

# **A Watershed in Committee Evidence Gathering: Victorian Parliament’s Inquiry into the CFA Training College at Fiskville\***

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\* Double-blind reviewed article.

## **Abstract**

In 2015-16 the Environment, Natural Resources and Regional Development Committee—a Joint Investigatory Committee (JIC) of the Parliament of Victoria—conducted an inquiry into the Country Fire Authority (CFA) Training College at Fiskville. The complexity of the inquiry led to this becoming the first JIC to table a report in Parliament about challenges faced when accessing documents from government agencies. The Committee’s final report recommended that the Victorian Government’s guidelines on how government agencies interact with parliamentary committees be amended, a recommendation that was accepted by the Government. Revised guidelines that, for the first time, dealt with the provision of documents to parliamentary committees, were issued in December 2017. This article considers the likely effectiveness of these guidelines in resolving the types of problems that arose during the Fiskville inquiry should they arise again in future inquiries. It argues that, notwithstanding the improvements brought about by the 2017 revised guidelines, JICs will need further powers if future inquiries that reach the level of complexity encountered by the Fiskville inquiry are to be conducted without hindrance.

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## INTRODUCTION

Joint Investigatory Committees (JICs) are established under the *Parliamentary Committees Act 2003* (Vic). The Act sets out the subject area that each is responsible for,<sup>3</sup> the composition of the committees (generally a total of seven Members drawn from both houses, with membership from a range of political parties) and the procedures and powers governing committees. In the 58th term of the Victorian Parliament ten JICs were established. Some inquiries have been narrow in scope, such as the 2016-17 *Inquiry into lowering the probationary driving age in Victoria to seventeen* by the Law Reform, Road and Community Safety Committee. Others have addressed complex problems, such as the 2015-16 *Inquiry into abuse in disability services* by the Family and Community Development Committee, and the 2015-16 *Inquiry into portability of long service leave entitlements* by the Economic, Education, Jobs and Skills Committee.

More recently the Victorian Parliament has tasked JICs with inquiring into long-term systemic failures or wrongdoing. For example, in 2013 the Family and Community Development Committee tabled its report of its *Inquiry into the handling of child abuse by religious and other non-Government organisations*.<sup>4</sup> This inquiry had commenced in April 2012, some months prior to the announcement, on 12 November 2012, of a national Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission ran for five years and produced a final report in 17 volumes<sup>5</sup>—a clear indication of the complexity of this subject.

The inquiry by the Environment, Natural Resources and Regional Development Committee that is the subject of this article falls into the more complex category. This was the 2015-16 *Inquiry into the Country Fire Authority (CFA) Training College at*

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<sup>3</sup> There is a provision in the *Parliamentary Committees Act 2003* (Vic) setting out the functions of each committee. For example, the functions of the Family and Community Development Committee are outlined in section 11, the functions of the Law Reform, Road and Community Safety Committee are outlined in section 13 and the functions of the Electoral Matters Committee are outlined in section 9A. The committees may change when a new term of Parliament commences.

<sup>4</sup> Family and Community Development Committee, *Betrayal of Trust. Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*. Parliament of Victoria. Tabled 13 November 2013.

<sup>5</sup> Royal Commission into Institutional Responses to Child Abuse, *Final Report*, Commonwealth of Australia, 2017.

*Fiskville*. This complexity, including the broad scope of the Inquiry's terms of reference, led the Committee to seek access to an unprecedented amount of documentation from the Victorian Government—15-20,000 documents in total.<sup>6</sup> The Committee's commitment to accessing these documents was unwavering in the face of many obstacles (see below). Part way through its deliberations, in December 2015, it saw fit to table a Special Report to Parliament specifically on the production of documents.<sup>7</sup> It also made recommendations to the Government in its final report intended to prevent future inquiries from facing the same challenges.

The Committee's persistence in this regard, and its consequent recommendations, have proved to be very significant. Revised guidelines governing the provision of documents by government agencies to all future inquiries have been developed.<sup>8</sup> The guidelines apply to Victorian Royal Commissions and Boards of Inquiry in addition to parliamentary inquiries.<sup>9</sup>

## OVERVIEW

The article commences with an outline of the Fiskville Inquiry and explains why the Committee sought to access many documents from government agencies. It also outlines the nature of the challenges the Committee faced with accessing the documents. The article then examines the steps taken by the Committee to access the documents and to ensure that future JIC inquiries do not face similar challenges. Next, the article analyses the Government's response to the recommendation by the Committee (namely, the issuing of revised guidelines for government agencies appearing before and providing documents to parliamentary committees), the new content of the guidelines and how they differ from the previous guidelines, dated

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6 Environment, Natural Resources and Regional Development Committee, *Inquiry into the CFA Training College at Fiskville Final Report*. Parliament of Victoria. Tabled 24 May 2016: 39 (hereafter *ENRRDC Final Report*).

7 Environment, Natural Resources and Regional Development Committee Inquiry into the CFA Training College at Fiskville Special Report on Production of Documents. Parliament of Victoria. Tabled 12 November 2015 (hereafter *ENRRDC Special Report*).

8 Department of Premier and Cabinet, *Guidelines for Appearing Before and Producing Documents to Victorian Inquiries*, Victorian Government, December 2017 (hereafter *2017 Guidelines*).

9 *2017 Guidelines*, see Part 2 'Types of Inquiries and their Powers'.

October 2002.<sup>10</sup> The ability of the 2017 Guidelines to resolve the types of problems that arose during the Fiskville inquiry for future similarly complex inquiries is considered. The article concludes with some suggestions for further powers that may further strengthen the 2017 Guidelines.

## THE FISKVILLE INQUIRY AND ACCESS TO DOCUMENTS

In December 2011, a newspaper article was published suggesting links between cancer and other diseases and firefighter training practices at Fiskville. The article placed particular emphasis on the views of the late Mr Brian Potter, a former Chief Officer of the CFA, who believed exposure to chemicals at the site had caused his cancer.<sup>11</sup> The CFA responded by announcing an independent inquiry into Fiskville chaired by Professor Robert Joy.<sup>12</sup> Professor Joy's appointment was criticised for several reasons, including that he was a former Deputy Chief Officer at the Environment Protection Authority (EPA).<sup>13</sup>

A second newspaper article was published in June 2012, raising questions about the quality of the recycled water used in training activities.<sup>14</sup> A WorkSafe investigation followed<sup>15</sup> and the United Firefighters Union raised concerns on behalf of its members.<sup>16</sup> Due to concerns about contamination, the site was closed in March 2015. This occurred three months after the parliamentary inquiry, which had been announced on 9 December 2014,<sup>17</sup> commenced deliberation.<sup>18</sup>

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10 Department of Premier and Cabinet, *Guidelines for Appearing Before State Parliamentary Committees*, Victorian Government, October 2002 (hereafter *2002 Guidelines*).

11 R. Lamperd, 'Cancer Town'. *Herald Sun*, 6 December 2011. The content of this newspaper article was discussed in *ENRRDC Final Report*, p. 6.

12 Professor Robert Joy, *Understanding the Past to Inform the Future: Report of the Independent Fiskville Investigation*, 2012.

13 *ENRRDC Final Report*, p. 6.

14 R. Lamperd, 'Water Contamination Scare in Fiskville'. *Herald Sun*, 25 June 2012.

15 *ENRRDC Final Report*, p. 6. See Chapter 7 of the *Final Report* for more details about WorkSafe's involvement.

16 *ENRRDC Final Report*, p. 7.

17 Premier of Victoria, 'Fiskville Inquiry Will Tell Firefighters the Whole Truth', Media Release, 9 December 2014.

18 *ENRRDC Final Report*, pp. 23-26.

Given this background, the terms of reference for the inquiry, issued on 23 December 2014, were broad. They required the Committee to investigate wide-ranging topics over a long time frame. They also required an examination of a complex regulatory framework including a range of Victorian legislation (such as occupational health and safety law and environmental law)<sup>19</sup> and regulatory bodies (such as WorkSafe and the EPA).<sup>20</sup> Matters to be addressed included pollution, contamination and unsafe activities (paragraph 1), health impacts on ‘employees, residents and visitors’ (paragraph 2) and the role of executive management both past and present (paragraph 3). All the foregoing terms of reference applied from 1970 (when the CFA opened the training centre) to the present; that is, to a period of more than 40 years. The Committee was also tasked with considering the prospect of the site being decontaminated (paragraph 4) and options for providing redress or justice to those who had been adversely affected (paragraph 5).<sup>21</sup>

The Committee employed the usual types of evidence gathering carried out by JICs, including:

- inviting submissions from individuals and organisations—the Fiskville inquiry received 450 submissions;<sup>22</sup>
- public hearings where a range of witnesses give evidence—in the Fiskville inquiry this included people adversely affected by the practices, CFA management, scientific experts, representatives from regulatory agencies and experts on compensation schemes;
- evidence-gathering trips—as part of the Fiskville inquiry the Committee visited Canberra and Germany;<sup>23</sup> and

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19 See particularly Environment, Natural Resources and Regional Development Committee, *Inquiry into the CFA Training College at Fiskville Interim Report*. Parliament of Victoria. Tabled 24 June 2015, p. 23-38 (hereafter *ENRRDC Interim Report*).

20 See particularly *ENRRDC Final Report*, Chapters 7 and 8.

21 *ENRRDC Interim Report*, p. vii.

22 A call for submissions was placed on the Committee’s website, newspaper advertisements were issued, and the *Interim Report* notes that ‘the Committee also wrote to a range of organisations inviting submissions, including government departments, local councils, and emergency management organisations’. *ENRRDC Interim Report*, p. viii.

23 There is very little experience in Australia of decontaminating and remediating sites similar to Fiskville. This was something that paragraph 4 of the Committee’s terms of reference required them to report on. The

- site visits.<sup>24</sup>

It soon became apparent that a document discovery process would be needed to complement these strategies. Early in the inquiry the Committee heard evidence that individuals were having trouble accessing information from the CFA about whether their health might have been affected by training practices and by chemicals used in firefighting foams at the Fiskville training centre.<sup>25</sup> Therefore, from the outset the Committee resolved (in the words of the Chair) to ‘find out the truth’.<sup>26</sup> This led to the Committee requesting documents from the CFA, as well as a range of other regulatory agencies, including the local Council,<sup>27</sup> the EPA and WorkSafe.<sup>28</sup>

Access to documents also became particularly important for addressing paragraph (3) of the terms of reference: ‘a study of the role of past and present executive management at Fiskville’. For this purpose, the Committee decided to access the minutes of the CFA Board meetings for the time frame being canvassed by the inquiry.<sup>29</sup> Some of the content in the minutes and their attachments contradicted the evidence the Committee heard during public hearings. A number of executives gave evidence during these hearings that they were not aware of contamination at Fiskville prior to 2011 (when the first newspaper article was published). For example, Mr Mick Bourke, Chief Executive Officer from September 2009 to February 2015, told the Committee that ‘[w]hen the story broke in 2011 it was like a bombshell in CFA, and people initially did not seem to want to put up their hand and say that there were things that could have been wrong at Fiskville’.<sup>30</sup> The Board minutes revealed that there had been some negotiations between 2008 to 2010 between Airservices Australia and the CFA about use of the Fiskville site,<sup>31</sup> but that on 31 May 2010 Mr

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Committee chose to visit Germany because it was considered to be ‘a world leader in decontaminating sites similar to Fiskville’. *ENRRDC Final Report*, p. 34.

<sup>24</sup> *ENRRDC Interim Report*, Chapter 5; *ENRRDC Final Report*, Chapter 2.

<sup>25</sup> *ENRRDC Interim Report*, p. vi.

<sup>26</sup> *ENRRDC Interim Report*, p. vi.

<sup>27</sup> Moorabool Shire Council.

<sup>28</sup> *ENRRDC Final Report*, p. 426.

<sup>29</sup> *ENRRDC Final Report*, p. 40.

<sup>30</sup> *ENRRDC Final Report*, p. 174. Other examples include Mr Euan Ferguson, Chief Officer from November 2010 to November 2015, and Mr Peter Rau, Officer in Charge at Fiskville from April 2005 to July 2008.

<sup>31</sup> *ENRRDC Final Report*, pp. 175-77.

Bourke reported to the Board that Airservices had withdrawn from these negotiations because of 'issues of potential chemical contaminations at Fiskville'.<sup>32</sup> This directly contradicted Mr Bourke's oral evidence.

The Committee's final report concluded that:

the documentary evidence shows an awareness of significant problems at Fiskville at all levels of executive management from the 1970s to December 2011. However, witnesses that appeared before the Committee at public hearings consistently claimed that they had a lack of knowledge.<sup>33</sup>

The Committee formed the view that witnesses were claiming lack of knowledge about four areas of which they should have been aware, based on the minutes of CFA board meetings. These were (1) chemical contamination, (2) occupational health and safety, (3) dangerous goods storage and disposal and (4) concerns surrounding water supply and quality.<sup>34</sup>

When referring to the value of the documents more broadly, the Committee described them as 'indispensable'.<sup>35</sup> The Committee noted that the documents had been used for a range of purposes, including:

to either verify or refute claims made in traditional sources of evidence relied upon by Parliamentary Committees (that is, submissions and transcripts of witnesses' evidence before the Committee). The documents have also been used to fill in gaps in the evidence. In some cases the documents provide the only source of non-anecdotal evidence for certain matters relevant to the inquiry.<sup>36</sup>

JICs have broad evidence-gathering powers under the *Parliamentary Committees Act 2003*. Section 28(1) of the Act provides that a JIC 'has power to send for persons, documents and other things'. Prior to the Fiskville inquiry this power had proved to

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32 ENRRDC Final Report, p. 177.

33 ENRRDC Final Report, p. 194; See also generally Chapter 5.

34 The information contained in the CFA Board documents about these four areas is outlined in Chapter 5 of ENRRDC Final Report, pp. 174-93.

35 ENRRDC Final Report, p. 44.

36 ENRRDC Final Report, p. 43.

be sufficient even in complex inquiries. The Family and Community Development Committee, when conducting the child abuse inquiry that also involved document gathering, did not experience any problems accessing information. That Committee noted in its final report:

The Committee did not need to resort to its powers to compel documents or witnesses. All of the organisations and individuals approached cooperated fully. Ultimately, no individuals or organisations refused a request to attend a hearing or to provide information.<sup>37</sup>

In stark contrast to this, the Fiskville Committee faced multiple challenges. These were summarised in its final report as follows:

The Committee had to request certain documents multiple times, received inadequate responses to summonses and received multiple versions of the same documents (for example, a version containing redactions due to a potential claim of executive privilege, followed by a complete (un-redacted) version after the Victorian Government determined that it would not claim executive privilege over the material).<sup>38</sup>

Additionally, the Victorian Government Solicitors Office (VGSO) informed the Committee in correspondence dated 11 September 2015 that Board papers for the first 26 years of the CFA's operations from prior to 1996 'no longer exist'.<sup>39</sup> After the Committee Chair asked for an explanation of why this was the case, the VGSO conceded on 25 September 2015 that the statement was inaccurate.<sup>40</sup>

The major challenge faced by the Committee when attempting to access the CFA Board papers was the Government's claims of executive privilege over the content of some of them. Because of these claims, the VGSO redacted large parts of board papers, and refused to provide some documents in their entirety, because of the 'potential' for the executive to claim executive privilege over the content.<sup>41</sup>

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<sup>37</sup> ENRRDC Final Report, p. 32.

<sup>38</sup> ENRRDC Final Report, p. 47.

<sup>39</sup> ENRRDC Special Report, p. 8.

<sup>40</sup> ENRRDC Final Report, p. 50.

<sup>41</sup> ENRRDC Special Report, p. 10.



These claims of executive privilege led to significant delays. The Committee's Special Report noted that 'the VGSO also advised that the process to determine whether such a claim will be made is time consuming'.<sup>42</sup> The claims of executive privilege ultimately resulted in the Committee requiring two extensions to the inquiry due date.<sup>43</sup>

In the Committee's final report, the Committee reflected on the release of CFA Board papers after the executive had had an opportunity to decide whether it in fact wished to claim executive privilege or not. The Committee noted that the majority of the documents had eventually been provided to the Committee and 'of the minutes containing material redacted by the VGSO, the Government formed a contrary view about executive privilege in around 85 percent of cases'.<sup>44</sup>

The Committee also expressed its displeasure at the redaction in one instance of material in one set of minutes that had been provided in full to a member of the public pursuant to a Freedom of Information request.<sup>45</sup> The Committee noted that it 'believe[s] that the VGSO should know that if material can be provided in full to a member of the public, there is no justification for providing a redacted version to a Parliamentary Committee'.<sup>46</sup>

As noted above, the Board papers led to significant findings in the final report in response to the term of reference concerning the role of executive management both past and present (paragraph 3). The Committee's persistence was clearly justified. The way the Committee met the challenges it faced in accessing documents therefore merits more detailed consideration.

## THE COMMITTEE'S RESPONSE

As noted in the Introduction, the Committee tabled a *Special Report on Production of Documents* in Parliament in December 2015. This was its first main response. The

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<sup>42</sup> ENRRDC *Special Report*, p. 10.

<sup>43</sup> ENRRDC *Final Report*, pp. 39 and 47.

<sup>44</sup> ENRRDC *Final Report*, p. 47.

<sup>45</sup> ENRRDC *Final Report*, p. 48.

<sup>46</sup> ENRRDC *Final Report*, p. 48.

second was to outline the challenges it faced in accessing the documents in the final report that was tabled in May 2016. The third was to make recommendations to the Government in that report aimed at ensuring that future JICs did not face the same challenges. Each of these will be considered in turn.

In many ways, the first response was the most attention-grabbing. It was unprecedented for a Victorian parliamentary committee to table a report dealing specifically with obstruction of evidence-gathering.<sup>47</sup> When tabling the Special Report, the Committee Chair expressed the Committee's 'disappointment' that this step had to be taken.<sup>48</sup> It was described by the Committee as necessary for the following reasons:

The Committee has promised to undertake a transparent inquiry. In view of its commitment to transparency, on 5 November 2015 the Committee unanimously determined a need to inform the Parliament of Victoria that the non-disclosure of CFA Board papers has implications for the Committee's capacity to adequately and transparently inquire into key aspects of the terms of reference for the inquiry.<sup>49</sup>

The Special Report summarised the extensive correspondence that had taken place between the Committee and the VGSO,<sup>50</sup> listed the number of minutes that had been received by the Committee at that point,<sup>51</sup> then outlined each of the following challenges that the Committee had experienced as follows:

- slow production of documents
- ad hoc production of documents
- the use of a filtering system for determining information to be produced

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<sup>47</sup> There had been problems experienced by the Victorian Legislative Council with access to documents in 2007, but this did not result in the tabling of a special report. Rather, the Council had passed a motion. See G. Taylor, 'Parliament's Power to Require the Production of Documents—A Recent Victorian Case'. *Deakin Law Review*, 13(2), 2008, pp. 17-48.

<sup>48</sup> *ENRRDC Special Report*, p. vii.

<sup>49</sup> *ENRRDC Special Report*, p. 1.

<sup>50</sup> *ENRRDC Special Report*, pp. 4-5 and Appendix 1.

<sup>51</sup> *ENRRDC Special Report*, Table 1.

- duplication of documents
- claims that existing documents no longer exist
- extensive redaction of material due to potential claims of executive privilege.<sup>52</sup>

In short, it publicised the Committee’s unanimous displeasure at the lack of cooperation by a government agency (the CFA) and its legal representative (the VGSO) with the inquiry. This resulted in further media attention to an inquiry that already had a high profile.<sup>53</sup> Most importantly perhaps, it was effective. The Board papers sought were supplied.

The Committee’s second response—sections of its final report—went into further detail about these matters. The majority of Chapter 2—the Chapter outlining the inquiry process—was dedicated to the document discovery process. There was a heading about ‘challenges associated with accessing CFA documents’ followed by an eight-page discussion.<sup>54</sup> The challenges related to both the board minutes and accessing financial information.

Following the discussion, one of the Committee’s findings was ‘[t]hat the Victorian Government Solicitor’s Office was obstructive and uncooperative in the document discovery process’.<sup>55</sup> This is a serious finding for a committee to make in relation to a government agency’s legal representative.

The Committee dedicated a further four pages of its final report<sup>56</sup> and formulated two recommendations with the purpose of ‘addressing challenges with accessing documents’, noting that:

If a similar inquiry arises in the future—that is an inquiry that requires the Parliamentary Committee to access documents in order to address the Terms of Reference provided by the Parliament—there needs to be

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<sup>52</sup> *ENRRDC Special Report*, p. 5.

<sup>53</sup> D. Gray, ‘CFA Blasted by Parliamentary Committee over Fiskville’. *The Age*, 12 November 2015; J. Edwards, ‘Victoria’s CFA Denies it Refused to Give Fiskville Evidence to Parliament’. *ABC News*, 12 November 2015; R. Lamperd and A. White, ‘CFA Refuses to Hand over Fiskville Inquiry Files’. *Herald Sun*, 12 November 2015.

<sup>54</sup> *ENRRDC Final Report*, pp. 46-53.

<sup>55</sup> *ENRRDC Final Report*, p. 53, Finding 18.

<sup>56</sup> *ENRRDC Final Report*, pp. 54-57.

increased clarity surrounding the provision of documents to Parliamentary Committees.<sup>57</sup>

These two recommendations amount to the third element of the Committee's response to these issues.

The first recommendation (*Recommendation 2* in the Report)<sup>58</sup> concerned proposed amendments to the *Victorian Model Litigant Guidelines*, which apply to Government lawyers during litigation.<sup>59</sup> The Government judged this recommendation to be irrelevant. In its response to the Fiskville inquiry report, it made the following comments about this recommendation.

The *Model Litigant Guidelines* relate to litigation and the conduct of Government agencies in dealing with claims made by citizens/private entities, rather than appearances before, and the production of documents to, Parliamentary Committees.<sup>60</sup>

The Government chose instead to focus its response to the Committee's other main recommendation on this subject (*Recommendation 3* in the Report), which was as follows:

That the Department of Premier and Cabinet amend the Guidelines for Appearing Before State Parliamentary Committees so that they contain some standards for conduct when a Parliamentary Committee requests information and documents. The standards should reflect relevant principles contained in the Model Litigant Guidelines.<sup>61</sup>

The *Guidelines for Appearing Before State Parliamentary Committees* were outdated—they were issued in October 2002 and pre-dated the 2003 Act that currently regulates the operation of JICs. The Committee observed that the 2002 'Guidelines

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<sup>57</sup> ENRRDC Final Report, p. 54.

<sup>58</sup> ENRRDC Final Report, p. 56.

<sup>59</sup> The guidelines stem from Appendix B to the Commonwealth's *Legal Services Directions*, issued pursuant to section 55ZF of the *Judiciary Act 1903* (Cth). See generally G. Appleby, 'The Government as Litigant'. *University of New South Wales Law Journal*, 37(1), 2014, pp. 94-124.

<sup>60</sup> Victorian Government, *Victorian Government's Response to the Environment, Natural Resources and Regional Development Committee's Inquiry into the CFA Training College at Fiskville*, 24 November 2016, p. 4.

<sup>61</sup> ENRRDC Final Report, p. 57.

do not encourage agencies to provide information in a timely and cooperative fashion' and provided only a few brief references to the provision of documents to JICs by government agencies.<sup>62</sup>

The Victorian Government acted on this recommendation (*Recommendation 3*). The next section of this paper notes this response, compares the revised (2017) Guidelines with those they replace, and considers their likely effects. The discussion provides an assessment of whether the 2017 Guidelines are likely to address the types of obstacles faced by the Committee during the Fiskville inquiry. It also analyses the likely impact of the revised Guidelines on future inquiries by JICs with particular emphasis on complex inquiries.

## THE REVISED GUIDELINES

The Victorian Government response to the Fiskville inquiry report (issued 6 months after the final report that is, 24 November 2016) made the following comments about the Committee's recommendation to update its Guidelines:

The Government is currently revising and updating its Guidelines for Appearing Before State Parliamentary Committees to reflect relevant principles of the Model Litigant Guidelines. [...]

Therefore, the revised Guidelines will:

- promote early engagement with inquiries to minimise the potential for misunderstandings;
- include standards of conduct for responding to requests for documents that reflect relevant principles of the Model Litigant Guidelines; and
- encourage departments and agencies to consider other options available to provide inquiries with the information they need where documents are subject to claims of executive privilege.

The revised Guidelines are expected to be released in early 2017.<sup>63</sup>

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<sup>62</sup> ENRRDC *Final Report*, p. 56.

<sup>63</sup> Victorian Government, *Victorian Government's Response*, p. 4.

The new Guidelines, entitled ‘Guidelines for appearing before and producing documents to Victorian inquiries’ became available in December 2017’.

## COMPARISON OF THE 2002 AND 2017 GUIDELINES

The first difference to be observed between the two guidelines is a matter of scope. The 2002 Guidelines were predominantly confined to parliamentary inquiries, with only a brief discussion about appearance before Victorian Royal Commissions included at the end of the document.<sup>64</sup> The 2002 Guidelines had not been updated to align with the introduction of the *Inquiries Act 2014* (Vic). That Act provides for Boards of Inquiry and updated the framework governing Royal Commissions. The 2017 Guidelines have been expanded and provide guidance on dealing with Boards of Inquiry and Royal Commissions established under the 2014 Act, in addition to Parliamentary inquiries. The guidance provided relates both to appearances before committees at public hearings and to provision of documents to all three types of inquiries.

As the focus of this article is parliamentary inquiries, it will not deal with the Guidelines about Boards of Inquiry and Royal Commissions, other than to note that there are distinct differences between these three types of processes and the clear distinctions made in the Guidelines are welcome.<sup>65</sup>

The second difference is that the 2017 Guidelines go into significantly more detail about the provision of documents to parliamentary committees. In the 2002 Guidelines, references to the provision of documents tend to envisage documents being referred to, or requested, during a public hearing. For example, they included a heading ‘What Documents Should be Disclosed in Committee Hearings?’<sup>66</sup> In the 2017 Guidelines, there is an entire Part (Part 3) entitled ‘Requests for documents’ that provides direction about requests made prior to public hearings, in addition to some brief references to requests for documents during hearings.<sup>67</sup> There is also a

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<sup>64</sup> *2002 Guidelines*, pp. 23-25.

<sup>65</sup> See, for example, guidance on answering questions that may incriminate the witness. *2017 Guidelines*, paragraphs 127-131.

<sup>66</sup> *2002 Guidelines*, paragraph 12.

<sup>67</sup> *2017 Guidelines*, paragraph 132.

heading in this Part about requests for documents that details how the Model Litigant Guidelines apply. This encourages compliance with principles such as ‘acting fairly’, ‘dealing with requests promptly’ and considering the inquiry’s resources when determining how to provide documents.<sup>68</sup>

The third difference is that guidance is provided in the 2017 version on privileges claimed by the executive. The 2002 Guidelines contained a section entitled ‘Can a witness claim public interest immunity?’ and defined this as ‘a traditional legal doctrine which allows Government to prevent the disclosure of certain evidence in legal proceedings if it is in the public interest to keep that evidence undisclosed’.<sup>69</sup> The Guidelines went on to list the types of documents and oral evidence over which immunity may have been claimed during a parliamentary committee inquiry.<sup>70</sup> There was no reference to ‘executive privilege’ in the 2002 Guidelines.

In contrast, the 2017 Guidelines clarify that public interest immunity only applies in legal proceedings and ‘executive inquiries including a Royal Commission or Board of Inquiry’.<sup>71</sup> With respect to parliamentary committee inquiries however, the relevant type of privilege is executive privilege.<sup>72</sup> The latter is not precisely defined in the Guidelines. They contain broad-brush statements such as ‘[e]xecutive privilege is a privilege held by the Executive Government’<sup>73</sup> and ‘[i]t is similar to public interest immunity, but applies in the context of parliamentary committee inquiries (as opposed to litigation before the courts and executive inquiries such as Royal Commissions).’<sup>74</sup> On the other hand, the Guidelines helpfully contain two separate appendices, one on ‘Executive Privilege’ (Appendix A) and another on ‘Public Interest Immunity’ (Appendix B). Each lists the types of information over which respective claims might be made. The Guidelines also clearly distinguish between provision of documents and oral evidence in relation to both public interest immunity and executive privilege (the relevant paragraphs are provided at the end of each of the

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<sup>68</sup> 2017 Guidelines, paragraph 36.

<sup>69</sup> 2002 Guidelines, paragraph 66.

<sup>70</sup> 2002 Guidelines, paragraph 71. There is also a reference to Cabinet processes at paragraph 46.

<sup>71</sup> 2017 Guidelines, paragraph 69.

<sup>72</sup> 2017 Guidelines, paragraphs 49 and 69.

<sup>73</sup> 2017 Guidelines, Appendix A.

<sup>74</sup> 2017 Guidelines, paragraph 49.

two appendices). Further discussion about the guidance on executive privilege in relation to the problems faced in during the Fiskville inquiry is provided below.

A fourth difference between the 2002 and 2017 Guidelines is that the level of autonomy granted to public officials or individual departments interacting with parliamentary committees is reduced. The 2017 Guidelines introduce new processes for coordinating government agency input to inquiries where there is more than one agency involved. The Guidelines specify that the Department of Premier and Cabinet (DPC) will nominate a 'lead department that will be responsible for coordinating the Government's response to requests for documents made by the committee'.<sup>75</sup> The Guidelines detail the duties of the lead department, such as writing to the chair of the committee,<sup>76</sup> seeking Cabinet approval for claims of executive privilege<sup>77</sup> and considering ways to provide a committee with as much information as possible where claims of executive privilege are involved.<sup>78</sup>

The 2002 Guidelines did refer to a 'lead agency', but they did not provide any guidance as to that agency's role. The Guidelines simply provided that '[w]here more than a single Department (not including DPC) is involved, officials must inform DPC and co-ordinate involvement in committee hearings with the lead agency (where DPC is not the lead agency)'.<sup>79</sup>

The 2017 Guidelines provide more detail about when to seek legal advice than the 2002 Guidelines. A heading in the 2017 Guidelines entitled 'When to seek legal advice' is followed by four paragraphs about getting advice about documents.<sup>80</sup> The Guidelines note that in some cases executive privilege claims will be clear and legal advice will not be required.<sup>81</sup> However, they also state that '[w]here there is any uncertainty', advice is required.<sup>82</sup> If an agency is considering presenting a committee with evidence in a way that provides it with the information it needs but does not

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<sup>75</sup> 2017 Guidelines, paragraph 44.

<sup>76</sup> 2017 Guidelines, paragraph 45.

<sup>77</sup> 2017 Guidelines, paragraph 53.

<sup>78</sup> 2017 Guidelines, paragraph 55.

<sup>79</sup> 2002 Guidelines, paragraph 32.

<sup>80</sup> 2017 Guidelines, paragraphs 30-42.

<sup>81</sup> 2017 Guidelines, paragraph 41.

<sup>82</sup> 2017 Guidelines, paragraph 42.



reveal information that is subject to a privilege claim (such as by ‘making a presentation to the committee that excludes sensitive material’), legal advice is required.<sup>83</sup>

The 2017 Guidelines also envisage situations where an official may need to ask the committee’s permission to seek legal advice during a hearing, such as if considerations relating to ‘secrecy provisions of Acts’ or ‘court orders or sub judge issues’ arise,<sup>84</sup> or if the witness is concerned that they are being asked to provide a document that may incriminate them,<sup>85</sup> or to give evidence that may incriminate them.<sup>86</sup>

There was a total of four references to obtaining legal advice in the 2002 Guidelines. Two of these related to claims of public interest immunity, with one paragraph advising that legal advisors or the VGSO can provide ‘a more detailed understanding of the above exemption provisions’.<sup>87</sup> A third concerned information that might be covered by a court order,<sup>88</sup> and the fourth related to an individual getting ‘independent legal advice’ if they felt their evidence may incriminate them.<sup>89</sup>

The more detailed specifications as to when legal advice is required, and the involvement of a lead agency, may impact the timeliness of provision of information to committees, a point that will be returned to below.

## **THE 2017 GUIDELINES AND THE FISKVILLE INQUIRY**

Given this background, it is natural to ask whether and to what extent the 2017 Guidelines address the concerns that arose during the Fiskville inquiry. They do so in two ways. The first is the explicit reference included in the Guidelines to the Model Litigant Guidelines. The second is the clarification of the scope of executive privilege

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<sup>83</sup> *2017 Guidelines*, paragraphs 55-56.

<sup>84</sup> *2017 Guidelines*, paragraph 117.

<sup>85</sup> *2017 Guidelines*, paragraph 67.

<sup>86</sup> *2017 Guidelines*, paragraph 131.

<sup>87</sup> *2002 Guidelines*, paragraph 73. See also paragraph 68.

<sup>88</sup> *2002 Guidelines*, paragraph 75.

<sup>89</sup> *2002 Guidelines*, paragraph 96.

and the process to be followed when claims of executive privilege are made. These need to be weighed against the new requirements to seek legal advice in a range of circumstances.

The Committee recommended that principles from the Model Litigant Guidelines be incorporated into the Guidelines for agency's appearing before parliamentary Committees. The key principles mentioned by the Committee are:

2(a): Act fairly in handling claims and litigation

2(c): Deal with claims promptly and not cause unnecessary delay

2(g): Where it is not possible to avoid litigation, keep the costs of litigation to a minimum.<sup>90</sup>

The 2017 Guidelines refer explicitly to these three principles.<sup>91</sup> They add that the provision of documents should be done in such a way that government agencies 'foster cooperation', avoid acting 'in an inflexible manner', consider 'alternative options' where claims of executive privilege are to be made and ensure 'timely provision of information to inquiries and communicating with inquiries early on about any potential difficulties in responding within the requested timeframe'.<sup>92</sup>

As noted above, the 2002 Guidelines were silent on executive privilege, the source of the majority of the obstacles faced during the Fiskville inquiry. It is therefore a significant improvement to have a definition of the scope of the privilege<sup>93</sup> and details about the process to be followed when a claim of executive privilege may be made over documents.<sup>94</sup> Welcome, too are guidelines about how to proceed when a claim in relation to documents is sustained, as well as when it is not,<sup>95</sup> and the process if privileged matters arise during oral evidence in a public hearing.<sup>96</sup>

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<sup>90</sup> *ENRRDC Final Report*, p. 55.

<sup>91</sup> *2017 Guidelines*, paragraph 36.

<sup>92</sup> *2017 Guidelines*, paragraph 37.

<sup>93</sup> *2017 Guidelines*, Appendix A.

<sup>94</sup> *2017 Guidelines*, paragraphs 49-52.

<sup>95</sup> *2017 Guidelines*, paragraphs 53-61.

<sup>96</sup> *2017 Guidelines*, paragraphs 123-126.

Importantly, however, the 2017 Guidelines suggest that agencies redact privileged content in documents and provide them to the parliamentary committee<sup>97</sup> while a Cabinet submission is prepared to resolve the claim of executive privilege.<sup>98</sup> However, one of the major problems faced by the Fiskville inquiry was receiving a redacted version of documents, only to receive the entire document after the Government determined that the potential claim of executive privilege was not upheld. This occurred in 85 percent of cases where a redacted version was initially received.<sup>99</sup> Unless there is a significant improvement in the assessment process, so that the VGSO identifies potential claims of executive privilege that align better with the actual claims of executive privilege, delays to committee inquiries will not be reduced.

The definition of the scope of executive privilege in the 2017 Guidelines may assist this process. During the Fiskville inquiry the VGSO would not provide the Committee with details about the types of privilege claims—only that there were potential claims. The Committee noted in its Special Report that ‘[d]espite requests for information about the specific nature of executive privilege the state may claim over the CFA Board papers, no advice has been forthcoming from the VGSO’.<sup>100</sup>

The Committee’s final report gave two examples of material that had been redacted from the CFA Board minutes in the first instance, then later provided to the Committee after it was determined that there was no claim of executive privilege over the content. One of these related to a meeting between the Minister and the CFA Chief Officer and the other related to approval of some amendments to Regulations by the relevant Minister.<sup>101</sup> These are both matters that are unlikely to be covered by any of the examples in the 2017 Guidelines. It is therefore possible to be cautiously optimistic that the Guidelines may result in content of this nature not being redacted during future inquiries.

It was noted in the previous section that the 2017 Guidelines require legal advice to be obtained in a variety of circumstances, particularly in relation to potential claims

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<sup>97</sup> 2017 Guidelines, paragraph 52.

<sup>98</sup> 2017 Guidelines, paragraph 53.

<sup>99</sup> ENRRDC Final Report, p. 47.

<sup>100</sup> ENRRDC Special Report, p. 11.

<sup>101</sup> ENRRDC Final Report, p. 48.

of executive privilege. Much will depend on how the VGSO responds. The Fiskville inquiry made the following finding about the VGSO: '[t]hat the Victorian Government Solicitor's Office was obstructive and uncooperative in the document discovery process'.<sup>102</sup>

There were many reasons for this finding, but there are three particularly pertinent examples. The first is that incorrect information was provided to the Committee about legal expenditure versus expenditure on remediation in response to a summons, as follows:

The VGSO advised the Committee that they had erroneously:

- Included expenditure that was not associated with Fiskville
- Included remediation expenditure as part of the total spent on legal expenses.<sup>103</sup>

The second (noted earlier) is that the VGSO refused to provide the Committee with CFA Board minutes pursuant to a claim of executive privilege when those same minutes had already been provided to the Committee by the CFA directly.<sup>104</sup> The third (also noted earlier) is that the VGSO advised the Committee that the meeting papers for all meetings between 1970 and 1996 'did not exist'. When the Committee questioned this, they VGSO advised that they had located the papers and retracted the claim.<sup>105</sup>

The principles from the Model Litigant Guidelines that have now been incorporated into the government agency guidelines *may* ameliorate these concerns with the VGSO. The VGSO has been required to abide by the Model Litigant Guidelines in litigation since they were introduced in 2001 and it should therefore be familiar with the requirements.

However, the primary source of enforcement of the Model Litigant Guidelines is a pronouncement or cost order by a court.<sup>106</sup> When it comes to the Guidelines for

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<sup>102</sup> *ENRRDC Final Report*, p. 53, Finding 18.

<sup>103</sup> *ENRRDC Final Report*, p. 53.

<sup>104</sup> *ENRRDC Final Report*, p. 48.

<sup>105</sup> *ENRRDC Special Report*, p. 9.

<sup>106</sup> Z. Chami, 'The Obligation to Act as a Model Litigant'. *AIAL Forum*, 64, 2010, pp. 55-56.

provision of documents to parliamentary committees, it remains an open question as to what will be the result of non-compliance with the principles imported from the Model Litigant Guidelines.

There is one further and major gap in the Guidelines. They do not provide a mechanism to resolve an impasse where the executive refuses to provide a JIC with a document that the latter considers necessary for its inquiry and is potentially not covered by privilege, but the JIC cannot assess the privilege claim or the relevance to the inquiry because they cannot view the contents. That is, the executive remains the sole arbiter in deciding whether content is withheld. The Guidelines contain the same flaw that Boughey and Weeks identify at the Commonwealth level when writing about Senate powers: '[a]llowing ministers to be the sole judges of whether or not release of a document is in the public interest has obvious implications for the ability of Parliament to hold them to account'.<sup>107</sup>

## **ADDITIONAL POWERS FOR JICS**

There are two key areas for improvement to the powers of JICs in the aftermath of the Fiskville inquiry: first clarifying the operation of parliamentary privilege<sup>108</sup> as it applies to requests for documents over which there is a Cabinet-in-confidence or broader executive privilege claim; and second, providing committees with powers for dealing with failures to respond to a request for documents.

These matters could be addressed by drawing from the experience of other jurisdictions where there is greater clarity—particularly New South Wales (NSW) (see next paragraph). Alternatively, a solution may be found in Victoria by borrowing from the approach of the Victorian Auditor-General's Office (VAGO).

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<sup>107</sup> J. Boughey and G. Weeks, 'Government Accountability as a "Constitutional Value"', in R. Dixon (ed.), *Australian Constitutional Values*. Oxford: Hart Publishing, 2018, p. 110.

<sup>108</sup> For an overview of parliamentary privilege and its interaction with other privileges, such as executive privilege, see R. Macreadie and G. Gardiner, 'Research Paper An Introduction to Parliamentary Privilege'. Parliamentary Library of Victoria, No.2 August 2010. For an explanation on the powers of the Victorian Parliament to deal with breaches of its privileges, see J. Waugh, 'Contempt of Parliament in Victoria'. *Adelaide Law Review*, 26(1), 2005, pp. 29-53.

There is more clarity surrounding disputes over documents in NSW, a matter over which there has been a High Court decision.<sup>109</sup> NSW also has an ‘independent legal arbiter’ mechanism that allows a ‘Queen’s Counsel, Senior Counsel or a retired Supreme Court judge’ to make a legal assessment of the ‘validity of a claim for privilege’ when the Legislative Council is seeking documents over which a claim of privilege is made.<sup>110</sup> For a variety of reasons however, this is not a model that is transferable to Victoria (Boughey and Weeks highlight that the Senate’s and NSW legislature’s powers ‘rest on different foundations’).<sup>111</sup> A specifically Victorian solution is therefore required.

A possible solution would be to borrow from the well-enshrined, approach used for the audits conducted by the VAGO. There are some similarities in the approach adopted by VAGO and JICs. However, the powers of the Auditor-General and staff under the *Audit Act 1994* (Vic) (Audit Act) provide explicit and better-defined powers over access to documents than those in the *Parliamentary Committees Act 2003*, even when read in conjunction with the 2017 Guidelines.

Under the Audit Act, VAGO has specific powers over documents, including those for which executive privilege is claimed. Specifically, section 11 of the Audit Act provides a VAGO auditor with the power to request and copy documents that are Cabinet-in-confidence in draft form and, importantly, documents that are held by a person although they do not belong to them. This distinction is important, because it extends the power of auditors to request and receive documents that might otherwise be protected as not being controlled or owned by the public servant or entity.

In fulfilling the obligation to disclose these documents to the VAGO, a public servant does not need to comply with the obligations that would otherwise apply in releasing documents (including Cabinet-in-confidence and any other secrecy requirement or restriction on the release of documents imposed by an enactment or rule of law).<sup>112</sup>

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<sup>109</sup> *Egan v Willis* (1998) 195 CLR 424.

<sup>110</sup> A. Twomey, ‘Executive Accountability to the Senate and the NSW Legislative Council’. *Australasian Parliamentary Review*, 23(1), 2008, p. 261.

<sup>111</sup> J. Boughey and G. Weeks ‘Government Accountability’, p. 111. This was also the conclusion of a Senate Committee inquiry on the subject: Senate Finance and Public Administration References Committee, *Independent Arbitration of Public Interest Immunity Claims*. Commonwealth of Australia, 2010.

<sup>112</sup> *Audit Act 1994* (Vic), s 12.

Additionally, the Audit Act has an offence section that makes it an offence to fail to produce documents requested by the VAGO.<sup>113</sup> The construction of the section provides that the offence and penalties can be applied to both a public entity (defined as a body corporate) and to individual public servants.<sup>114</sup>

Clearly, there are differences in the powers available to JICs and VAGO auditors that are justified by the substantive difference in the type of investigations conducted by them. VAGO investigations are narrower in scope and audits do not extend to investigating questions of policy, policy implementation or government malfeasance. Indeed, it can be argued that importing VAGO powers would be an inappropriate expansion of parliamentary power, primarily because VAGO powers, while wider and deeper, are more narrowly focused. Therefore, providing these types of powers to JICs could unduly affect government decision-making. It would allow members of JICs to debate policy decisions as they are made.

Nevertheless, the recent move towards referring to JICs complex inquiries with a focus on identifying and dealing with systemic and individual failure, as seen in the *Inquiry into the handling of child abuse by religious and other non-Government organisations* and the Fiskville inquiry, clearly require changes to the powers of JICs if JICs are to successfully conduct similar inquiries in the future.

The proroguing of Parliament and the JICs for the 2018 Victorian election provides a new opportunity to review the statutory and policy settings that regulate JICs and introduce changes. These could include amendments to the *Parliamentary Committees Act 2003*, to clarify existing powers and to provide new powers to ensure that future inquiries undertaken by JICs are not subjected to the same challenges faced during the Fiskville inquiry.

## CONCLUSION

The Fiskville inquiry, with its focus on document discovery, is the highest profile and most recent example of the challenges that can be faced by JICs. The challenges for JICs undertaking inquiry work is due, in part, to the traditional tension that exists

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<sup>113</sup> *Audit Act 1994* (Vic), s 14.

<sup>114</sup> *Audit Act 1994* (Vic), s 14(1).

between the parliament exercising an oversight and review function over the executive branch and its performance. This function, as exercised by a JIC, forms part of the broader tension in the parliament-executive relationship that is an essential aspect of the separation of powers inherent in a Westminster system.

One possible interpretation of the actions of the Government during the Fiskville inquiry is that they were aimed at deterring investigation of possible executive government failure. If that is correct, the question of whether these actions to avoid oversight were an appropriate exercise of power within the context of the Westminster tradition is important and requires further investigation. Such investigation is beyond the scope of this article.

What can be addressed here is the question of whether the Fiskville inquiry has changed the way that JICs and executive government interact, particularly when the inquiry is into long-term systemic failure or wrongdoing. Will the updates to the Guidelines ensure that a JIC has adequate and timely access to documents that are necessary for it to complete its inquiries?

The answer is somewhat mixed. The December 2017 Guidelines do provide greater clarity and direction for public servants. However, the executive branch remains in control of how documents are, if at all, provided to JICs. It also retains complete control over how it interprets the operation of its own privilege with respect to those documents.

Thus, while recognising that the new Guidelines are a significant improvement on the earlier Guidelines, they do not overcome all the challenges that faced the Fiskville inquiry—an inquiry that subjected the executive government to scrutiny concerning potential policy or operational failure in important matters. Improvements are required to better manage access to documents as JICs carry out their oversight and investigation role. This article has presented some options for further consideration.