

AUSTRALASIAN STUDY OF PARLIAMENT GROUP

Auditor General's opinions on ministerial notifications in Western Australia

Supporting executive accountability, or merely a 'fig leaf'?

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OVERVIEW

A mechanism unique in Australia, whose practical reach is determined by four structural features

Western Australia is the only jurisdiction in which the Auditor General is required by statute to give Parliament an opinion on a ministerial decision to withhold information.

1

Initiation

Engaged only when the Minister elects to notify. Notifications have fallen from an average of 13 a year to fewer than four.

2

Access to material

The Auditor General depends on the Minister to provide the material sought.

3

The assessment

"Reasonable and appropriate" resolves a question still contested in New South Wales about the role of the arbiter and approach to assessing where the public interest lies.

4

Reporting

The opinion is tabled in both Houses, and may then be discussed publicly.

CONTEXT

Access to executive information is essential to oversight, and is a recognised and constant source of tension

PARLIAMENT

Access to executive information is central to representative and responsible government, and is secured by the power to require the production of information.

THE EXECUTIVE

Ministers may withhold information on public interest immunity grounds, and have at times invoked parliamentary privilege to the same end.

Disputes over the validity of a claim are political. Courts have declined the balancing exercise as inappropriate to the judicial function, and parliaments have developed their own means of adjudication.

TWO APPROACHES

New South Wales and Western Australia differ at four points in the process

STAGE	NEW SOUTH WALES	WESTERN AUSTRALIA	MORE OPEN
Initiation	Any member, in writing to the Clerk	The Minister, by tabling a section 82 notice	NSW
Access to material	The Clerk releases the document to the arbiter	Depends on the Minister providing the material	NSW
The assessment	Legal assessment, or a balance of public interests? Unresolved	Whether the decision was "reasonable and appropriate"	WA
Reporting	To members; published only by order of the House	Tabled in both Houses	WA

In each case the adjudicator is independent of the executive and the opinion is advisory. Resolution of the dispute remains with Parliament.

INITIATION

The Western Australian mechanism is engaged only by the Minister, and notifications have declined

13

notices a year on average
2006 to 2020

Government without control of both Houses

<4

notices a year on average
since 2020

The period of bicameral control

No consequence prescribed

The provisions are silent on a failure to notify. EFOC observed in 2016 that the inability to compel or penalise reduced effectiveness.

Justiciability

Walker SC considered it "well arguable" that the obligation was justiciable. Casimaty suggests the question lies with political accountability.

Awareness

EFOC found a significant gap in ministerial knowledge of the obligation, and made recommendations to address it.

THE ASSESSMENT

The WA statutory wording is broad; the approach in New South Wales is contested

NEW SOUTH WALES

A question left open

Twomey: the arbiter should assess the claim at law. The balancing exercise belongs to Parliament.

The former Clerk: arbiters are well qualified to balance, as a trial judge must.

WESTERN AUSTRALIA

A question answered by statute

The opinion is on whether the decision was "reasonable and appropriate". Includes, but is not restricted to, legal principles.

Walker SC: words of that kind are loaded with contestable values and debatable balances.

SUITED TO THE TASK

Auditors General are the oldest of the integrity institutions, with a long practice of reporting responsibly where sensitive information is involved.

THE CONTRARY VIEW

Placing the office within the tension risks politicising it.

REPORTING THE CONCLUSION

The Western Australian opinion is tabled, and may then be discussed publicly

NEW SOUTH WALES

- 1 Lodged with the Clerk
- 2 Available to Legislative Council members
- 3 Published only by order of the House

If the government holds the numbers, an adverse finding need not become public.

WESTERN AUSTRALIA

- 1 Draft provided to the Minister for procedural fairness
- 2 Tabled in both Houses
- 3 Members may refer to it in debate; the Auditor General may discuss it publicly

The information withheld is generally not disclosed. What tabling secures is public discussion of the refusal.

CASE STUDY

Griffin Coal: the Minister submitted to the process, then declined to provide the material sought

Questions without notice in the Legislative Council concerning the arrangements for, and cost of, legal services provided by Ashurst to the State Solicitor's Office.



CASE STUDY

A claim of privilege over the evidence prevented an opinion being formed on part of the matter

2

disclaimers of opinion

Without the retainer, the Auditor General could not determine whether its terms could be disclosed.

1

adverse opinion

On costs, the information could have been disclosed without revealing the nature of the advice.

1 day

interview to disclosure

The report did not produce the information. A media interview on 14 August was followed by disclosure on 15 August.

"...access to sensitive government documents by my auditors in fulfilling their duties does not equal public disclosure."

Auditor General for Western Australia, Annual Report

THE WIDER CONTEXT

The same year saw a record number of disclaimers and a peak in non-provision at estimates

1

Five disclaimers of opinion

The highest number the Auditor General has issued in one year.

2

Non-provision at Budget Estimates

A peak in instances of information not being provided to the Legislative Council.

3

Bicameral control

The last complete financial year in which the government held a majority in both Houses.

4

Amendments not yet proclaimed

The 2022 provisions on waiver of privilege remain uncommenced.

The mechanism was least used at the point where the political check behind it was weakest.

CONCLUSION

Structural safeguards alone cannot ensure accountability.

There is scope to improve the Western Australian mechanism by reference to New South Wales. But even a mechanism enshrined in statute can be frustrated, and its effectiveness depends on a willingness to engage with the process in good faith.

Without that commitment, it risks becoming symbolic rather than substantive.