LEGISLATIVE COUNCIL

STANDING COMMITTEE ON
FINANCE AND PUBLIC ADMINISTRATION

11th Report to the Legislative Council

INQUIRY INTO VICTORIAN GOVERNMENT
DECISION MAKING, CONSULTATION AND
APPROVAL PROCESSES

SECOND INTERIM REPORT – AUGUST 2010
LEGISLATIVE COUNCIL
STANDING COMMITTEE ON
FINANCE AND PUBLIC ADMINISTRATION

INQUIRY INTO VICTORIAN GOVERNMENT DECISION
MAKING, CONSULTATION AND APPROVAL PROCESSES

SECOND INTERIM REPORT

AUGUST 2010

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STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

Committee Members

Mr Gordon Rich-Phillips – Chairman
Member for South Eastern Metropolitan Region

Mr Matthew Viney – Deputy Chairman
Member for Eastern Victoria Region

Mr Greg Barber
Member for Northern Metropolitan Region

Ms Candy Broad (until 13 April 2010)
Member for Northern Victoria Region

Mr Matthew Guy
Member for Northern Metropolitan Region

Mr Peter Hall
Member for Eastern Victoria Region

Mr Peter Kavanagh
Member for Western Victoria Region

Mr Brian Tee (from 13 April 2010)
Member for Eastern Metropolitan Region

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ESTABLISHMENT OF STANDING COMMITTEE

On 21 November 2007, the Legislative Council resolved to appoint a Standing Committee on Finance and Public Administration with a Membership of seven Members. The Council’s resolution came into operation on 1 April 2008 and the Committee’s inaugural meeting was convened on 7 April 2008.

In accordance with the establishing resolution, the following Members were appointed to the Committee:

- Mr Greg Barber - Australian Greens,
- Ms Candy Broad - Australian Labor Party,
- Mr Matthew Guy - Liberal Party,
- Mr Peter Hall – Nationals,
- Mr Peter Kavanagh - Democratic Labor Party,
- Mr Gordon Rich-Phillips - Liberal Party, and
- Mr Matthew Viney - Australian Labor Party.

At its inaugural meeting the Committee elected Mr Rich-Phillips as Chairman, and Mr Viney as Deputy Chairman.

On 13 April 2010, Mr Brian Tee replaced Ms Candy Broad as a member on the Committee.

The establishing resolution provides the Committee with a wide range of powers. Some key features of the Standing Committee include:

- The Standing Committee exists until the Parliament is either prorogued or dissolved.
- Members of the Committee may be substituted by another Member from the same political party.
- The Committee has the power to inquire into any matter or thing relevant to its functions, which is either referred to it by resolution of the Legislative Council, or determined by the Committee.
- The power to appoint sub-committees to inquire into matters.
SECOND INTERIM REPORT

1. Establishment of Inquiry

1. Pursuant to Legislative Council Sessional Order No. 22 (10), the Standing Committee on Finance and Public Administration may inquire into any proposal, matter or thing that is relevant to its functions which is referred to it by resolution of the Council or determined by the Committee.

2. On 3 March 2010, the Committee resolved to inquire into and report on Victorian Government decision making, consultation and approval processes, and any knowledge and/or involvement of Ministers, Ministerial staff and/or Victorian Government officers since 1 December 2006 and in particular issues arising from media plans prepared within the Victorian Government since 1 December 2006.

3. The Committee agreed that the first matter to be investigated would be the Windsor Hotel redevelopment planning process. The basis for the Committee’s initial investigations was a document inadvertently released from the Office of the Minister for Planning.

4. The document, dated 24 February 2010 titled Minister for Planning Justin Madden Media Plan, outlined a strategy to use expected public opposition to the Windsor Hotel redevelopment as grounds to reject the development. The document stated:

   Windsor Ad C’ttee – report due first week of Feb report is expected to recommend that development go ahead. Strategy at this stage is to release it for public comment as this affects the entire community and then use those responses as reason to halt it as we have listened to community views.

5. Legislative Council Sessional Order 22 (11) stipulates that within seven days of deciding to inquire into any proposal, matter or thing, the Committee will inform the Council of its terms of reference. The Committee did this through a letter to the President of the Legislative Council dated 3 March 2010. The Council was duly advised of the Committee’s new Inquiry on 9 March 2010.
2. Call for Documents

6. On 3 March 2010, the Committee resolved to write to the Minister for Planning; the Premier; the Secretary, Department of Planning and Community Development; and the Secretary, Department of Premier and Cabinet seeking access to a copy of the document titled *Minister for Planning Justin Madden Media Plan*.

7. In response, the Committee received a letter from the Attorney-General on 5 March 2010 enclosing a copy of the document titled *Minister for Planning Justin Madden Media Plan*. The Attorney-General advised that the Government’s decision to provide this document to the Committee was not an indication of how it might respond to similar requests in the future. A copy of the Attorney-General’s letter and the document is provided in Appendix 1.

8. The Committee also resolved to separately write to the Premier; the Minister for Planning; the Department of Premier and Cabinet; and the Department of Planning and Community Development seeking access to any other documents of a nature similar to the document titled *Minister for Planning Justin Madden Media Plan*.

9. In response to the Committee’s request for other media plans, the Committee received the following correspondence:

   - letter dated 24 March 2010 from Mr Yehudi Blacher, Secretary, Department of Planning and Community Development advising the Department has no such documents;

   - letter dated 24 March 2010 from the Attorney-General, on behalf of the Premier, advising that members of the Legislative Assembly are immune from the processes of the Legislative Council and its Committees and that as a consequence, the Government would not be providing the Committee with documents from the Premier’s office;

   - letter dated 29 March 2010 from Ms Helen Silver, Secretary, Department of Premier and Cabinet advising that the Department has no such documents; and
• letter dated 13 April 2010 from the Attorney-General, on behalf of the Minister for Planning, advising there are no such documents in the office of the Minister for Planning.

3. Call for Witnesses

3.1 12 March 2010 Public Hearings

10. On 3 March 2010, the Committee resolved to conduct public hearings and take evidence from the following witnesses with respect to the Windsor Hotel redevelopment planning process:

• Mr Yehudi Blacher, Secretary, Department of Planning and Community Development

• Mr David Hodge, Executive Director, Planning Services & Development Facilitation, Department of Planning and Community Development

• Ms Peta Duke, media adviser

• Mr George Svigos, Premier’s media unit

• Ms Fiona Macrae, Premier’s media unit

• Hon. Justin Madden MLC, Minister for Planning

11. The first day of public hearings was scheduled for Friday 12 March 2010.

12. In response to the initial hearing invitations, the Committee received the following correspondence:

• letter dated 9 March 2010 from Mr Yehudi Blacher, Secretary, Department of Planning and Community Development confirming he would attend on behalf of the Department on 12 March 2010 and acknowledging the Committee’s subsequent advice that Mr David Hodge from the Department would not be a required witness on that day; (see Appendix 2);
13. The Committee met on 9 March 2010 to consider the above correspondence and to finalise witnesses for the hearings scheduled on 12 March. At this meeting the Committee resolved:

- that Ms Peta Duke, Media Adviser, Office of the Premier be issued with a summons to appear before the Committee at 1.00 p.m. on Friday, 12 March 2010 to give evidence in relation to its Inquiry into Victorian Government decision making, consultation and approval processes; and in particular, her role in any media plans, consultation and other involvement in the Windsor Hotel redevelopment process;

- that the order of witnesses for the initial public hearings be:

  1. Mr Yehudi Blacher, Secretary, Department of Planning and Community Development
  2. Ms Peta Duke, Media Adviser
  3. Mr David Hodge, Planning Services & Development Facilitation, Department of Planning and Community Development;

- that each individual witness be invited to give separate evidence; and

- that the Committee advise the Minister for Planning that his appearance before the Committee will be rescheduled to a date to be advised.

14. In accordance with the Committee’s resolution to summons Ms Peta Duke to give evidence, a summons was prepared and sent to the witness by registered post, email and facsimile on 9 March 2010.

15. On 11 March 2010, the Committee Secretariat confirmed with the Attorney-General’s office that Ms Duke was in receipt of the summons requiring her attendance at 1.00 p.m. on Friday 12 March 2010. No advice was received
until 12.55 p.m. on 12 March as to whether or not the witness would appear as directed.

16. The Minister for Planning was advised in writing on 9 March and 10 March that he would not be a required witness at the hearings scheduled for 12 March 2010 as the Committee wished to first take evidence from relevant Departmental officers and Ministerial advisers prior to taking evidence from the Minister. The Minister was advised a rescheduling of his hearing time would take place in due course. Copies of the Committee’s letters to the Minister are provided in Appendix 5.

17. On Friday, 12 March 2010, the Committee met to receive sworn evidence from the following witnesses:

10.30 a.m. Mr Yeudi Blacher, Secretary, Department of Planning and Community Development.

1.00 p.m. Ms Peta Duke, Media Adviser, Office of the Premier

18. The Committee received evidence from Mr Blacher between 10.30am and 11.45am on 12 March.

19. At 12.55 p.m on 12 March, the Committee Secretariat received an email from Ms Peta Duke, attaching a letter from the Attorney-General directing her not to attend the hearing. This letter was then circulated to Committee Members. A separate letter from the Attorney-General to the Committee was hand delivered at 1.00 p.m. that day. A copy of Ms Duke’s email and the Attorney-General’s letter to Ms Duke is provided in Appendix 6. A copy of the Attorney-General’s letter to the Committee is provided in Appendix 7.

20. At 1.00 p.m. on 12 March, the Minister for Planning occupied the witness chair without the invitation of the Committee. The Committee Chairman reiterated previous correspondence to the Minister that he was not a scheduled or required witness that day, and as the required witness was not in attendance the meeting would not proceed.

21. The Committee wishes to bring to the attention of the Legislative Council the behaviour of the Minister for Planning in responding uncooperatively to two separate letters from the Committee prior to the 12 March 2010 hearings
confirming he was not a required witness on that day. The Committee believes the Minister disrupted the Committee proceedings by occupying a witness chair without invitation. The Committee is of the opinion that such behaviour is unprecedented and totally inappropriate for a member of the public, let alone a Minister of the Crown, particularly the Minister for the Respect Agenda.

3.2 6 April 2010 Public Hearings

22. On 23 March 2010, the Committee resolved that Ms Peta Duke, Ministerial Media Adviser, be issued with a further summons to attend a public hearing on Tuesday, 6 April 2010 to give evidence in relation to its Inquiry into Victorian Government decision making, consultation and approval processes and her role in any media plans, consultation and other involvement in the Windsor Hotel redevelopment process.

23. Also at its meeting on 23 March 2010, the Committee resolved to conduct further public hearings on Tuesday 6 April 2010 with evidence to be received from:

- two separate probity auditors (PricewaterhouseCoopers and RSM Bird Cameron) appointed by the Minister for Planning to review Hotel Windsor Redevelopment Planning and Heritage Permit Applications;
- Ms Peta Duke, media adviser;
- Mr George Svigos, Premier’s media unit;
- Ms Fiona Macrae, Premier’s media unit; and
- Mr Justin Jarvis, Chief of Staff to Minister for Planning.

24. The Usher of the Black Rod and the Committee Secretary attempted to hand deliver the second summons to Ms Duke on 24 March 2010 at 1 Treasury Place, Melbourne. The Committee Secretary was advised in an email from Ms Duke and telephone conversation with the Attorney-General’s office that Ms Duke would not appear in person to receive the summons and that she had authorised Crown Counsel to accept service on her behalf. Accordingly, a staff member nominated by Crown Counsel John Lynch appeared to take receipt of the summons.

25. On 24 March 2010, the remaining witnesses as outlined in paragraph 23 above were all written to inviting them to give evidence on 6 April. A response was required no later than 5.00 p.m. on 31 March 2010.
26. On 31 March 2010, the Committee received a letter from the Attorney-General advising that Ministerial advisers, Mr George Svigos, Ms Fiona Macrae and Mr Justin Jarvis were directed not to attend the hearings for the same reasons identified in his letter of 9 March 2010.

27. On 1 April 2010, the Committee received an email from Ms Peta Duke advising that the Attorney-General had again directed her not to attend the Committee hearing to give evidence. On the same day, the Committee received a letter from the Attorney-General confirming the above. A copy of Ms Duke’s email and the Attorney-General’s letter is provided in Appendix 8.

28. On 6 April 2010, the Committee received sworn evidence from the following witnesses:

- Mr Jason Agnoletto, Engagement Partner and Mr Tony Peake, Review Partner, PricewaterhouseCoopers; and

- Mr Stephen G Marks - Director, Probity Services, RSM Bird Cameron.

29. At the direction of the Attorney-General, and in breach of the summons of 24 March 2010, Ms Peta Duke did not present to give evidence on 6 April 2010.

3.3 29 April 2010 Public Hearings

30. On 13 April 2010, the Committee resolved to summons the following witnesses to attend public hearings on Thursday, 29 April 2010 to give evidence in relation to its Inquiry into Victorian Government decision making, consultation and approval processes and their involvement in any media plans, consultation and other involvement in the Windsor Hotel redevelopment process:

- Mr George Svigos, Office of the Premier;

- Ms Fiona Macrae, Office of the Premier; and

- Mr Justin Jarvis, Office of the Minister for Planning.

31. At approximately 5.45 p.m. on 28 April 2010, the Committee office received separate emails from the individuals referred to above, advising that they had
been directed by the Attorney-General not to attend the public hearing scheduled for 29 April. A copy of the emails are provided in Appendix 9.

32. A letter was also received from the Attorney-General dated 28 April 2010 confirming that he had directed the three individuals not to attend the hearing. A copy of the Attorney-General’s letter is provided in Appendix 10.

33. In view of the above intervention by the Attorney-General, the Committee was unable to proceed with its scheduled public hearings on 29 April 2010.

3.4 1 June 2010 Public Hearings

34. At its meeting on 5 May 2010, the Committee resolved to conduct further public hearings in relation to the Windsor Hotel redevelopment planning process on Tuesday 1 June 2010 with evidence to be received from:

- Mr Geoffrey London, Victorian Government Architect; and
- Ms Prue Digby, Deputy Secretary, Planning and Local Government, Department of Planning and Community Development.

35. Written invitations were sent to the above witnesses on 7 May 2010. Following acceptance of their invitations, both witnesses appeared before the Committee on 1 June to give sworn evidence.

4. Intervention by the Attorney-General

36. The Committee reports to the Legislative Council that the Attorney-General’s interventions in directing various witnesses not to give evidence at scheduled public hearings represents a significant interference in the Committee’s functions and ability to fully investigate the issues within its terms of reference.

37. It has been noted by Professor Enid Campbell that:

“If the making of a claim of Crown privilege does not absolve the witness from the duty to appear on summons, neither a Minister nor the Cabinet can have any right to instruct a witness not to attend, and
38. The Committee notes that it is the position of Government that Crown privilege does absolve witnesses of a duty to appear on summons.

39. During the course of the Inquiry, the Attorney-General has put forward four separate arguments as to why witnesses have been directed not to appear before the Committee. The first relates to a so-called ‘long-standing convention that Ministerial advisers will not appear before a Parliamentary committee’. The second argument is based on the Attorney-General’s claims that the Committee’s summonses to witnesses are procedurally defective.

40. The third argument put forward by the Attorney-General is that Advisors are Advisors to Ministers who are members of the Legislative Assembly and therefore they cannot be compelled to give evidence before Legislative Council committees. The fourth argument is that evidence by the Advisors would be, or is likely to be, subject to executive privilege (Public Interest Immunity).

41. By letter dated 28 April 2010 (Appendix 10) the Attorney-General stated that until a substantive response to his concerns was made by the Committee the summonses would be considered by the Attorney-General as being invalid. To date, the Committee has not provided to the Attorney-General any substantive response on the basis that the Committee reports to the Legislative Council not the Attorney-General.

42. The Committee strongly rejects these four claims.

4.1 Ministerial Advisers appearing before committees

43. The Committee disputes the Attorney-General’s claim that Ministerial advisers are not compelled to give evidence to Parliamentary committees.

44. In a letter to the Select Committee on Gaming Licensing in March 2007, the Clerk of the Legislative Council advised as follows:

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Ministerial staff, in the broadest sense of the term, have no immunity against being summoned to attend to give evidence as a matter of law. Like public servants, Ministerial Advisers should generally not be held accountable for matters of opinion on policy, which is the domain of Ministers.

From time to time in Australia Governments have made claims of a ‘convention’ that Ministerial staff not appear, but Parliaments do not generally recognise such a convention, let alone its inherent inconsistency with the powers of the Houses and their Committees. Two contemporary examples are:

- In 2002, the Senate Select Committee on a Certain Maritime Incident rejected the claim that Ministerial staff are immune from summons to appear.
- In 2004 a New South Wales Legislative Council Committee responded to the failure of a Minister’s Chief of Staff to appear by summoning the Chief of Staff, who subsequently appeared.

There is, in effect, no distinction to be made between public servants and Ministerial staff.

45. Further, in June 2007, the Legislative Council obtained legal opinion from Mr Bret Walker SC in relation to the powers of the Council and its committees to order for the production of documents and witnesses. Responding to the question as to whether committees of the Legislative Council possess an unfettered right to compel the attendance of all other persons, including Ministerial advisers to give evidence, Mr Walker replied in the affirmative.

46. Mr Walker’s advice to the Council stated:

_A critical distinction is between compulsion to attend to give evidence, and compulsion to answer particular questions. Conventionally, and for good reason, Houses have not required public servants, or Ministerial advisers, to answer questions about policy, in such a way as to endanger the necessary confidence between Ministers and public servants._

_Assuming there is no intention on foot in the Council to alter that conventional position, there is no reason why such persons should not be required to give evidence outside that conventionally proscribed area. In particular, Ministerial advisers are not a caste which has been given the benefit of parliamentary precedent in this direction, let alone as at 1855. Of course, the usual role of Ministerial advisers means that in most cases their attendance would be sought to answer policy questions of a kind conventionally reserved for Ministers._

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2 Legal opinion obtained by Mr Bret Walker SC, Select Committee on Gaming Licensing – First Interim Report, July 2007, p. 47
47. The Attorney-General refers to a so-called Constitutional convention known as the McMullan Principle. The Committee notes that the Hon. Bob McMullan MP, after who the principle was named, himself questions the validity of such a principle in certain cases:

There is a longstanding principle which I have articulated—in fact, to my embarrassment, I saw it reported in one place as the ‘McMullan principle’—which says: ‘Staff are responsible to ministers. Ministers are responsible to the parliament.’ In the normal course that is correct, but that means you have to accept responsibility for what your staff do. You cannot say: ‘They’re responsible to me but I do not care what they do; I am not going to tell you what they do. If they make a mistake, it is nobody’s business.’ Then there is a black hole of accountability because they deal with the departments. They give instructions; they receive directions. It was of course classically illustrated in ‘children overboard’, but it is illustrated here as well. There is a big black hole in Australian accountability, and either ministers have to accept responsibility for what their staff do or staff have to be accountable. It cannot be that nobody is accountable.  

48. The key point made by Mr McMullan is that any convention whereby Ministerial advisers do not appear before committees can only be claimed in cases where the Minister accepts responsibility for a matter.

49. It is clear through recent Parliamentary debates and public statements, that the Minister for Planning has not taken responsibility for the leaked media plan relating to the Windsor Hotel planning consultation process.

50. On 9 March 2010, the Minister for Planning advised the Legislative Council as follows:

As I have said previously and publicly, this was a document I would not necessarily see, and nor had I seen it. It appears to have been a collation of information relating to up and coming planning matters and events from my diary as well as legislation and other additional comments. This document was prepared by my media adviser for her own planning purposes. It reflects her views on issues, not the government’s. And they were her words; they were not my words.

51. Both the Minister for Planning and the Premier advised Parliament and made public statements confirming the media plan was prepared by Ms Peta Duke and that she had subsequently been removed from her position within the Minister’s office.

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1 House of Representatives Main Committee, Tuesday 28 November 2006, p 180.
2 Victorian Parliamentary Debates, Legislative Council, 9 March 2010, p.598
52. In view of the above, the Committee does not accept the so-called McMullan Principle and has sought the attendance of Ms Duke to give evidence at a public hearing on three separate occasions: an invitation dated 3 March 2010, a first summons dated 9 March 2010 and a second summons dated 24 March 2010. All three attempts by the Committee to take evidence from this witness have been unsuccessful.

53. By letter dated 23 April (see Appendix 11), the Attorney-General proposed a compromise whereby the Committee identified the matters it wished to inquire into with Ms Duke and Mr Jarvis, Minister Madden would raise these matters with them and then give their response in evidence to the Committee. The Committee has not to date specifically responded to this offer by the Attorney.

54. The Committee notes that its intention to obtain evidence from Ministerial advisers is consistent with the views expressed in the recent Review of Victoria’s Integrity and Anti-corruption System (May 2010):

Traditionally, ministerial officers have been considered accountable through the convention of individual ministerial responsibility, rather than subject to the same external scrutiny as public servants. However, in recent years the number of ministerial officers has increased considerably. This makes the traditional approach of ministerial accountability for the actions of their staff increasingly challenging and increases the likelihood that ministers could distance themselves from the actions (or inactions) of their staff. It has resulted in suggestions that ministerial officers should be more directly subject to scrutiny.

As ministerial officers, parliamentary advisers and electorate officers are publicly funded, the Review considers that they should be subject to external scrutiny to ensure they act with integrity.5

55. On 23 March 2010, the Committee resolved to seek the advice of the Clerk of the Legislative Council in regard to the Attorney-General’s instructions to Ms Duke not to attend a hearing scheduled for 12 March.

56. On 26 March 2010, the Committee received a letter from the Clerk of the Legislative Council advising that in general, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions can be treated as contempt. Further, the Clerk advises that a direction to not attend a committee hearing in response to a summons would

5 Public Sector Standards Commissioner, ‘Review of Victoria’s integrity and anti-corruption system’, May 2010 p. 14
fall within the definition of contempt and accordingly may be dealt with by the House.

57. However, the Clerk further advises that in relation to any action taken by the Attorney-General, no further action is possible in the Legislative Council as the Attorney-General is a member of the Legislative Assembly and responsible only to that House and not to the Legislative Council. A copy of the Clerk’s letter is provided in Appendix 12.

4.2 Form of Committee Summonses

58. The Attorney-General’s letter to the Committee dated 12 March (see Appendix 7) questioned the period of time given to the witness to prepare for the hearing and the method of delivery of the summons. The Committee notes the terms of the summons and delivery method were consistent with Parliamentary guidelines and practices. The witness was given nine days to prepare for the hearing following the initial invitation on 3 March 2010 and was provided with a copy of Parliament’s Guidelines for the Rights and Responsibilities of Witnesses. Further, parliamentary practices and conventions indicate the important element of a summons is not the means of delivery but the certainty of receipt. As stated earlier in this report, the Attorney-General’s office confirmed receipt of delivery of the summons which was further confirmed in the Attorney-General’s letter to the Committee dated 12 March 2010.

59. Further letters from the Attorney-General dated 1 April, 21 April, and 28 April 2010 questioned the practices and procedures for signing various summonses to witnesses in relation to the Windsor Hotel issue. At its meeting on 5 May 2010, the Committee agreed to write to the Clerk of the Legislative Council seeking his advice on these matters. A copy of the Clerk’s response is provided in Appendix 13.

60. In view of the advice of the Clerk, the Committee advises the House it has adhered to the appropriate Parliamentary customs and practices in serving various summonses to witnesses.

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6 Odger’s Australian Senate Practice, Twelfth Edition, Department of the Senate, Canberra, p. 425
5. Conclusions

5.1 Attorney-General's Interference

61. The Committee concludes that its investigations have been significantly hindered as a result of the Attorney-General’s interference.

5.2 Required Witnesses

62. The Committee concludes that in the event that a Minister denies knowledge of a state of affairs or has distanced him/herself from a public servant or advisor’s actions and that public servant or advisor has a direct involvement in the state of affairs in question, there may be grounds for the public servant or advisor to be answerable to the Committee.

63. In accordance with Legislative Council Standing Order 18.06 (2), the Committee reports to the Council that Ms Peta Duke, Mr George Svigos, Ms Fiona Macrae and Mr Justin Jarvis have failed to appear to give evidence, pursuant to orders of the Committee, in relation to their role in any media plans, consultation and other involvement in the Windsor Hotel redevelopment process.

64. The Committee advises the Council that Ms Peta Duke, Mr George Svigos, Ms Fiona Macrae and Mr Justin Jarvis are required witnesses in the Committee’s inquiry and investigations into the Windsor Hotel redevelopment planning process.

RECOMMENDATION

65. The Committee recommends that the Legislative Council resolves to order the witnesses (Ms Peta Duke, Mr George Svigos, Ms Fiona Macrae and Mr Justin Jarvis) to appear before the Standing Committee on Finance and Public Administration to answer questions in relation to its Inquiry into Victorian Government Decision Making, Consultation and Approval Processes.

Committee Room
10 August 2010
APPENDICES
APPENDIX 1

Mr Gordon Rich-Phillips, MLC
Chair
Standing Committee on Finance and Public Administration
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Rich-Phillips

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING,
CONSULTATION AND APPROVAL PROCESSES

I refer to the request issued by the Standing Committee on Finance and Public Administration, seeking a copy of "the memorandum/email headed ‘Minister for Planning Justin Madden Media Plan’ with respect to the Windsor Hotel redevelopment process”.

I enclose a copy of the requested document.

As you know this document is already in the public domain. The Government’s decision to provide this document to the Committee is not an indication of how it might respond to similar requests in the future.

Yours sincerely,

ROB HULLS MP
Attorney-General
APPENDIX 1 (continued)
## MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Media</th>
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<tbody>
<tr>
<td>UPDATED FEBRUARY 24</td>
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<tr>
<td>Tuesday, 23 February – Thursday, February 25, 2010</td>
<td>PARLIAMENT SITTING</td>
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<td></td>
<td>GAIC and UGB</td>
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<td></td>
<td>GAID debate scheduled to resume on Thursday.</td>
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<td></td>
<td>Amendment to expand UGB has expired and cannot debate it until GAID completed. It will return after GAID approved</td>
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<tr>
<td>Thursday, February 27, 2009</td>
<td>Renewable Energy Report to be released.</td>
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<td>Recommendations urging us to cut red tape in the planning process and have the state government take over the administration and enforcement of permit conditions. (From a planning perspective)</td>
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<tr>
<td></td>
<td>REPORT RELEASED AT 10AM</td>
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<tr>
<td>Thursday for Friday</td>
<td>Sea level package for Age DROP Minister to stop proposed development at Port Fairy due to rising sea levels. (From a planning perspective)</td>
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<td></td>
<td>RELEASE of draft advisory committee report on coastal climate change for public comment. $1 million to local councils to assist them in geographical studies and other research in relation to rising sea levels.</td>
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<tr>
<td>Friday, February 26, 2010</td>
<td>10.30am meet with local Leader Jorno in a get to know you session discussing local issues and background jorno on the upcoming launch of the Manlybymong River Design Guidelines</td>
<td>Local media</td>
</tr>
<tr>
<td>Friday, February 26, 2010</td>
<td>TBC EVENT with Essendon Representatives going to India this weekend to secure sponsorship deals but will give them opportunity to promote Vic interests. Story to be developed into yarn about spreading the message of Respect Minister to meet with players and speak to them about it and have players spread the message to their peers. I AM TALKING TO ESSENDON TO WORK UP SOMETHING NOT SURE WHAT FORM IT WILL TAKE YET FOR FRIDAY</td>
<td>Possible long term r'ship with Essendon and a proposed multi-cultural game in round 10 when they play the Bulldogs. Works as JM new electorate and footy – would be along the lines of the Dreamtime game and Essendon can come on board as Respect Ambassadors.</td>
</tr>
<tr>
<td>Friday, February 26, 2010</td>
<td>IF ESSENDON FALLS THROUGH Minister will go to an oldies home with a young person as part of the Respect Agenda ie: respecting and building relationships with communities.</td>
<td>Local media and senior media</td>
</tr>
<tr>
<td>Sunday, 28 February, 2010</td>
<td>10am LAUNCH: Kanarranook Boulevard 50th Kanarranook project was funded by DPCD and is being delivered by Frankston City Council as a CAD project - launch to be done during the Kanarranook Creek Association's annual festival.</td>
<td>All media – to promote Alister Harkness. Night before Liberals will announce pre-selection candidate for Frankston.</td>
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## MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Media</th>
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<tbody>
<tr>
<td>Monday, 1 March, 2010</td>
<td>PROJECT 15 SERIES STARTS Age online and in print series focusing on the first 15km of Melbourne. NEW THINGS - Possibility of incentives for developers to keep housing affordable; - Lot sizes will be smaller, and - Needs are getting smaller.</td>
<td>Ted will be at event. Minister will need strong attack lines on Opposition.</td>
</tr>
<tr>
<td>THIS WEEK</td>
<td>Approval of planning amendment to hand local planning laws back to Mildura Council. Council were subdividing prime farmland land with no plan or regard for the local or state planning schemes so Minister came over the top to pass an amendment to stop any subdivisions. Taskforce was appointed and this has now concluded with recommendations to the Minister. Minister will this week special gazette an amendment to give planning power back and clearly define new zones.</td>
<td>Will be local interest as well as interest in South Gippsland as they are subject to a similar planning provision. Will be some criticism of landholders who want to subdivide or have brought subdivisions. Hardship provisions have been included in the amendment and council is working with residents on an ongoing basis to resolve issues. Will be some who crack it however as they are not deemed to be in genuine hardship by council criteria.</td>
</tr>
<tr>
<td>Tuesday, 2 March, 2010</td>
<td>5.30pm – 6.15pm VPELA Seminar – Minister to open 2010 seminar. Treasury theatre</td>
<td>No decision on this as yet – awaiting advice. Dept gave program background brief on this and they were focused on Geelong rather than overall policy. Program also attended public meeting in Geelong that went feral about the development last Wednesday.</td>
</tr>
<tr>
<td>Tuesday, 2 March, 2010</td>
<td>7.30pm INSIGHT PROGRAM As part of a wider discussion, we'll be looking at the current project in Geelong - an area that's been identified as a growth area by the State Government in the Melbourne @ $ Million. We're primarily interested in the project because it is a development that has been cited by VicUrban as one that exemplifies what needs to be done to meet Victoria's growing population as set out in the government's Melbourne @ Five Million. The social housing issue will feature in the discussion, but we're primarily interested in the topic of changing neighbourhoods as low medium-density areas change to make way for more people. We've invited VicUrban on the program as they'd be best placed to talk to the issue from the development's point of view. However, I wanted to put the invite to the Minister in the event VicUrban declines as it's important that either they or the Minister come on the program to talk about the issue. Also joining us on the program will Brendan Gleeson from</td>
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</table>
MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>Wednesday, 3 March, 2010</td>
<td>1pm-2:15pm THE BOOKSELLER LUNCHEON – Minister to speak</td>
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<tr>
<td></td>
<td>Post-Deng Restaurant</td>
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<td></td>
<td>214-216 Little Bourke Street</td>
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<tr>
<td>Wednesday, 3 March, 2010</td>
<td>5.30pm – 6.30pm Minister to launch UDIA Enviro Development</td>
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<td>with Jennings Melbourne Museum</td>
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<tr>
<td>Thursday, 4 March, 2010</td>
<td>1pm MEDIA TRAINING</td>
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<tr>
<td>Friday, 5 March, 2010</td>
<td>ESSENDON – International Women’s Day Breakfast.</td>
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<tr>
<td>Tuesday, 9 March, 2010</td>
<td>PARLIAMENT SITTING</td>
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<td>Monday, 15 March, 2010</td>
<td>COMMUNITY CABINET: GEELONG</td>
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<tr>
<td>Tuesday, 16 March, 2010</td>
<td>9.30pm – 9pm: Building Commission and Plumbing Industry</td>
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<td></td>
<td>Commission Continuing Professional Development Awards.</td>
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</tbody>
</table>

PLANNED MEDIA EVENTS

PROACTIVE

GAA to do an update on works at Tigunina industrial development (local paper) works have begun however no one other than Kmart has brought it at this point give it a plug.

Dandenong Government Services Building: Later this month Sod turning to signify Grocon’s commencement of construction on Dandenong’s Government Services Building; one of the first new developments to be delivered on land acquired by VicUrban under the Revitalising Central Dandenong (RCD) initiative.

This project – to which the State Government has committed funding of up to $19 million – has been assessed by Ernst & Young as potentially generating $85 million and 400 jobs for the region during construction.

Building: New advertisement campaign to stop dodgy builders CAV to put out the campaign and Robinson has done story on it in the past will work with her around these. Will work with Bec to beat into something.

March 11 World Plumbing Day – will be marked by release of new advertisements, awards and Kenny to speak at first one.

Coburg social housing development in the same vein as Geelong VicUrban ready to announce and provide information to residents – waiting on VicUrban and Housing to brief Moreland councillors on 24th (as requested by Carlo Carli and then VicUrban info and approval can go on 24th March.

Minister’s Heritage Award – Feb
## MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
<thead>
<tr>
<th>Date</th>
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<tr>
<td></td>
<td>Mildura – restrictions currently in place by Minister on subdivisions. Strategy has been devised by Council and is with Minister for consideration. If appropriate Minister will remove conditions.</td>
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<td>New heritage provisions in planning</td>
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<td>Advertising Signs review</td>
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<td>Kingston Green Wedge announcement on detail</td>
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<td>Car parking review</td>
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<td></td>
<td>Future Farming Improving rural land use. Rural Planning Group - Report to Minister for Planning</td>
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<td></td>
<td>South Gippsland Rural Strategy (Response after implementation of C48) as with Mildura</td>
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<td></td>
<td>Windsor Ad C’tee – report due first week of Feb report is expected to recommend that development go ahead. Strategy at this stage is to release it for public comment as this affects the entire community and then use those responses as reason to halt it as we have listened to community views.</td>
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<td></td>
<td>This is one of three proposed developments in this end of town that people want to re-develop plan is to work with Melbourne City Council to establish new planning guidelines for this area.</td>
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<td><strong>WEEKEND MEDIA EVENTS</strong></td>
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<tr>
<td>Sunday, 28 February, 2010</td>
<td>Tūrām LAUNCH: Kananook Creek Boulevard $8m Kananook project was funded by DPCD and is being delivered by Frankston City Council as a CAD project - launch to be done during the Kananook Creek Association’s annual festival.</td>
<td>All media – to promote Alistair Harkness.</td>
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<td>Night before Liberals will announce pre-selection candidate for Frankston.</td>
<td>Ted will be at event. Minister will need strong attack lines on Opposition.</td>
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<td>Release of River Valley Vision Guidelines – covers a large area and forfits a 2012 election promise to protect the Yarra and Maribyrnong valleys from inappropriate development.</td>
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<td>In doing this the plan is to maximise the open space around river with parkland, doing up the Footscray Wharf, looking at developing a new park, improving trails and pedestrian crossings etc as well as streetscape.</td>
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<td><strong>STATISTICS AND DATA</strong></td>
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<td>• Density of suburban blocks – maps and graphics JM spoke to Dowling is to run this as part of larger planning story.</td>
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<td>• PULSE data – this is where building permit data comes from (Pulse lady back from leave next week so will discuss).</td>
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<td>• Permit activity for bushfire areas</td>
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<td>• Residential advisory committee report</td>
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<td>• Residential Zones – response to Ad C’tee recs</td>
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<td></td>
<td>• Advertising Signs review</td>
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<td></td>
<td><strong>RESPECT</strong></td>
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<td></td>
<td>• Sport code of conduct</td>
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</tbody>
</table>
STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION
Second Interim Report on Victorian Government Decision Making,
Consultation and Approval Processes – August 2010

APPENDIX 1 (continued)

MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
<thead>
<tr>
<th>Date</th>
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<tbody>
<tr>
<td></td>
<td>Respect Grants Program - $10,000 to small groups</td>
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<td></td>
<td>Respect Awareness Campaign aimed a behavioural Change</td>
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<td>Respect Round Tables</td>
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<td>Respect Ambassadors</td>
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<td>Respect Awards</td>
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<td>Partnerships with Organisations – Fox trucking have a program where</td>
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<td>they work with employees on building healthy relationships in</td>
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<td></td>
<td>particular in relation to domestic violence would be good to do</td>
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<td></td>
<td>something with them</td>
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<td></td>
<td>Website for feedback</td>
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<td>Online chat with herald sun or through our own site</td>
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<td></td>
<td>O Week at universities</td>
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<td></td>
<td>Collingwood Alternative School has also been in touch re Respect</td>
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<td>Agenda and the Program they are running in their school – sending</td>
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<td>info to the Minister</td>
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<td>Possibility of multi-cultural football game with Essendon and</td>
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<td>Bulldogs</td>
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<td>Essendon ambassadors for Respect Agenda</td>
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</tbody>
</table>

DAYS RESPECT EVENTS CAN BE TIED INTO

- Cultural Diversity Week VIVDA Victoria March 14
- National Youth Week 14-20 June
- National Volunteers Week 10-17 May
- Refugee Week 14/20 June

KITE FLYERS

- World Heritage Listing MCG – have now received info and am looking into it
- Providing incentives for developers to provide affordable housing – JM flagged this with Dowling
- Stopping car parking being built for inner city dwellings, free bikes and bike racks provided instead
- New centre of Melbourne – provided amended UGB approved.

ISSUES

- March 16 and 17 Bastian Point decision in Supreme Court
- Documents tabled on Feb 16 – will need cover as allegations against Minister’s actions.
- Bacchus Marsh Avenue of Honour – VicRoads want to put in a round-a-bout and it is currently under heritage consideration – there is a lot of emotion in the community about the proposal.
- Box Hill Tower – under consideration by the dept.
- Port Bellerine Tourist Resort
- x 3 development proposals in central Melbourne
  - 350 William Street – 50 level mixed use
  - 399 Little Lonsdale Street – 3 storey residential
  - 70 Southbank Boulevard – 62 level mixed use
- Bushfire Bunkers – first bunker will hopefully be accredited however there are issues with it as it is not accredited for the highest risk areas as a test for that has not been written yet. Producer has been convinced to hold off announcing his bunker accreditation until issues can be resolved – it is thought this bunker will meet the highest standard but a test has not been established to ensure this.
- Social housing – ongoing issue in Geelong and surrounds. Insight are looking at doing a program on it next month. Researcher asked to meet with department around planning for future affordability in Melbourne. Dept met with researcher and he was not interested in planning provisions more the welfare side. Since then has gone to Vic Urban and has been directed to speak to OHV and Wynne.
- Domestic Building Insurance – Luke Enright handling
- Royal Commission Planning written submission due March 15, 2010 – this will be releases soon after so will be media interest.

OPPOSITION ATTACK

5
MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
<thead>
<tr>
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<tr>
<td></td>
<td>Valley Lake – criticised VicUrban and Govt for charging up to $1 million for houses in this area... The libs proposed to turn this area into a toxic waste dump. Inga – Accused Morlino, Madden and Govt in general of having no respect as she was not invited to an event... GAIC</td>
<td></td>
</tr>
</tbody>
</table>

FOIs

WoVG Requests

N/A

Planning/Minister specific

The Age: Documents relating to Hotel Windsor between 1/10/08 and 1/8/09 (including correspondence between DPCD and Denton Coker Marshall/Halim Group) - search underway

Matthew Guy: All e-mails sent & received by Minister and his staff between 29/5/09 and 3/8/09 - response being prepared with assistance of AG’s office (Brimbank)

Statutory Entities

GAA: Matthew Guy: Reports, research and analysis undertaken by the GAA in relation to the UGZ and the GAIC - clarification requested 1/8/7, awaiting applicant response
## APPENDIX 1 (continued)

### MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

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<th>Date</th>
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</table>

**LEGISLATION**
- GAIC
- UGB
- Planning and Environment Act – out for consultation
- Building Amendment Bill – in Parliament March
### MINISTER FOR PLANNING JUSTIN MADDEN MEDIA PLAN

<table>
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<tr>
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**RESPECT MEDIA REQUESTS**

- **Herald Sun** – Matt Johnston requested first interview with Minister for Respect
- **Sunday Herald Sun** – Peter Rolfe requested drop in this space
- **Tripple J Hack Program** – Irene Scott requested interview and talkback ph: 03 916 1950
- **Sunrise** – producer Paul Richards ph: 02 67776885
- **SEN** – morning show Chris 0438 922 217
  - Afternoon Kerry (Sinclair has number)
- **SAW** – Ross and John (Nicole 5243 2065)
  - Mitchell
  - Hinch (Amy 0423 505 083)
- **SBS** – Greg Dyett 03 9949 2428
- **ABC**
  - National News morning program (Laura 02 83335091)
  - National News drive (Steve Chase 02 8333 5091)
  - ABC Perth – host Geoff Hutchinson (Annie 0417 912 904)

Doug Pollard
Exec Producer/Presenter, Freshly Doug
Thursdays 9-noon, Joy 94.9fm
www.joy.org.au
www.rainbowreporter.com
0408 122 831
9 March 2010

Mr Richard Willis
Secretary, Legislation & Select Committees
Department of the Legislative Council
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

INVITATION TO GIVE EVIDENCE BEFORE THE STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

I refer to your letter dated 3 March 2010 requesting the production of a document and inviting me to appear before the Standing Committee. I refer also to your letter dated 4 March 2010 to David Hodge of my Department inviting him to appear before the Standing Committee.

Document Production

You advise that the Committee seeks the provision of a copy of a memorandum/email headed ‘Minister for Planning Justin Madden Media Plan’ with respect to the Windsor Hotel redevelopment processes referred to in media reports last Thursday and Friday. There is no such document in the Department.

Witness Attendance

As the Victorian Public Service Code of Conduct notes, public servants appear before parliamentary committees on behalf of their respective Ministers. As such the convention is for Committees to request the responsible Minister to identify the most appropriate officials to provide the information sought by the Committee. That would be done in consultation with the relevant Secretary.

In this case, the Committee wrote directly both to myself and David Hodge requesting our appearance on 12 March 2010 but has since advised that Mr Hodge will not be required on that day. I confirm I shall attend to speak on behalf of the Department at 10.00 a.m., Friday 12 March 2010. Should the Committee reinvigorate its request of Mr Hodge it will be dealt with at that time.

Yours sincerely

Yehudi Blacher
SECRETARY
APPENDIX 3

Mr Richard Willis
Secretary
Standing Committee on Finance and Public Administration
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES

I refer to the invitations issued by the Standing Committee on Finance and Public Administration to Mr George Svigos and Ms Fiona Macrae (the Advisers) to attend and give evidence at a public hearing on 12 March 2010.

The opposition parties know full well that there is a long-standing convention that Ministerial advisers do not appear before Parliamentary committees and the Government has no intention of breaching that convention.

I have directed the Advisers not to attend this hearing because:

(a) in accordance with the Constitutional convention known as the McMullan Principle, Ministerial advisers are not liable to be called to give evidence before parliamentary committees;
(b) the Advisers are advisers to Ministers who are members of the Legislative Assembly and therefore cannot be compelled to attend by Legislative Council Committees; and
(c) evidence given by the Advisers would be subject to executive privilege (public interest immunity).

The Advisers will therefore not be attending the hearing on 12 March.

Yours sincerely

[Signature]

ROB HULLS MP
Attorney-General
APPENDIX 3 (continued)

Mr Richard Willis  
Secretary  
Standing Committee on Finance and Public Administration  
Parliament House  
EAST MELBOURNE VIC 3002

Dear Mr Willis

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES

I refer to the invitation issued by the Standing Committee on Finance and Public Administration to Ms Peta Duke to attend and give evidence at a public hearing on 12 March 2010.

The opposition parties know full well that there is a long-standing convention that Ministerial advisers do not appear before Parliamentary committees and the Government has no intention of breaching that convention.

I have directed Ms Duke not to attend this hearing because, in accordance with the Constitutional convention known as the McMullan Principle, Ministerial advisers are not liable to be called to give evidence before parliamentary committees. Moreover, evidence given by Ms Duke would be subject to executive privilege (public interest immunity). Ms Duke will therefore not be attending the hearing on 12 March.

Yours sincerely

ROB HULS MP
Attorney General
Minister for Planning

Richard Willis
Secretary
Council Committees
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

Re: PARLIAMENT INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES.

I refer to your correspondence of 3 March 2010 regarding the resolution of the Legislative Council Standing Committee on Finance and Public Administration.

Please be advised that I will be attending this Friday.

Yours Sincerely

JUSTIN MADDEN MLC
Minister for Planning

09.03.2010
9 March 2010

Hon Justin Madden MLC
Minister for Planning
PO Box 500
East Melbourne VIC 3002

Dear Minister,

Re: Parliamentary Inquiry into Victorian Government decision making, consultation and approval processes

I refer to the Committee’s recent invitation to you to give evidence in relation to the above Inquiry and in particular, to discuss the Windsor Hotel redevelopment process.

The Committee met today to further consider the scheduling of hearings and I can advise that the Committee wishes to reschedule your hearing to another date and time to be confirmed.

As you would be aware, the Committee is also aiming to take evidence from Department of Planning and Community Development officers, together with relevant media advisers within the Office of the Premier. The Committee wishes to receive this evidence first before proceeding with your hearing. As some of these appointments are yet to be finalised, it is preferable that your hearing time be postponed to another date.

I will liaise with your office in due course regarding a rescheduling of your hearing invitation.

Yours sincerely,

RICHARD WILLIS
SECRETARY
COUNCIL COMMITTEES
10 March 2010

Hon Justin Madden MLC
Minister for Planning
PO Box 500
East Melbourne VIC 3002

Dear Minister,

Re: Parliamentary Inquiry into Victorian Government decision making, consultation and approval processes

Thank you for your letter received yesterday afternoon advising you will be attending the public hearing on Friday 12 March 2010. A copy has been forwarded to the Committee Members.

As indicated in my letter to you yesterday, the Committee reiterates that you are not a required witness for the hearings this Friday. The Committee believes it is important to obtain evidence from other witnesses including the Secretary of the Department of Planning and Community Development and relevant media advisers before it reschedules your hearing appointment.

I will liaise with your office in due course regarding a rescheduling of your hearing invitation.

Yours sincerely,

[Signature]

RICHARD WILLIS
SECRETARY
COUNCIL COMMITTEES
12 March 2010

Mr Richard Willis
Secretary
Legislative Council Committees
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

I refer to your letter of 9 March 2010 and to the request for me to attend the Legislative Council Committee Room at Parliament House at 1:00pm today.

I advise that I have been directed by the Attorney-General not to attend the Committee to give evidence. Accordingly, I regret to inform you that I am not in a position to do so.

A copy of the Attorney-General’s letter to me is attached for your information.

Yours sincerely,

Peta Duke
APPENDIX 6 (continued)

12 MAR 2010

Ms Peta Duke
Media Adviser
Office of the Premier
1 Treasury Place
EAST MELBOURNE VIC 3002

Dear Ms Duke

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING CONSULTATION AND APPROVAL PROCESSES

I refer to the facsimile sent to you on 9 March 2010 by the Secretary, Legislative Council Committee, informing you that he was sending a formal summons to you to attend before the Standing Committee on Finance and Public Administration at 1.00 pm on 12 March 2010. I refer also to the direction that I provided to you in relation to the invitation previously given to you to appear before that Committee.

I again direct you, on behalf of the Executive Government, not to attend before the Committee on that date. I will inform the Committee of my direction by letter and provide you with a copy.

The reason for my direction is stated in the letter – the Committee, in seeking to summons you, has breached Constitutional convention. Further, particularly given the terms of reference of the Committee, any evidence sought from you is likely to be the subject of Executive privilege (public interest immunity).

Yours sincerely

ROB HULLS MP
Attorney-General
Dear Mr Willis

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES

I refer to your letter to Ms Peta Duke dated 9 March 2010 which was faxed to her at the Office of the Premier. Ms Duke has provided me with a copy of that facsimile. I refer also to my letters of 9 March 2010 in which I informed you of the directions that I had given to advisers not to attend before the Committee in response to invitations that had been given to them.

Your letter attaches a document titled “Summons to Witness” which you say is a copy of the formal summons which was being sent by registered post. I understand that no such summons has been received by Ms Duke, nor has it arrived in the Office of the Premier. That document seeks her attendance before the Committee at 1.00 pm today.

The Standing Committee, which is a creature of the Parliament, and which gains its powers and privileges from the conventions of Parliament, is also bound by those conventions. Further, the Committee should abide by the Parliament’s own Guidelines for the Rights and Responsibility of Witnesses (the Guidelines).

The Committee has breached the procedures in the Guidelines in a number of respects:
- Ms Duke has not been given adequate notice of the meeting (see paragraph 2). This is well illustrated by the fact that she has not yet even received the formal summons;
- Ms Duke has not been given a sufficient outline of the matters expected to be dealt with in her appearance (paragraph 2). Your letter refers to the Windsor Hotel redevelopment process but states that this is in addition to the terms of reference of the Committee itself. Merely referring to the terms of reference of a Committee – particularly where those terms include all Victorian Government decision making,

Attorney General

12 MAR 2010

Mr Richard Willis
Secretary
Standing Committee on Finance and Public Administration
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES

I refer to your letter to Ms Peta Duke dated 9 March 2010 which was faxed to her at the Office of the Premier. Ms Duke has provided me with a copy of that facsimile. I refer also to my letters of 9 March 2010 in which I informed you of the directions that I had given to advisers not to attend before the Committee in response to invitations that had been given to them.

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- Ms Duke has not been given a sufficient outline of the matters expected to be dealt with in her appearance (paragraph 2). Your letter refers to the Windsor Hotel redevelopment process but states that this is in addition to the terms of reference of the Committee itself. Merely referring to the terms of reference of a Committee – particularly where those terms include all Victorian Government decision making,
consultation and approval processes since 1 December 2006 – provides her with no assistance in identifying the questions for which she should prepare herself;

- Ms Duke has not been given the opportunity to make a submission in writing before her appearance (paragraph 6); and

- Ms Duke has not been given any opportunity before the meeting to raise any matters of concern relating to the evidence she is being asked to give (paragraph 7).

These matters, taken together, constitute a substantive denial of natural justice to Ms Duke; she has not been afforded procedural fairness.

As well as denying Ms Duke natural justice, the approach taken by the Committee has breached Constitutional convention. My letters of 9 March 2010 refer to the convention known as the McMullan Principle. The application of Constitutional convention in this case is bolstered by the fact that Ms Duke was employed as a media adviser in the Premier’s Office and allocated to the office of the Minister for Planning. This relationship between Ms Duke and the Premier is acknowledged in the addressing of your letter and was accepted by the Leader of the Opposition in the Council in debate on Wednesday 9 March 2010. As the Committee is aware, members of each House are immune from the process of the other. As my letter of 9 March 2010 states, that immunity extends to advisers to members of another House.

In these circumstances, I have reiterated my direction to Ms Duke not to attend before the Committee.

Appropriately, and as ministerial advisers are only accountable through their Ministers, I am advised that the Minister for Planning, the Hon. Justin Madden will be available to answer questions from the Committee today.

Yours sincerely

[Signature]

ROB HULLS MP
Attorney-General
Mr Richard Willis
Secretary
Standing Committee on Finance and Public Administration
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis,

I refer to Mr Tunnescliffe's letter to me of 24 March 2010 and to the request that I attend the Legislative Council Committee Room at 1:00pm on Tuesday 6 April 2010.

I advise that I have again been directed by the Attorney-General not to attend the Committee to give evidence. A copy of the Attorney-General's letter to me is attached for your information. Accordingly, I again advise that I am not in a position to respond to the Committee's request.

I understand that the Attorney-General has written to the Committee advising of his direction to me and indicating an alternative course of action in relation to my attendance at the Committee hearing.

Yours sincerely,

Peta Duke

(See attached file: Letter to Peta Duke 1.10.10.pdf)
APPENDIX 8 (continued)

Attorney-General

1 Treasury Place
Melbourne, Victoria 3002
GPO Box 4326
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DC 210703

1 APR 2010

Ms Peta Duke
Office of the Premier
1 Treasury Place
EAST MELBOURNE VIC 3002

Dear Ms Duke

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING,
CONSULTATION AND APPROVAL PROCESSES

I refer to the letter dated 24 March 2010 from the Clerk of the Legislative Council to you headed “further summons to witness” which seeks your attendance at the Standing Committee on Finance and Public Administration on 6 April 2010. I refer also to the direction that I provided to you in my letter dated 12 March 2010 in relation in to the previous “summons” to appear on before the Committee on that day.

I again direct you, on behalf of the Executive Government, not to attend before the Committee on that date. I will inform the Committee of my direction in a letter and provide you with a copy.

The reason for my direction is that stated in both the attached letter and my previous letter. The Committee, in seeking to summons you, has breached Constitutional convention and thus exceeded the limits of its powers. The “summon” is also, on its face, procedurally defective. Finally, as I noted before, given the terms of reference of the Committee, no evidence sought from you is likely to be the subject of Executive privilege (public interest immunity).

I note that are also entitled to seek independent legal advice and I urge you to do so.

Yours sincerely

ROB HUELS MP
Attorney-General
Dear Mr Willis,

I refer to your letter of 14th April 2010 and the request for me to attend the Legislative Council Committee Room at Parliament House tomorrow.

I regret to inform you that I have been directed by the Attorney General not to attend and I will be complying with that direction.

Yours Sincerely,

George Svigas
George Svigas
Head of Communications
Office of the Premier of Victoria
Ph: 03 9651 8799
Mob: 0400 140 406
George.Svigas@minstaff.vic.gov.au
Dear Mr Willis,

I refer to your letter of 14th April 2010 and the request for me to attend the Legislative Council Committee Room at Parliament House tomorrow.

I regret to inform you that I have been directed by the Attorney General not to attend and I will be complying with that direction.

Yours Sincerely

Fiona Macrae | Media Adviser

Office of the Premier of Victoria

1 Treasury Place, East Melbourne, VIC, 3002

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e fiona.macrae@minstaff.vic.gov.au w www.premier.vic.gov.au

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Parliamentary Committee
Justin Jarvis
to:
richard.willis
28/04/2010 05:48 PM
Show Details

**History:** This message has been replied to.

Dear Mr Willis,

I refer to your letter of 14th April 2010 and the request for me to attend the Legislative Council Committee Room at Parliament House tomorrow.

I regret to inform you that I have been directed by the Attorney General not to attend and I will be complying with that direction.

Yours Sincerely

Justin Jarvis
Chief of Staff
Office of the Minister for Planning
Ph: 9037 8114
Fax: 9037 8921
APPENDIX 10

Attorney-General

28 APR 2010

Mr Richard Willis
Secretary
Standing Committee on Finance and Public Administration
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES

I refer to your dated 27 April 2010 referring to my letters of 21 and 23 April 2010.

In my letter of 21 April 2010 I noted that Legislative Council Standing Order 18.06(1) provides that an order summoning a witness must be signed by the Clerk of the Committee and that you do not hold (or purport in your signature block to hold) that role. I asked that you (or the Committee) establish to me by what authority you are entitled to exercise the power of the Parliament to interfere with the rights of an individual.

You state in your letter any letters/summons signed by you as Secretary to the Committee are done so under the direction of the Committee and the Clerk of the Legislative Council. Your response reinforces my concerns: neither the Committee nor the Clerk of the Legislative Council have the power to amend the Standing Orders, nor for that matter to direct people to act otherwise than in accordance with those orders.

Given your reply, and in the absence of any substantive response to my letters (which you say I will not receive until after 5 May 2010), I do not consider that valid summonses have been issued to any of Ms Fiona Macrae, Mr George Svigos or Mr Justin Jarvis. This opinion is independent of any question of the lack of constitutional power of a Council Committee to summon an adviser.
APPENDIX 10 (continued)

In the circumstances, I will inform the advisers of my opinion, and direct them that, given there has been no substantiation of the process, they should not appear before the Committee.

Yours sincerely

[Signature]

ROB HULES MP
Attorney General
23 APR 2010

Mr Richard Willis
Secretary
Standing Committee on Finance and Public Administration
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

INQUIRY INTO VICTORIAN GOVERNMENT DECISION MAKING, CONSULTATION AND APPROVAL PROCESSES

I refer to my letter to you dated 1 April 2010 in relation to what was said to be a second and final summons to Ms Peta Duke. I note that I have not received a reply. I refer also to my letter of 21 April 2010 in which I both questioned the efficacy of the purported summons to Ms Fiona Macrae, Mr George Svigos and Mr Justin Jarvis and noted that, nevertheless, given the form of those “summonses”, it appears that the Committee accepts what I have said about the deficiencies of the documents directed at Ms Duke.

The Standing Committee seeks to inquire into the Windsor Hotel redevelopment planning process. The Minister for Planning, Mr Justin Madden MLC, is the responsible Minister in relation to that process. While the Minister was invited to appear before the Committee in your letter dated 3 March 2010, that invitation was later withdrawn on the basis that the committee wanted to hear evidence from other witnesses first; it refused to hear from the Minister when he attended the Committee on 12 March 2010. The Committee has, however, now heard from other witnesses.

In the circumstances, I again make the offer that the Committee identify the matters it wishes to inquire into with Ms Duke in writing. As I previously stated, given that Ms Duke, whilst employed as a media adviser to the Premier, was allocated to the Minister’s Office, the Minister is amenable to raising each of the matters identified with Ms Duke, obtaining her response, and appearing before the Committee himself to provide evidence. The Minister is also prepared to take the same approach with any matters you would like to raise with his Chief of Staff, Mr Jarvis.
APPENDIX 11 (continued)

The first two dot points from your letters to Ms Macne and Mr Svigos have been put to them and they both have said that they had no role in the preparation of any media plans in relation to the Windsor Hotel redevelopment planning process. Further, they have no knowledge of the basis for the comments drafted in the document titled 'Minister for Planning Justin Madden Media Plan', other than receiving a copy via email. The last dot point is too vague to put to them, particularly as it refers to “matters raised in recent Parliamentary debates” and refers to a website containing all Parliamentary debates since 1992. There therefore seems no utility in the Standing Committee persisting in attempts to obtain information from them.

The Government’s compromise would allow any relevant questions of substance to be answered. It would avoid challenges being made to the manner in which the Committee has purported to exercise its powers and avoid the potential for the power of the Parliament to determine the limits of its own powers being abrogated to the courts. It would also avoid as has been attributed to Mr Barber – Ms Duke being “dragged” before the Committee. It would be a more responsible exercise of the powers of the Parliament.

I shall await your urgent advices in relation to the matters raised in this letter and my previous correspondence.

Yours sincerely

ROB HULLS MP
Attorney General
26 March 2010

Mr Richard Willis
Secretary, Legislative Council Committees
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Mr Willis

Re: Standing Committee Inquiry into Victorian Government decision-making, consultation and approval processes

I refer to your letter of 25 March 2010 which seeks my advice as to whether the direction of the Attorney-General to Ms Peta Duke not to comply with the Committee’s summons to attend its hearing on 12 March 2010 would constitute a contempt of Parliament.

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions can be treated as a contempt. The activities of the committees are considered to be an extension of the work of the Houses and they are given particularly wide powers which are considered necessary to enable them to adequately fulfil their function. Standing Order 24.10, which applies to your committee, gives the committee the power to call persons, documents and other things. This is a very wide power giving the committee the capacity to call for any person, other than a Member or Officer of the Assembly who can only attend by leave of the Assembly, to appear to give evidence. There are no other exceptions and witnesses are expected to attend when required, particularly when summoned to do so.

The failure to respond to a summons to attend a committee hearing when required is a very serious matter. Standing Order 18.07 states that a witness who does not attend when required may be censured or declared guilty of contempt of the Council. Interference with witnesses is also a serious matter. May’s Parliamentary Practice 23rd Edition at page 150 specifically says that “any conduct calculated to deter prospective witnesses from giving evidence before either House or a Committee is a contempt” and this principle is embodied in Standing Order 18.11.
A direction to not attend a committee hearing in response to a summons would in my view fall within the definition of contempt and accordingly may be dealt with by the House. However, I have to point out to the Committee that in relation to any action taken by the Attorney-General, no further action is possible in the Legislative Council as the Attorney-General is a member of the Legislative Assembly and responsible only to that House and not to the Legislative Council.

Yours sincerely

Wayne Tunnocliffe
Clerk of the Legislative Council
25 May 2010

Mr Richard Willis
Secretary, Standing Committee on Finance and Public Administration
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Richard,

Re: Standing Committee Inquiry into Victorian Government decision making, consultation and approval processes

I refer to your letter of 5 May 2010 seeking my advice about some matters raised by the Attorney-General in his letters to the Committee primarily concerning summonses issued to witnesses in relation to this Inquiry.

In his letters the Attorney-General refers to Legislative Council Standing Order 18.06(1) which states that “A Select Committee may summon witnesses by its own order, signed by the Clerk of the Committee” and draws attention to summonses having been signed in one instance by myself and in others by the Secretary, Legislative Council Committees, therefore in his view not complying with the Standing Order.

At the outset, I have to advise the Committee that it has not been the practice in recent years to appoint a person as Clerk of a Committee as was the case in the past, particularly since the establishment of the Council Committee Office in the current Parliament, and the Standing Orders have not been amended to reflect this change in title. However, despite the resultant ambiguity, I am satisfied that proper processes regarding the issuing of the summonses have been followed and that there are no irregularities, either in parliamentary practice and procedure or as a matter of law. The issue arises simply from a change in the title of the office from “Clerk of the Committee” to “Secretary, Legislative Council Committees”.

What is important in advising on this matter is to consider my authority to appoint staff as I see fit to service any Council committees and the nature and duties of the position of Secretary (or Clerk) of the Committee.

A committee, being created by the House, is regarded as being a part of the House and the powers, privileges and immunities of the Houses are extended to its committees by virtue of the Constitution Act 1975. By custom and practice the Clerk is therefore regarded as the Clerk of the House and its committees and is ultimately responsible for ensuring that the committees can operate effectively.

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APPENDIX 13 (continued)

My authority to employ Parliamentary Officers is found in section 18 of the Parliamentary Administration Act 2005. Under that Act, the Clerk “may employ as many persons as Parliamentary Officers as are required for the exercise of the functions of the Department” and “assign work to Parliamentary Officers”.

Further, under section 32 of the Act, the Clerk may delegate to any other Parliamentary Officer any of his functions under the Act, so as to provide support to the work of Legislative Council committees and various joint investigatory committees under the administration of the Department.

The position of Secretary, Legislative Council Committees was specifically created in October 2006 to support the activities of the Legislation Committee and to manage and direct “inquiries undertaken by Select Committees established by the Council from time to time.”. The position description statement also states that “the Secretary must work within the requirements of the Standing Orders of the Legislative Council and other Parliamentary policies and procedures in relation to the work of Select Committees”. The Secretary, Legislative Council Committees is, for all intents and purposes, the “Clerk” to the Standing Committee on Finance and Public Administration. Some of the following pertinent duties of the position in relation to the work of this Committee clearly indicate that the Secretary performs the role of the Clerk of the Committee:

- Manage, co-ordinate and supervise the Committee’s research and investigatory work, including the design and direction of the Committee’s inquiry;
- Negotiate and liaise at senior levels in both public and private sectors in relation to the Committee’s work;
- Advise witnesses on the practices and procedures for giving evidence at Committee hearings; and
- Other duties as directed by the Clerk.

Moreover, the position statement indicates that the Secretary is:

- responsible to the Assistant Clerk – Committees (who in turn is responsible to the Clerk);
- required to attend Select Committee meetings as required; and
- appointed by Authority of the Clerk of the Legislative Council under the provisions of the Parliamentary Administration Act 2005.

Consistent with his position description, the Secretary, Legislative Council Committees is my delegate when acting as the Clerk to the Standing Committee on Finance and Public Administration, and the various other Select Committees and he exercises the appropriate responsibilities, power, authority, duties and functions necessary for the efficient and speedy despatch of committee business. This delegation applied from 21 November 2007 when the Standing Committee on Finance and Public Administration was established by a Resolution of the Legislative Council.

In adopting Sessional Order 22 (24) establishing the Committee, the Council resolved to apply the provisions of the Standing Orders relating to Select Committees to this Committee as if it were a Select Committee. Standing Order 24.10 of the Council states that a Select Committee has power to send for persons, documents and other things. The Council, in establishing this Committee, has thus expressly delegated this power to the Committee and there is no doubt in my mind about the
appropriateness of the Clerk (or his delegate) to issue summonses to witnesses on behalf of the Committee. The Standing Orders provide no distinct powers to the Clerk of the Committee. When it is thought desirable or necessary for distinct powers or functions to be provided to a position, the accepted practice in public administration is to provide such powers by legislation, as is the case with the position of Clerk under the Parliamentary Administration Act 2006.

I should add that it has been the practice in the Council for either the Clerk of the House, the Secretary/Executive Officers, or Clerk to the Committee to sign summonses calling for persons or documents. This was the case with a number of Select Committees established by the Council in recent years, including the Select Committee on the Frankston Central Activity District Development, the Select Committee on Seal Rocks Project, the Select Committee on the Urban and Regional Land Corporation Managing Director and more recently the Select Committee on Gaming Licensing. I note that the signing of the summonses issued by these Committees has previously not been questioned. However, there is no question that when a person has been summoned to be examined at the Bar of the House, by orders of the Council, that summons will always be signed by the Clerk of the House and no one else.

I believe that I have therefore clearly established the authority of the Secretary, Legislative Council Committees, to sign summonses on behalf of the Committee. I turn now to the issue of my signing the second summons to Ms. Peta Duke. I have previously advised the Committee that the failure to respond to a summons is a very serious matter. The persons who have been summoned were well aware of their obligation to appear before the Committee and there is no basis either in Parliamentary practice and procedure or as a matter of law for them not to appear. Given this situation, when the absence of a Clerk of the Committee as such was brought to my attention, because of the seriousness and possible consequences of a witness refusing to again appear before this Committee after being summoned, I considered it necessary that someone having significant authority sign that second summons. There is no doubt in my view that as Clerk of the Legislative Council, being the most senior officer of the Department, and given that I had delegated the responsibility to the Secretary, Legislative Council Committees in the first place, it was entirely appropriate that I sign the second summons on behalf of the Committee.

Nothing in the Standing Orders prevents me from signing summonses of this nature.

I am therefore satisfied that the Standing Committee has adhered to appropriate Parliamentary practice in the form and content of the various summonses issued to witnesses. There are no questions of irregularity of the Committee’s processes regarding any decisions to issue the summonses or their execution. I also note that Odinga Australian Senate Practice states that the important element of a summons is the certainty of receipt by a witness. You have advised me that in all instances to date, each and every summons issued by the Committee has been confirmed as having been received by the witnesses concerned.

Further, it is also worth noting that Erskine May’s Parliamentary Practice states that warrants (which are more of a serious nature than summonses) issued by order of the House of Commons are not vitiated by or reversible on the grounds of irregularities of form. It is usually sufficient that any means may be used by which a witness is actually notified that their attendance is required by a Committee, signed by a person who has some authority to do so. The courts have taken the view that it will not interfere with an internal procedure adopted by a Parliament, unless legislation has expressly provided for such intervention.
I also note the Attorney-General has suggested that the proper person who should sign summonses on behalf of the Committee is the Assistant Clerk – Committees. This is incorrect, as the position of Assistant Clerk-Committees has an overseen supervisory role of the operations of currently the six Joint Investigatory Committees for which the Department is administratively responsible, together with the Council Committee Office. The Assistant Clerk-Committees is not involved in the day to day administration of any of these committees.

Finally, I remind the Committee that, because the proceedings of the Committee are proceedings in Parliament the House alone is the judge of the validity of summonses.

I trust the above clarifies the matters raised by the Attorney-General.

Finally, I stress to the Committee that I take my responsibilities as Clerk to ensure the efficient and orderly conduct of the business of the Legislative Council and its committees very seriously indeed. Adherence to proper processes is crucial to uphold the reputation of the Council and particularly in this instance where the rights of individuals are affected. I reiterate to the Committee that this issue arises simply through a change in title from “Clerk of the Committee” to “Secretary, Legislative Council Committees” and I am therefore confident that there is no valid argument for abuse of process. However, because I acknowledge the degree of ambiguity in the Standing Orders, I will be respectfully suggesting to the Standing Orders Committee that, in any review of the Standing Orders, the necessary amendment be made to put the issue beyond doubt.

Yours sincerely

Wayna Tunedcliffe
Clerk of the Legislative Council
EXTRACTS OF PROCEEDINGS

The Committee divided on the following questions during consideration of this Interim Report, with the result of the divisions detailed below. Questions agreed to without division are not recorded in these extracts. The Chairman of the Standing Committee can only vote when there is an equality of votes. Paragraph and finding numbers refer to the Committee’s draft report and consequently may differ from the final adopted report as printed.

Meeting No. 46 — 23 July 2010

Mr Viney moved — That the proposed draft report presented to the Committee by the Chair be not accepted and that the Committee secretary be instructed to prepare a factual report to the House on the same model as the ‘Inquiry into Victorian Government Decision Making, Consultation and Approval Processes – First Interim Report’ presented on 13 April 2010.

Question — That the motion be agreed to — put

Ayes 2
Mr Tee
Mr Viney

Noes 3
Mr Barber
Mr Guy
Mr Kavanagh

Question negatived.

Paragraph 20 — Amendment moved by Mr Tee, That the Committee delete the first sentence in paragraph 20 and insert in its place the following: ‘At 1.00 p.m. on 12 March, the Minister for Planning occupied the witness chair and offered to give evidence.’

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 2
Mr Tee
Mr Viney

Noes 3
Mr Barber
Mr Guy
Mr Kavanagh

Amendment negatived.

Paragraph 21 — Amendment moved by Mr Barber, That the Committee delete the second sentence in paragraph 21 and insert in its place the following: ‘The Committee believes the Minister disrupted the Committee proceedings by occupying a witness chair without invitation.’

Question — That the amendment be agreed to — put.
The Committee divided.

**Ayes 3**
- Mr Barber
- Mr Guy
- Mr Kavanagh

**Noes 2**
- Mr Tee
- Mr Viney

Amendment agreed to.

**Paragraph 33** – Amendment moved by Mr Tee, That the Committee delete paragraph 33 and insert in its place the following: ‘In view of the above intervention of the Attorney-General and the Committee’s failure to respond to concerns raised by the Attorney-General, the Committee was unable to proceed with its scheduled public hearings on 29 April 2010.’

Question — That the amendment be agreed to — put.

The Committee divided.

**Ayes 2**
- Mr Tee
- Mr Viney

**Noes 3**
- Mr Barber
- Mr Guy
- Mr Kavanagh

Amendment negatived.

**New Paragraph 39** – Amendment moved by Mr Tee, That the Committee agree to insert the following new paragraph 39: ‘By letter dated 28 April 2010 (Appendix 9) the Attorney-General stated that until a substantive response to his concerns was made by the Committee the summonses would be considered by the Attorney-General as being invalid. To date, the Committee has not provided to the Attorney-General any substantive response.’

Question — That the amendment be agreed to — put.

The Committee divided.

**Ayes 3**
- Mr Kavanagh
- Mr Tee
- Mr Viney

**Noes 2**
- Mr Barber
- Mr Guy

Amendment agreed to.

**New Paragraph 39** – Amendment moved by Mr Kavanagh, That the following words be inserted after the word ‘response’ at the end of new paragraph 39: ‘on the basis that the Committee reports to the Legislative Council not the Attorney-General.’

Question — That the amendment be agreed to — put.

The Committee divided.
Ayes 3
Mr Barber
Mr Guy
Mr Kavanagh

Noes 2
Mr Tee
Mr Viney

Amendment agreed to.

New Paragraph 40 – Amendment moved by Mr Guy, That the Committee agree to insert the following new paragraph 40: ‘The Committee strongly rejects these four claims.’

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 3
Mr Barber
Mr Guy
Mr Kavanagh

Noes 2
Mr Tee
Mr Viney

Amendment agreed to.

Meeting No. 47 — 2 August 2010

New Paragraph – Amendment moved by Mr Barber, That the Committee agree to insert a new paragraph after paragraph 36 as follows:

‘It has been noted by Professor Enid Campbell that:

‘If the making of a claim of Crown privilege does not absolve the witness from the duty to appear on summons, neither a Minister nor the Cabinet can have any right to instruct a witness not to attend, and the giving of such an instruction might properly be adjudged by the House concerned as a breach of Parliamentary privilege’.

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 3
Mr Barber
Mr Guy
Mr Kavanagh

Noes 2
Mr Tee
Mr Viney

Question agreed to.

Paragraph 47 – Amendment moved by Mr Tee, That the Committee delete paragraph 47 and insert in its place the following: ‘By letter dated 23 April
(see Appendix 10), the Attorney-General proposed a mechanism to enable all relevant material to be provided to the Committee. The Attorney suggested a compromise whereby the Committee identified the matters it wished to inquire into with Ms Duke and Mr Jarvis, Minister Madden would raise these matters with them and then give their response in evidence to the Committee. The Committee has to date not specifically responded to this offer by the Attorney.’

Discussion ensued.

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 2  Noes 3
Mr Tee  Mr Barber
Mr Viney  Mr Guy
Mr Kavanagh

Question negatived

**Paragraph 58**

Mr Viney foreshadowed the deletion of paragraph 58.

Amendment moved by Mr Kavanagh, That paragraph 58 be amended by deleting the words ‘further believes that’ on the first line of paragraph 58, and inserting in its place the following: ‘concludes that’.

Discussion ensued.

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 3  Noes 2
Mr Barber  Mr Tee
Mr Guy  Mr Viney
Mr Kavanagh

Question agreed to.

Mr Viney moved — That the Committee delete paragraph 58.

Discussion ensued.

Question — That the motion be agreed to — put.

The Committee divided.

Ayes 2  Noes 3
Mr Tee  Mr Barber
Mr Viney          Mr Guy
Mr Kavanagh

Question negatived.

Amendment moved by Mr Tee — That the amended paragraph 58 be further amended by deleting the words ‘the Attorney-General’s interference’ and inserting in its place: ‘the Committee’s failure to respond to the concerns raised by the Attorney-General.’

Discussion ensued.

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 2          Noes 3
Mr Tee          Mr Barber
Mr Viney        Mr Guy
               Mr Kavanagh

Question negatived.

New Paragraph — Amendment moved by Mr Viney, That the Committee agree to insert a new paragraph after paragraph 58 as follows: ‘The Committee acknowledges that there has been an impasse in the position of the Committee and the Attorney-General which has resulted in the Committee not responding to the Attorney-General’s concerns identified in several letters.

Discussion ensued.

Question — That the amendment be agreed to — put.

The Committee divided.

Ayes 2          Noes 3
Mr Tee          Mr Barber
Mr Viney        Mr Guy
               Mr Kavanagh

Question negatived.

New Paragraph — Amendment moved by Mr Barber, That the Committee agree to insert a new paragraph immediately after sub-heading 5.2 as follows: ‘The Committee concludes that in the event that a Minister denies knowledge of a state of affairs or has distanced him/herself from a public servant or advisor’s actions and that public servant or advisor has a direct involvement in the state of affairs in question, there may be grounds for the public servant or advisor to be answerable to the Committee.’

Discussion ensued.

Question — That the amendment be agreed to — put.
The Committee divided.

**Ayes 3**  
Mr Barber  
Mr Guy  
Mr Kavanagh

**Noes 2**  
Mr Tee  
Mr Viney

Question agreed to.

**Paragraph 60** — Mr Viney moved — That the Committee delete paragraph 60.

Discussion ensued.

Question — That the motion be agreed to — put.

The Committee divided.

**Ayes 2**  
Mr Tee  
Mr Viney

**Noes 3**  
Mr Barber  
Mr Guy  
Mr Kavanagh

Question negatived.

**Recommendation Options**

Mr Viney suggested the Committee’s interim report not contain any recommendations

First draft recommendation — ‘The Committee recommends the Legislative Council resolves to seek leave of the Legislative Assembly for the Attorney-General to appear before the bar of the Council and explain his directions to witnesses to breach Committee summonses.’

Discussion ensued.

Question — That the recommendation be agreed to — put.

The Committee divided.

**Ayes 2**  
Mr Guy  
Mr Kavanagh

**Noes 3**  
Mr Barber  
Mr Tee  
Mr Viney

Question negatived.

Second draft recommendation — ‘That the Committee recommends the Legislative Council resolves to summons the witnesses before the bar of the Council to explain their failure to attend the hearings as ordered.’

Discussion ensued.
Question — That the recommendation be agreed to — put.

The Committee divided.

Ayes 2
Mr Barber
Mr Kavanagh

Noes 3
Mr Guy
Mr Tee
Mr Viney

Question negatived.

Third draft recommendation - ‘That the Committee recommends the Legislative Council resolves to summons the witnesses before the bar of the Council to answer questions in relation to the Inquiry.’

Discussion ensued.

Question — That the recommendation be agreed to — put.

The Committee divided.

Ayes 2
Mr Barber
Mr Kavanagh

Noes 3
Mr Guy
Mr Tee
Mr Viney

Question negatived.

Fourth draft recommendation – ‘That the Committee recommends the Legislative Council resolves to order the witnesses to attend the Committee to answer questions in relation to the Inquiry.’

Discussion ensued.

Mr Barber moved — That the following recommendation be included in the interim report: ‘The Committee recommends that the Legislative Council resolves to order the witnesses (Ms Peta Duke, Mr George Svigos, Ms Fiona Macrae and Mr Justin Jarvis) to appear before the Standing Committee on Finance and Public Administration to answer questions in relation to its Inquiry into Victorian Government Decision Making, Consultation and Approval Processes.’

Discussion ensued.

Question — That the motion be agreed to — put.

The Committee divided.

Ayes 3
Mr Barber
Mr Guy
Mr Kavanagh

Noes 2
Mr Tee
Mr Viney
Question agreed to.

Mr Kavanagh moved — That the following recommendation be inculded in the interim report: ‘That the Committee recommends the Legislative Council determines whether any persons should be summoned before the bar of the Council to give evidence on any matter relevant to the Inquiry.’

Discussion ensued.

Question — That the motion be agreed to — put.

The Committee divided.

**Ayes 2**
- Mr Barber
- Mr Kavanagh

**Noes 3**
- Mr Guy
- Mr Tee
- Mr Viney

Question negatived.

**Meeting No. 48 — 10 August 2010**

Mr Kavanagh moved — That the draft report (paragraphs 1 to 65), as amended, be adopted as the Second Interim Report of the Committee on its Inquiry into Victorian Government Decision Making, Consultation and Approval Processes.

Question — That the motion be agreed to — put.

The Committee divided.

**Ayes 4**
- Mr Barber
- Mr Guy
- Mr Hall
- Mr Kavanagh

**Noes 2**
- Mr Tee
- Mr Viney

Question agreed to.
Minority Report – Brian Tee and Matt Viney

Inquiry into Victorian Government Decision Making, Consultation and Approval Processes – How the Opposition Failed to Run a Committee

The inquiry into the Windsor planning process was set up by the Opposition to undermine the Government’s decisions on the Windsor Hotel redevelopment. Notwithstanding significant resources in terms of four Parliamentary Staff and a Committee membership stacked by the Opposition with 5 non-government MP’s to 2 Government MP’s, the Committee has failed to find anything new in five months and endless Public Hearings.

The Committee has wasted hundreds of hours of MP and staff time, and many thousands of taxpayers dollars on endless argument with the Attorney-General while refusing to hear from the responsible Minister who has been willing to appear and answer all questions about the planning process in general and in particular the planning process for the Hotel Windsor. This offer by the Minister to give evidence to the Committee has been available to the Committee for the past five months. The Committee has refused to hear from the Minister and has even refused to discuss and consider his offer to attend.

In yet another desperate bid for a headline, the Opposition dominated Committee gave up and, without any reference to the Parliament, handed over responsibility for the inquiry to the Ombudsman.

Finally, in a very serious breach of procedure of the Parliament, the leak of the draft report to a journalist resulted in an article in The Age on 22 July 2010 ahead of any consideration of that draft by the Committee.

Some of the language and assertions made in the draft report were inappropriate, inflammatory and inaccurate. The majority of the Committee realised the errors and some of these claims and assertions were corrected in the final interim report. The leaked report may not be covered by Parliamentary privilege and individuals against whom adverse comments were made could consider legal action.

It is the view of the Government members that this leak occurred in an attempt to ‘lock in’ all Non-Government members to the proposed recommendations as published in the Age.

Ultimately this did not occur and the final report is very different to the first draft leaked to the Age. The Government members wish to acknowledge that the Committee ultimately was not influenced by the ‘leak’ strategy.

We also note that in the end there are no extreme recommendations about staff and that members of the Committee rejected a suggestion that the Legislative Council invoke those standing orders which provide for the potential arrest and detention of certain persons.
It is the view of the Government Members that such a flippant disregard of the rights of individuals in a civil society demonstrates the depths that this sham inquiry has reached.

We strongly hold the view that the detention of an individual is best determined by an impartial Court of Law, and should certainly not be determined by a bunch of politicians on a political witch hunt.

We appreciate that the committee rejected such an outrageous course of action.

Structure of the Committee
The Committee was stacked with five members from the non-government parties and only two members from the Government. So while the public elected 49% of ALP members to the Legislative Council only 28% of members of the Committee are from the Government.

Failure to call responsible Minister
The biased nature of the Committee is further evidenced by the inexplicable failure to call Minister Madden to give evidence. Minister Madden as the responsible Planning Authority in this matter is central to the Windsor Hotel decision making process and yet the Committee refused to call him to give evidence.

It is the Minister who is accountable to Parliament and who is responsible for Department and the statutory planning processes. It is the Minister who made the decision at the heart of this inquiry. Yet the Committee refused to hear him. Indeed in our view this has denied the public the opportunity to hear from the person who made the decision.

Findings of the Committee
This is the second report of the Committee. Notwithstanding the substantial resources and the evidence of five witnesses the Committee is unable to make any adverse findings.

On the contrary, the witness evidence revealed:
1. There was nothing unusual in the decision making process (Secretary and Deputy Secretary of the Department and the two Independent Auditors.)
2. The Windsor Redevelopment design was excellent. (Victorian Government Architect).

Dispute with the Attorney-General
The Committee has engaged in a protracted dispute with the Attorney-General. Despite having ample opportunity, the Committee has not tried to resolve the dispute.

The dispute began when the Committee summoned advisors to give evidence. The Attorney-General identified four flaws with the Committee’s approach:

- The longstanding convention that Ministerial Advisors not appear before Parliamentary Committees. (The McMullan Principle – which has previously enjoyed bipartisan support – and was followed by the Liberal Prime Minister John Howard);
• The summonses were deficient because they were signed by the Committee Secretary and the Clerk of the Legislative Council rather than by the Clerk of Committees in breach of Legislative Council Standing Order 18;
• The advisors are ultimately responsible to Members of the Legislative Assembly and therefore cannot be compelled to attend a Legislative Council Committee; and
• The evidence of advisors is subject to executive privilege (Public Interest Immunity.)

The Attorney-General has on a number of occasions indicated, in writing, that until the Committee responded to these flaws the summonses would be treated as invalid. The Committee has never responded to the Attorney-General on these matters.

The failure to respond to these serious deficiencies demonstrates contempt by the Non-Government dominated Committee of the Standing Orders of the Legislative Council and long accepted Parliamentary Practices.

In addition, the Committee disregarded and refused to respond to an attempt by the Attorney-General to mediate the impasse. The Attorney, by way of compromise suggested that the Committee identify matters it wishes to inquire into with the advisors. These matters would then be put to the advisors and Minister Madden would give their response to the Committee in evidence. This compromise may have resolved all outstanding issues. Instead, the Committee refused to even acknowledge this approach by the Attorney-General and has never even considered his compromise in its deliberations.

The Central Issue of Public Accountability
In our view the central flaw in the Committee’s considerations lies in a fundamental misunderstanding of Ministerial Accountability. This is a political accountability that holds Ministers [and Governments] accountable through the Parliament, including its committees.

The Committee has used the findings of Elizabeth Proust in her recent review of the structures of Accountability in Victoria as a basis for its argument. However the argument they have put in their report demonstrates their misunderstanding.

The Parliament exercises a political accountability of Ministers and Government. These processes are separate to the legal accountability Ministers, their staff and all politicians face, just like any other citizen. That is if they act against the Law they can and should be held to account in the Law.

Political accountability is the process whereby the community, through the Parliament, can hold politicians to account for making good or bad decisions.

Similarly, if any employee, including ministerial staff, makes a mistake at work, such as sending an email to the wrong person, they can expect to be held accountable by their employer. It is not reasonable to think ministerial staff can be held accountable in a political sense. Their name was not on a ballot paper, the Minister [their boss] was.
The Proust report was focussed on questions of integrity in Public Office. Her recommendations were centred on issues of public integrity and corruption, not the making of mistakes at work or the quality of decision making by a Minister, their staff or department.

It is therefore our view that the committee should call the Minister and obtain evidence from him about any concerns they might have over the Windsor Hotel planning decision. As noted earlier, the Minister has indicated he would be happy to give evidence on this matter.

Conclusions
The Committee has failed to make any new findings and has failed to provide any justification for its continued waste of taxpayer funding.

Brian Tee Matt Viney
GREG BARBER MINORITY REPORT– WINDSOR HOTEL HEARINGS

This minority report proceeds on the verifiable basis that there is no convention that grants ministerial staff immunity from the Council’s legal powers to compulsorily summons witnesses.

The Legislative Council stands at an important juncture. It can either choose to end the myth of this constitutional convention, or it can yield to the claims of the executive and further contribute to the establishment of such a convention.

By allowing this important opportunity to pass, and condoning the crucial witnesses’ defiance of a summons of the Committee, not only is the doctrine of parliamentary supremacy weakened in the face of an assertive executive, but future governments will be empowered to intentionally exploit this gap in parliamentary accountability until the day that it is eventually corrected.

In addition to the recommendation of the majority report, this minority report further concludes that if the committee continues to face resistance from the Attorney-General on behalf of the executive government, the only way to definitively resolve this dispute between the privileges of the Legislative Council and the executive is through adjudication in the Supreme Court of Victoria.

Proceedings in the Supreme Court can be instigated in one of two ways:

1. The Legislative Council as the Applicant

Through a motion of the House, the Legislative Council nominates a MLC or the President to issue proceedings on its behalf in the Supreme Court against the Attorney-General.

The Legislative Council would seek a declaration under section 36 of the Supreme Court Act 1986[^1] to ascertain:

i) the existence and scope of the House’s privileges to command the attendance of Ministerial staff as witnesses before a Committee; and

ii) the existence and scope of the Executive’s alleged privilege to avoid compliance with the Council’s orders for the production of documents.

There are however, two weaknesses with this approach.

Firstly, challenges may be open as to whether the MLC or President has standing to represent the Council. Given that the Court will already be

[^1]: This section reads ‘A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without consequential relief.’
cautious about accepting jurisdiction, any likelihood of the case being struck out on procedural grounds should be avoided if possible.

Secondly, a declaration cannot be in the nature of an advisory opinion, it requires an unambiguous controversy to be resolved. It could be arguable that the facts to date do not give rise to a sufficient enough controversy for the Court to grant itself jurisdiction to oversee a parliamentary dispute. As Gaudron, Gummow and Hayne JJ in the majority of *Egan v Willis* stated:

Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law but they should not be entertained in the abstract and apart from a justiciable controversy. Declaratory relief should be directed to the determination of legal controversies concerning rights, liabilities and interests of a kind which are protected or enforced in the courts.

To create a justiciable controversy under the general law, the following option for the Council is preferred.

### 2. The Legislative Council as the Respondent

If, contrary to a resolution of the Council, the witnesses refuse to attend the Bar of the House, Standing Order 23.05 will be invoked by the Council and the President will direct the Usher of the Black Rod to take into custody those declared guilty of contempt.

The purpose of this action is not to actually imprison Ms Duke, Mr Svigos, Ms Macrae or Mr Jarvis but to place the Supreme Court in a position to adjudicate on the dispute. This would arise through the witnesses seeking damages in tort for assault and false imprisonment. The Premier has stated that the government would take this matter to court if required.

The ability for the witnesses to be awarded damages is dependent upon the Council’s claim to the defence of legal authority. In order to rely on this defence, it will be necessary to ascertain:

i) the existence and scope of the House’s privileges to command the attendance of ministerial staff as witnesses before a Committee; and

ii) the existence and scope of the Executive’s alleged privilege to avoid compliance with the Council’s orders.

The likelihood of success of judicial review is based upon the following reasons:

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The Issue of Justiciability

For the Supreme Court to entertain jurisdiction, an important distinction must be drawn between the *legality* of a ministerial adviser’s immunity and the purported *convention* of ministerial adviser’s immunity from the Council’s compulsory powers.

Courts do not define or enforce conventions,\(^6\) which is largely why conventions are so amorphous. Courts do however ‘make observations and draw conclusions as to their understandings of what conventions are.’\(^7\) While the government is relying on a convention for its immunity, the Council must seek judicial review on the legality of its privileges and correspondingly, the executive’s alleged immunity.

Unlike conventions, a court will grant leave to determine the privileges of the Parliament\(^8\) and whether those privileges override the alleged convention. The *Case of the Sheriff of Middlesex*\(^9\) and *Stockdale v Hansard*\(^10\) established the principle that Courts have jurisdiction to determine the existence and scope of a parliamentary privilege but not to review its exercise.

As constitutional scholar Gerard Carney has noted, ‘this approach is based on the fact that parliamentary privileges exist by virtue of the law as interpreted by the courts, but a House when exercising a legally recognised privilege is entitled to act within its discretion in such manner as it sees fit to protect its capacity to function.’\(^11\)

These two common law rulings contributed to the privileges and immunities of the House of Commons just prior to 1855; so they are particularly pertinent to the Legislative Council’s powers conferred under section 19(1) of the *Constitution Act 1975*.

The Council would be seeking to have its strict legal powers (as against the Attorney-General’s alleged convention) enforced by the courts. In May this year, Justice Kaye in a judgment of the Supreme Court of Victoria clearly articulated Victoria’s constitutional structure:

In a representative democracy such as ours, Parliament, in making laws, thereby expresses, and is answerable to, the will of the people. In such a system, the executive is charged with the responsibility of administering a number of those laws. In doing so, it is necessarily subservient, and answerable to Parliament and its duty constituted

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\(^6\) One notable exception is the Canadian case *Re Resolution to amend the Constitution* (1981) 1 SCR. In this case, constitutional conventions were examined by the Court because they were necessary to resolve the issue in dispute. While the Supreme Court ruled that the convention did exist, they denied they had power to enforce the convention. For present purposes, the court also ruled that a longstanding convention could never ‘crystallise’ into law.

\(^7\) Ian Killey *Constitutional Conventions in Australia: An introduction to the unwritten rules of Australia’s Constitutions* Australian Scholarly Publishing 2009 at 7.

\(^8\) *Ex Parte Fitzpatrick and Browne* (1955) 92 CLR 157 per Dixon CJ.

\(^9\) (1840) 11 AD &E 273; 113 ER 419.

\(^10\) (1839) 9 A & E 1; 3 ST TR NS 736; 112 ER 1112.

committees. The supremacy of the Parliament over the executive is critical to a free democracy, and was forged in the great constitutional battles in Great Britain commencing in Stuart times.\textsuperscript{12}

It is extremely likely that the Supreme Court would uphold the privileges of the Legislative Council to summons ministerial witnesses and punish them for contempt when such a summons is calculatedly disobeyed.

**Powers of the Council**

Section 19(2) of the *Constitution Act 1975* allows the Parliament to legislate for or with respect to the privileges, immunities and powers it inherited from the 1855 House of Commons. Such legislative provisions have to be clearly intended by the Parliament.

There is no qualification in any Victorian Act of executive immunity to Parliament’s investigatory powers; however the Council is able to self-impose extra-legal limitations on its powers such as *Rulings from the Chair* and the *Guidelines for the Rights and Responsibilities of Witnesses*. Such limitations are not legal restrictions, and accordingly are not justiciable by a Court.

These extra-legal limitations or acts of self-restraint will continue to apply to ministerial staffers appearing directly before a Committee. Ministers can continue to issue directions to staff that are due to appear before a Parliamentary Committee, however as constitutional conventions scholar, Ian Killey qualifies:

“It should be noted that a Ministerial instruction or direction…”

Such as that provided in this present case by the Attorney-General

“…cannot bind a Parliamentary committee, which hold compulsory powers which could be used to compel public servants to go beyond the wishes of their Ministers. However, those committees generally acknowledge and accept the role of public servants when receiving evidence from them.”\textsuperscript{13}

In other words, when the ministerial staffer is being given directions from two masters, the Parliament is supreme, but will be restrained by its own procedures and conventions. This practice does not equate – in convention or in law – to a relinquishing of the privileges vested in the Legislative Council through section 19 of the Constitution.

Other than ordering a Member from another House of an Australian Parliament (who are protected by parliamentary privilege), there are no restrictions on a Committee calling any witnesses to fulfil Parliament’s role as the ‘grand inquest of the nation’.\textsuperscript{14}

\textsuperscript{12} *WBM v Chief Commissioner of Police* (2010) VSC 219 at 45. Emphasis added.

\textsuperscript{13} Ian Killey *Constitutional Conventions in Australia: An introduction to the unwritten rules of Australia’s Constitutions* Australian Scholarly Publishing 2009 at 116.

\textsuperscript{14} Greg Taylor *The Constitution of Victoria* Federation Press 2006 at 200 quoting the judgment in *Stockdale v Hansard* (1839) 9 A & E 1; 3 ST TR NS 736; 112 ER 1112 at 1156.
Referral to the Ombudsman

On 17 of June, the committee resolved to refer the matter to the ombudsman under section 16 of the *Ombudsman Act 1973*. The Attorney-General’s public response to this referral was unusual. The Age reported:

Mr Hulls yesterday conceded that advisers in the Premier's office, as well as Mr Brumby and Planning Minister Justin Madden, could be questioned by the Ombudsman about their roles in the affair. “The fact is, he [the Ombudsman] can speak to whoever he likes if he gets a reference from the Parliament,” Mr Hulls said.15

It is implausible that the ombudsman, whose powers are derived from an Act of Parliament could have a power that the Parliament, acting through a Committee, does not itself have. To adjust the objects in the analogy of a famous constitutional quote, ‘a stream cannot rise higher than its source’.16 By definition, the Parliament must have those powers in order to invest them in another.

The Premier and Attorney-General’s acquiescence to the ombudsman’s investigatory powers further highlights the peculiarity of this alleged convention restricting Parliament’s powers. No equivalent argument is made that would restrict the power of the ombudsman. According to the Attorney-General’s reasoning, the ombudsman is more powerful than all of Victoria’s elected officials combined.

Dismantling the Mutual Non-Aggression Pact

Establishing legislation to define the powers of the Parliament to enforce accountability of the executive is the most cost-effective solution to overcoming this impasse. Victorian constitutional scholar Greg Taylor observes ‘at the moment the point is nowhere being pressed, a situation which is perhaps due in part to a mutual non-aggression pact reflecting a convergence of interests between governments and oppositions. Today’s opposition is tomorrow’s government.’17

Short-term political strategy should not supplant higher level principles of democratic accountability. Opposition parties are generally champions for openness and transparency; but such political positions should be formed by allegiance to principles of good governance – not on short-term political advantages. Both Liberal and Labor parties have made such pledges when out of government:

STATELINE’S JOSEPHINE CAFAGNA: So, let me get this absolutely clear: if they were your media advisors, you would want them to appear in the same circumstances?

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16 *Australian Communist Party v The Commonwealth* (1950) 83 CLR 1 at 258 per Fullagar J.
TED BAILLIEU: In the same circumstances, yes. I think that they can provide information which the ministers say they can’t provide. And that’s obviously a case where it’s appropriate.18

Similarly with federal Labor in opposition, Senate Leader John Faulkner was strongly of the view that no such immunity existed19 and the party also adopted official policy for the 2004 election to counter ‘the black hole in accountability’ that McMullan came to note in the principle named after him. The policy document endorsed by Craig Emerson and Mark Latham stated:

Labor will revive the Westminster system of ministerial accountability. Where a minister denies knowledge of the actions of a staff member, it is only reasonable that the staff member can be required to provide information to the parliament about such actions.20

That election was lost and the policy was not taken with the Labor party into government in 2007.

Conclusion

If the Council submits to the executive’s assertions, it will be allowing this ‘Windsor saga’ to join the ‘children overboard’ inquiry,21 and Victoria’s previous 2002 select committee22 as evidence creeping towards the existence of a convention of immunity.

As outlined in this minority report, a convention is not justiciable by a court and such immunity will only ever remain a convention unless expressed through clear statutory provisions. In the absence of such legislation, the Legislative Council and its committees clearly have the legal power (which is justiciable) to call for any ministerial staff as witnesses if it so chooses.

To productively resolve the current impasse, the legislature should seek to have its powers over the executive confirmed by the judiciary. This report has briefly demonstrated the expected likelihood that the Council’s powers would indeed be confirmed by the Supreme Court.

Recommendations

1. If the required witnesses fail to appear before the committee in contradiction of the order of the Council, the Council should declare them guilty of contempt pursuant to Standing Order 23.05. The President will then direct the Usher of the Black Rod to take those witnesses declared guilty of contempt into custody. The inevitable

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21 Select Committee for an Inquiry Into a Certain Maritime Incident.
22 Select Committee on the Urban and Regional Land Corporation Managing Director.
injunction and legal challenge will enable the Council's powers to become a justiciable issue to be heard by the Supreme Court.

2. Following this, the Parliament could then legislate, in accordance with the Supreme Court's judgment, the privileges of the executive, Parliament and its respective committees pursuant to section 19(2) of the Constitution Act 1975.