



Legislative Council

10 November 2023

Mr David Limbrick
Chair
Select Committee on the 2026 Commonwealth Games Bid
By email: commonwealthgames@parliament.vic.gov.au

Dear Mr Limbrick,

Advice sought by the Select Committee on the 2026 Commonwealth Games Bid

Thank you for your letter dated 3 November 2023 seeking procedural advice for the Select Committee on the 2026 Commonwealth Games Bid. I provide the following responses to the questions raised by the Committee:

Whether a claim of executive privilege is valid when a committee requests documents or other information under parliamentary privilege

The Legislative Council has not conceded the existence of any conclusive executive privilege in relation to its proceedings.

The Legislative Council, through a 2007 Select Committee into Gaming Licensing, received legal advice from Bret Walker SC on the question of whether a claim of executive privilege is valid when a committee is seeking documents. The advice can be summarised as follows:

- The capacity of the Legislative Council (and its committees) to scrutinise the workings of government, and particularly those of the Executive, are beyond serious question.
- The Council has a general power to order papers. There is no precedent for a successful claim on behalf of the Executive to resist all and any orders for papers.
- Executive privilege and public interest immunity (as distinct from Cabinet documents) are not sufficient claims for non-production of documents. Where a document is not to be regarded as a Cabinet document, there should be no public interest reason to keep it from the people's representatives, the legislators, in the Council.

The Select Committee tabled an interim report in August 2007 and concluded: *'The advice received by the Committee from the Clerk of the Legislative Council, and legal opinion received by the Council from Mr Bret Walker SC, does not endorse the Government's wide-ranging claim of Executive privilege'*. The Select Committee further concluded that – *'Certain individuals have either disputed the Committee's power to call for documents and papers, or claimed it is a narrowly defined power. The lack of an established judicial determination of this question in the State of Victoria has limited the capacity of the Committee to seek compliance with its summonses.'*

The process for resolving disputes where a claim of executive privilege is made and the Committee disputes the claim

A committee cannot take action to enforce a request for documents or other information when it disputes a claim of executive privilege. A committee can only report the matter to the Council.

If the Committee has simply requested documents and has received a claim of executive privilege, it may resolve to formalise the call for documents by way of a summons. If a claim of executive privilege is made following a summons, the Committee can engage in correspondence to determine whether there is an alternative method of getting access to the information it needs or it can question agencies about the claim at public hearing.

If the Committee is unable to resolve the matter to the committee's satisfaction, it can take no further action or report the matter to the House. It is then up to the House to determine a course of action which may include the House itself passing an order for production of documents motion under Legislative Council Standing Order 10.01. Chapter 10 of Council Standing Orders deals with the production of documents by a motion of the House and includes the ability to appoint a legal arbiter to consider disputed claims of executive privilege. To date, there is no precedent of a legal arbiter being appointed under these Standing Orders in Victorian Parliament. These are matters for the House to consider, not the Committee.

Matters relating to interactions between the Office of the Premier of Victoria and witnesses, in particular whether the Office's response on behalf of former MPs may be considered an interference in the inquiry process

Standing order 17.10 'Interference with witnesses and false evidence' states:

If it appears that any person has —

- (a) by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influenced another person in respect of any evidence given or to be given before the Council or a committee; or*
- (b) been directly or indirectly endeavouring to deter or hinder any person from appearing or giving evidence; or*

(c) given any evidence which they know to be false or misleading in any case before the Council or any committee — such person may be declared guilty of contempt.

The first question the Committee should consider is whether they believe the actions of the Office of the Premier fall within any of the above. The Committee may need to seek further information to make an assessment, for example whether the former members had requested the Office of the Premier to respond on their behalf, or whether the Office intervened to ‘deter or hinder’ them from appearing.

If the Committee considers interference has occurred, the second question for the Committee is whether the interference has had a material impact on its ability to conduct the inquiry. In this case, the next step would be to report the matter to the House. The House may refer the matter to the Privileges Committee or take some other action (or none at all).

I understand the Select Committee’s question to me is in regard to a response by the Office of the Premier seeking an extension of time to respond. This in itself would most likely not be considered a contempt. However, if the Committee received a letter from the Office of the Premier saying they had directed the former members not to give evidence, then this would be a different matter. A direction to not attend a committee hearing in response to an invitation or summons could fall within the definition of contempt and may be dealt with by the House.

I trust this advice assists the Select Committee in its deliberations. I confirm I am happy for this advice to be published if the Committee resolves to do so.

Please do not hesitate to contact my office if we can assist further.

Yours sincerely



Robert McDonald
Clerk of the Legislative Council