mechanisms for obtaining information (for the purposes of this paper, in the form of documents).

7.2 When the Legislative Council or its committees desire information, the person who has the information in his or her possession or power is invited to table the information. In the large proportion of cases, the person accepts the invitation.

7.3 When a person refuses the invitation to produce documents on the grounds of commercial confidentiality, the House or the committee may pursue the matter by negotiating with the person for portions or edited versions of the documents. If this fails, the House or the committee can issue a summons under the provisions of the *Parliamentary Privileges Act 1891*.

7.4 The High Court's decision in *Egan v Willis and Cahill*[26] is distinguishable on the facts, but is relevant to the issue of the extent and scope of the Legislative Council's power to enforce an order to produce documents, and the Courts' power to examine the exercise of such a power. Unless the question of the Parliament's power to enforce its Standing Orders[27] arises in relation to a point of substantive law (such as a trespass action), the Courts cannot examine the exercise of a parliamentary privilege[28]. The question of the application of claims of commercial confidentiality in relation to information in which the Parliament has an interest has not been tested in the Courts as a result of this rule.

7.5 Section 4 of the *Parliamentary Privileges Act 1891* provides:

> *"Each House of the Parliament of the said Colony, and any Committee of either House, duly authorised by the House to send for persons or papers, may order any person to attend before the House or before such Committee, as the case may be, and also to produce to*

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26 (1998) 158 CLR 527.

27 The permanent rules which govern the conduct of business in a house of parliament.

28 *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

such House or Committee any paper, book, record, or other document in the possession or power of such person."

7.6 For these provisions to have the practical effect of compelling papers, the papers must be summonsed by the Legislative Council (or a committee granted the same powers by the Legislative Council):

- For the Legislative Council to summon witnesses or order papers, the order must be under the hand of the President (s5 *Parliamentary Privileges Act 1891*; SO 418); and

- A committee summons to order the attendance by a person or the production of documents must be under the hand of the Clerk and the authorisation of the Chairman (s5 of the *Parliamentary Privileges Act 1891*).

7.7 Under s7 of the *Parliamentary Privileges Act 1891*, the question of relevance is reserved for resolution in the House under the normal procedures. If the House determines that material is irrelevant, s7 prevents the House from ordering it. All other reasons for non-production, including claims of commercial confidentiality, are dealt with within the absolute discretion of the House to exercise its power to order production.

7.8 If non-compliance with a summons is not excused, and production is ordered under s8 of the *Parliamentary Privileges Act 1891*, the House has the power to punish the person summarily for non-compliance with the order as contempt of Parliament.

Protective procedural measures of the Legislative Council

Standing Orders

7.9 The Standing Orders provide for the protection of sensitive material from disclosure where the House determines that it is in the public interest to suppress the information.

Customs of the House

7.10 It is a custom of the House that documents be made available to members on a read only basis. The documents are in the custody of the Clerk and are available to members to read, but not to copy or publish. Such a procedure has been used where the House itself has ordered the production of documents but has accepted a minister's

averment that publication or disclosure of the documents or some of the information they contain would or could have an adverse commercial effect.[29]

7.11 It could be said that the power to compel papers and records and the complementary power to suppress material produces a similar effect to a claim of commercial confidentiality in that information may be protected from public disclosure, with the additional public benefit of allowing parliamentary scrutiny. Under the Standing Orders, the House wields the power to decide (in the public interest) whether to protect the document, as opposed to claims of commercial confidentiality, where the agency determines the need for protection.

8 SHOULD COMMERCIAL CONFIDENTIALITY PROPERLY ATTACH TO DOCUMENTS IN WHICH PARLIAMENT HAS AN INTEREST?

8.1 Historically, the Legislative Council generally does not insist on disclosure in response to claims of commercial confidentiality.[30] This may be seen as unsatisfactory in terms of parliamentary supervision of the administration of the State, or as a practical decision not to pursue disclosure to legitimate claims of commercial confidentiality.

8.2 Proponents of full disclosure cite the public interest as the overriding factor determining whether commercial confidentiality should attach to documents in which Parliament has an interest. There are areas of particular concern that:

8.2.1 whole services are potentially shielded from the public eye where a "blanket" claim of confidentiality is made;

8.2.2 there is no independent assessment of the merits of the claim; and

8.2.3 contracting out does not have the result of transferring liability for failure to deliver services to the private sector.

8.3 Accountability is identified by many[31] as a cost of contracting out. As a general principle, it is argued that all parliamentary scrutiny mechanisms, as an aspect of

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29 The 32nd Report of the Standing Committee on Government Agencies, *The Identification and Parliamentary Oversight of Government Agencies*, October 1992, p 10.

30 Ibid, p 10.

31 Senate Finance and Public Administration References Committee, *Contracting out of Government Services Second Report,* May 1998; the 35th Report of the Public Accounts and Estimates Committee (Victoria), *Commercial in Confidence Material and the Public Interest,* March 2000; Seddon, N. "Is Accountability a Cost of Contracting Out?" *Sunrise or Sunset? Reinventing Administrative Law for the New Millennium, Administrative Law Forum,* June 2000.

accountability, should be applied where services are contracted out by public sector entities, because each House of Parliament has the role and power to supervise the administration of the State.[32] Scrutiny can only be meaningful if adequate information is available for consideration and evaluation.[33]

8.4 Claims of commercial confidentiality which cloak or "blanket" an entire contract are of particular concern: it is acknowledged by many sources that only a small part of a contract is likely to be of such commercial sensitivity as to warrant protection.[34]

8.5 The Senate[35] and Victorian[36] Committees proposed that the merits of each claim be tested on a case by case basis[37] and that a test be either codified by the Parliament in the form of a statute or by amending the Standing Orders. A merits test of this type could be applied by the Legislative Council in determining whether to excuse a refusal (or claim of commercial confidentiality) to produce papers by order under s7 of the *Parliamentary Privileges Act 1891*. Alternatively, it could be applied by the House or its committees in determining whether to exercise the power to order the papers.

8.6 This proposal has significant disadvantages to a House with absolute discretion to determine claims as:

- codifying a test in statute requires the assent of the Legislative Assembly, which is an unnecessary step because the Legislative Council has the power to regulate its own procedures by its own resolution;
- statute invites judicial review of the internal proceedings of Parliament, contrary to long standing authority prohibiting such review[38]; and
- the Standing Orders can be suspended by resolution of the House (SO 433 – 435).

8.7 The Senate Finance and Public Administration References Committee discussed the option of giving the Auditor General the role of applying the test.[39] Currently, the

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32 Seddon, N. "Is Accountability a Cost of Contracting Out?", *Sunrise or Sunset? Reinventing Administrative Law for the New Millennium*, *Administrative Law Forum*, June 2000.

33 Corcoran & MacPherson, "Disclosure and the Public Interest: Confidentiality Claims in Outsourcing Agreements" (2000), 74 ALJ 259 at 262.

34 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p 9.

35 Senate Finance and Public Administration References Committee.

36 The Public Accounts and Estimates Committee (Victoria).

37 Ibid.

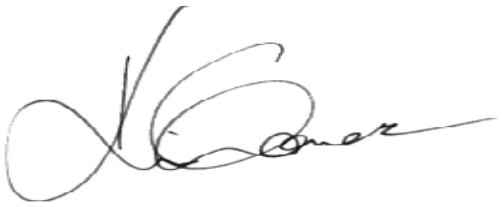
38 *Bradlaugh v Gossett* [1884] QB 271.

39 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p 69.

Western Australian Auditor General does not have this jurisdiction, and it is inappropriate for the Auditor General to have a role in making what is essentially a political decision. If a test were to be part of the Standing Orders, it would be inappropriate for the President to arbitrate, given the Legislative Council's well established practice of referring matters of privilege to Select Committees of Privilege.

9 CLOSING COMMENT

9.1 The Committee believes it would be useful if this report was taken into account by government agencies and Ministers so that further consideration is given to implications of claiming commercial confidentiality when responding to the Parliament. The Committee hopes this report will generate further discussion on an issue that is of increasing significance in a climate of increasing interaction between the public and private sectors.



Hon Kim Chance MLC
Chairman

Date: November 21 2000

APPENDIX 1

TERMS OF REFERENCE FOR THE STANDING COMMITTEE ON PUBLIC ADMINISTRATION

Schedule 1 of the Standing Orders establishes the Standing Committee on Public Administration.

The Terms of Reference for the Standing Committee are:

"1. A Standing Committee on Public Administration is established.

2. The Committee consists of 6 members.

3. The functions of the Committee are:

(1) to inquire into and report to the House on the means of establishing agencies, the roles, functions, efficiency, effectiveness, and accountability of agencies and, generally, the conduct of public administration by or through agencies, including the relevance and effectiveness of applicable law and administrative practises;

(2) to consider and report on any bill referred to it by the House providing for the creation, alteration or abolition of an agency, including abolition or alteration by reason of privatization; and

(3) except as provided in Standing Order 339(c), the Committee shall not proceed to an inquiry whose sole or principal object would involve consideration of matters that fall within the purview, or are a function, of another Committee.

4. In this order:

"Agency" means-

(a) an agent or instrumentality of the State Government, established for the purpose of developing, implementing or administering any program or policy with a public purpose or any such program or

policy that relies substantially for its development, implementation or administration on public monies or revenue;

(b) any person empowered by a written law to make a decision enforceable at law whether by that person or otherwise,

and, where appropriate, includes any agency officer or employee acting, or having ostensible authority to act, as the agent or delegate of the agency, but does not include:

(c) a House of the Parliament, or any Committee or member of either House, or any officer or employee of a department of the Parliament;

(d) a court of law or a court of record, or a judge or other member of either court;

(e) any person whose functions are solely of an advisory nature and the failure to obtain or act in accordance with advice given by that person does not invalidate or make voidable a decision made by another person;

(f) a police officer or other person in the course of exercising a power conferred by a written law to arrest or charge a person with the commission of an offence, or to enter premises and seize or detain any object or thing;

(g) a local government within the meaning of the Local Government Act 1995."