AUDITOR GENERAL AMENDMENT BILL 2022

Second Reading

Resumed from 15 November.

HON DR STEVE THOMAS (South West — Leader of the Opposition) [2.17 pm]: I indicate that I am the lead speaker for the opposition on this bill. Before everybody races out of the chamber, the debate will be one for the economic tragics, so I do not mind if members decide to excuse themselves!

Hon Sue Ellery: Unless you are required to stay in the chamber!

Hon Dr STEVE THOMAS: Apart from those on the roster for the Labor Party Whip, of course. Members should not assume that they are excused from that.

I will start with an apology to Hansard, because I will be quoting a fair degree of technical information. This is a highly technical bill. I state at the outset that the opposition will do its very best to support the bill and the intent of the government, but we will obviously be raising a number of questions and wondering whether there might be some improvement to the bill over time. There are a number of issues to go through in great detail.

For those members who have not been exposed significantly to the Auditor General, their function is critically important. They are an integral part of the accountability process of government. It should be noted, honourable members, that the Auditor General is an officer of the Parliament, not an officer of the government. The Auditor General serves the Parliament and plays a critical role, being at arm's length from executive government and a checker, if you will, on executive government, so much so that the Auditor General Act, again, I apologise to Hansard because I will be passing a great deal of information to reporters eventually, says —

> **7. Status and independence of Auditor General**
>
> (1) The Auditor General is an independent officer of Parliament.

That is critically important —

> (2) The functions of the Auditor General are as specified in this Act and other written laws and there are no implied functions arising from the Auditor General being an independent officer of Parliament.
>
> (3) The powers of Parliament to act in relation to the Auditor General are as specified in or applying under this Act and other written laws and there are no implied powers of Parliament arising from the Auditor General being an independent officer of Parliament.
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> (4) In subsection (3) —
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> ***Parliament*** includes —
>
> (a) each House of Parliament; and
>
> (b) the members of each House of Parliament; and
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> (c) the committees of each House of Parliament and joint committees of both Houses of Parliament.
>
> (5) The Auditor General is authorised and required to act independently in relation to the performance of the functions of the Auditor General and, subject to this Act and other written laws, has complete discretion in the performance of those functions.

I think the next subsection is particularly important —

> (6) In particular, the Auditor General is not subject to direction from anyone in relation to —
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> (a) whether or not a particular audit is to be conducted; or
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> (b) the way in which a particular audit is to be conducted; or
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> (c) whether or not a particular report is to be made; or
>
> (d) what is to be included in a particular report; or
>
> (e) the priority to be given to any particular matter.

I would say that section 7 of the existing Auditor General Act grants an enormous amount of power to the Auditor General, and it is absolutely critical that it does so. The Auditor General fulfils that role on behalf of every member present here.

I know that a few of the members here partake of the Auditor General's briefings. I am a bit of a tragic for them, myself. I think they are very useful. It will probably come as no surprise to the minister managing the bill that it is not unknown for me to put out press releases based on the advice of the Auditor General, and I suspect that, in turn,

Labor members—perhaps the minister herself—have done the same thing in opposition. The Auditor General is always a good tool for opposition and a necessary check, shall I say, for government.

Hon Darren West: It's a strange hobby, member!

Hon Dr STEVE THOMAS: I have a few strange hobbies, but let us not go there; I only have an hour! I would not mind going back to unlimited time frames for the debate on this bill as it is really important. I could spend a lot of time talking about the actions of the Auditor General. I spent many years engaged in it. From 2005 to 2008, I was a member of the Public Accounts Committee of the place that shall not be named and I had a very solid working relationship with the Auditor General at the time, I remember, going all the way back to Des Pearson, who was a very good Auditor General.

I know governments get a little bit frustrated with the work of Auditors General, but the reality is that they are critical. As the act says, the Auditor General is an independent officer of the Parliament. The Auditor General responds to the needs of the Parliament, but the Parliament does not have carte blanche to direct the work of the Auditor General. The Parliament can suggest investigations, and there is a lot of interaction between the Auditor General, the Public Accounts Committee and the Standing Committee on Estimates and Financial Operations. Those two committees combine every now and again to form the Joint Standing Committee on Audit, which is effectively all the members of the Public Accounts Committee and all the members of the estimates committee of this place. It is not a frequent or regular get-together. In my early days, that committee was involved in the merging of the Government Finance Statistics and the Generally Accepted Accounting Principles, the two accounting systems for government. It was a very long and technical debate, with GFS on one side and GAAP on the other. It was a complicated issue. The work of the joint audit committee is occasionally very important, but I have to say it is probably not the most exciting of the things that come through Parliament.

I am not going to have time in my speech on the second reading today to go through all the details that we need to. It is my intent that we will spend a reasonable amount of time in the committee stage trying to pick through the impacts of this bill. The intent of the bill is to formalise the access arrangements that the Auditor General will have to obtain information. From that perspective, the intent of the bill is good. The question will be: is it the best way to deliver it, and how does it compare to what currently exists? We will spend a bit of time on that question.

Why does the bill exist? The bill exists because of a number of principles that are loose, let us say, in the current legislation, particularly with cabinet-in-confidence documents, legally privileged documents and, rather more vaguely, community interest documents. In one reading of the existing act, access to all those documents is automatically granted, but in practice, as I will demonstrate, it is not. The intent of the bill, as I understand it, is to formalise that process. In government and in politics, providing that formality is always a double-edged sword. It can make some things better, but not always. The question is whether having the freedom to make it less formal provides a better outcome than the freedom to formalise it.

My wife tells me frequently that I like things in black and white, and that is true. That probably makes me not the easiest person in the world to live with, but we will not go there for the time being. I am not going to put that to a vote.

Hon Sue Ellery: My husband would say the same!

Hon Dr STEVE THOMAS: Yes. Hon Tjorn Sibma had to share a room with me for four years. He could probably give some stories.

Hon Tjorn Sibma: It was like a marriage!

Hon Dr STEVE THOMAS: I tend to prefer to be relatively prescriptive. I think that reduces the arguments, though not necessarily always. That has been my modus operandi for most of my life, and I propose that we continue down that path. It does, however, pose some questions and some risks, some of which I will cover as I go through my speech.

As indicated in the minister's second reading speech, part of the genesis for this legislation was the Joint Standing Committee on Audit's seventh report from 2016, *Review of the operation and effectiveness of the Auditor General Act 2006*. Hon Ken Travers, MLC, was the chair of that committee, and Hon Dr Kim Hames, MLA, was the deputy chair. This was a review, from the latter stages of the previous government, of the functions of the Auditor General Act. There have been question marks about whether the amount of information being sought is well founded and well distributed. I will not read the entire report, as members can find it online, but I will pull out some of the more important bits from the executive summary.

Point 1 of the executive summary says —

> The Auditor General serves an important role in Western Australia.

I think we all agree on that on. Notably, the second sentence is —

> The Auditor General is an independent officer of the Parliament and responsible for scrutinising the financial accounts of the public sector and related entities as well as assessing the efficiency and effectiveness of public sector activities.

I think it is critical that in the very first paragraph the committee acknowledges the independence of the Auditor General. I will now jump to some of the findings and recommendations of the report. Finding 2 states —

> The Committee finds that there is a need for the *Auditor General Act 2006* to continue.

I would have thought that if it did not do so it would be time to find a new committee!

Just before I go on, there were a few luminaries on that committee and I should probably mention them. The committee comprised luminaries from both sides: Hon Peter Katsambanis, MLC; Hon Alanna Clohesy, MLC, who has gone on to great heights since that time; Mr Ben Wyatt, MLA; Mr Matt Taylor, MLA; Hon Martin Aldridge, MLC; Mr Dean Nalder, MLA; Hon Helen Morton, MLC; Hon Rick Mazza, MLC; Mr Bill Johnston, MLA; Mrs Glenys Godfrey, MLA; Hon Liz Behjat, MLC; and the honourable—sorry; not honourable—Mr Sean L'Estrange, MLA. He may have become honourable afterwards as a minister, but I am not entirely sure. It was a broad group that comprised Labor, Liberal and National Party members and a Shooters, Fishers and Farmers Party member in Hon Rick Mazza.

Recommendation 1 of the committee was —

> The Committee recommends that the Treasurer amend the *Auditor General Act 2006* to require the Treasurer's recommended Auditor General appointee have the majority support of the Legislative Assembly Public Accounts Committee and the Legislative Council Standing Committee on Estimates and Financial Operations.

It will be interesting to see where that recommendation ended up. I will do this in order and go to finding 4, which reads —

> The Committee finds that the Auditor General should have access to all information necessary to conduct an audit, including access to Cabinet documents and documents subject to legal professional privilege.

I will come back to that in some detail in a minute. That led to recommendation 2, which reads —

> The Committee recommends that the Treasurer urgently amend the *Auditor General Act 2006* to clearly provide the Auditor General with the power to compel a person to provide any information required, including documents subject to legal professional privilege, Cabinet confidentiality or any other public interest immunity.

Recommendation 3 states —

> The Committee recommends that, pending legislative amendments contained in Recommendation 2, the current administrative arrangements that apply to Cabinet documents be streamlined.

I do not know whether that was done; I suspect that we have been trying to get to this point, with multiple governments being involved. That is the critical part of the recommendation because that is the bit that largely deals with the most important parts of the bill before the house. There are other components, but that is largely the driving force that pushes it forward. The critical part, as I read it, in relation to this bill is the urgent amendment—let us not quibble over the definition of "urgent" and the period 2016 to 2022—to the act to clearly provide, and I am interested that the word "clearly" is used, the Auditor General with the power to compel a person to provide that level of information. That was the intent of the committee, and that is the intent of the bill before the house. That probably means that we need to have some discussion about what precisely is meant by those particular documents—cabinet confidentiality, legal professional privilege and the public interest component. Those definitions will come a bit later when we work out the definitions of "protected materials" and "restricted materials".

I would like to start by very much focusing on the definition of "cabinet-in-confidence". Members might ask why I would do that. We will come to some debate during the process of the bill as to whether cabinet-in-confidence is supported in the existing legislation or whether it is not supported in terms of automatic access by the Auditor General. Let us talk about what "cabinet confidentiality" means. One of the critical arguments about the bill is the definition of "cabinet-in-confidence". What does that mean and what access should be granted? I note that on the Auditor General website, there is a reference to what "cabinet-in-confidence" means. This document is appendix 1 from report 18, *Opinions on ministerial notification.* Some of this information is worth knowing. Appendix 1 states —

> Cabinet confidentiality is a long established principle that aims to protect the deliberations and decisions of Cabinet. The practice of classifying Cabinet information in confidence comes from the Westminster system in the United Kingdom and does not stem from any legislation. It allows Cabinet Ministers to freely debate policies and agency proposals as part of government decision-making.

I ask members to take note of that in particular—it does not stem from legislation and it does not stem from the Constitution; it is not a written law. That makes it an interesting thing to deal with in the making of written laws. This document from the Office of the Auditor General continues —

> The classification of information as Cabinet-in-confidence … is not simple. While it is important that Cabinet information is kept in confidence; the principles of public interest, governmental transparency and parliamentary access to information are also vital.
>
> There is limited guidance available for agencies for determining if information is subject to CIC. The Department of the Premier and Cabinet … is the Cabinet Secretariat and provides guidance to Western Australian agencies on Cabinet processes. The DPC Cabinet Handbook, designed to assist officers to understand the Cabinet process and prepare papers for submission to Cabinet, says:
>
> The confidentiality of Cabinet documents, discussions and decisions is a long established principle and has been regarded as essential for the maintenance of Cabinet collective responsibility.
>
> and that
>
> …Cabinet records includes Cabinet agendas, submissions, attachments to submissions, comment sheets and decisions.
>
> The DPC Cabinet Handbook does not provide guidance on whether CIC applies to documents prepared to help inform submissions.

There are obviously some variations in other jurisdictions, which we will come to. The document continues —

> The Commonwealth Cabinet Handbook and the New South Wales Department of Premier and Cabinet paper on cabinet conventions contain similar descriptions in their focus on Cabinet minutes, agendas, programmes, submissions and correspondence.

There is reference to the Western Australian Freedom of Information Act 1992 as well. The Office of the Auditor General recognises the difficulty with the definition of "cabinet-in-confidence" and that makes it a difficult thing to start bringing legislation to. Members might ask why that is a particularly interesting component. It is because of section 34 of the Auditor General Act 2006, which is found at page 19. It is headed "Power to obtain information" and we will be referencing this quite a lot during this debate, which I know everybody is riveted by. Subsection (1) reads —

> For the purpose of an audit the Auditor General may, by written notice, direct a person to do all or any of the following —
>
> (a) to provide the Auditor General with any information or explanation that the Auditor General requires;
>
> (b) to attend and give evidence before the Auditor General or an authorised person;
>
> (c) to produce to the Auditor General any documents in the custody or under the control of the person.

Subsection (2) reads —

> The Auditor General may direct that —
>
> (a) the information, explanation or answers to questions be given either orally or in writing (as the Auditor General requires);
>
> (b) the information, explanation or answers to questions be verified or given on oath or affirmation that the information or evidence the person will give will be true.

There are the sections that allow the Auditor General to authorise a person to take that information. Read on its own, section 34 would appear to indicate that, effectively, the Auditor General has the power to seek any information they want because it is not restricted to anything in section 34 of the act; cabinet-in-confidence, community interest and legal professional privilege are not referred to in that section.

Section 35 of the existing act deals with access to accounts, information, money and property, which further enhances the power of the Auditor General. Section 35(2) states —

> For the purpose of an audit the Auditor General, or an authorised person, is entitled to full and free access at all reasonable times to —
>
> (a) all accounts, information, documents, systems and records that the Auditor General considers to be relevant to the audit; or
>
> (b) public money, other money or statutory authority money; or
>
> (c) public property or other property, that is or are in the possession of any person and the Auditor General, or an authorised person, may make copies of or take extracts from any of the accounts, information, documents and records.

That is the current section 35 of the existing act. It indicates that the Auditor General has an immensely powerful position if that is to be read without reference effectively to the documents that have traditionally been restricted.

Section 36 of the existing act is titled "Duty to give information overrides other duties and rights". Subsection (1) says that a person is not excused from giving information if it might incriminate them, which is fine. Subsection (2), though, is the interesting one. It states —

> (2) A person must give information or an explanation, answer a question or produce a document as required under section 34 despite any duty of secrecy or confidentiality that the person has under another written law, and the person does not commit an offence under another written law by doing so.

As we read that particular part of the act, in theory it suggests that effectively the Auditor General has access to any information despite any duty of secrecy or confidentiality. I note that the current wording of section 36(2) of the existing Auditor General Act says that "the person has under another written law". One of the issues, of course, is that cabinet-in-confidence matters and community interest do not occur under a written law. If there is an argument to be had anywhere that the bill before the house will add to the powers of the Auditor General, I think it is in those rounds that the definition of whether the Auditor General has access is further defined. I will probably run out of time, but I will come back to some alternative views on that. As I have said in various briefings on this, that part of existing section 36(2)—that this power exists despite secrecy or confidentiality that the person has under another written law—is quite pivotal to the debate before the house.

If we wanted to look at that in more detail, this was referenced in the note that the Office of the Auditor General itself put out in referencing cabinet processes, in particular the *Cabinet handbook*. It is a joy to us all that the *Cabinet handbook* is also available as a public document for those who are interested in chasing it up and reading it. My apologies again to Hansard; I will make sure that I leave copies of this so it makes it easier. But I think it is important for us to know exactly what we are debating. This is an extract of the *Cabinet handbook*, which I downloaded last week, so I do not know whether it has changed in the meantime, but I suspect it is as close to current as I could possibly find. I want to look at section 3, "Confidentiality and security". This might explain a little about cabinet documents. It states —

> The confidentiality of Cabinet documents, discussions and decisions is a long established principle and has been regarded as essential for the maintenance of Cabinet collective responsibility. However, this principle needs to be tempered by the requirement for prior advice and consultation, and to disseminate Cabinet decisions and background information to ensure effective implementation. To fulfil these aims, the following guidelines have been adopted: —

It is in dot point form —

- Access to all Cabinet documents should be guided by the 'need to know' principle. Access should only be granted if it is required for an officer to perform his/her duties.
- Ministers have primary responsibility for maintaining satisfactory security systems for Cabinet documents in their areas of responsibility, including the extent to which others have access to them. Departments and Ministers' offices requiring information in relation to particular Cabinet submissions should obtain approval from the appropriate Minister's office, which may ask Cabinet Services to supply the information.
- All Cabinet documents are stamped 'Not to be copied' to reinforce confidentiality. The Minister's office should contact Cabinet Services to obtain additional copies if required.
- While all Cabinet documents are confidential, care should be taken with documents not yet submitted to Cabinet. The distribution of Cabinet submissions for comment … should be on the understanding that the documents are not copied and are returned to the source. Additional copies of a submission may be obtained from Cabinet Services.

I probably do not need to read the rest of that in. The next dot point states that the faxing and emailing of cabinet documents is discouraged, but it may have to be done. The next dot point says that officers who have received copies of cabinet documents must observe the confidentiality of that information—that should be obvious. The next dot point states —

- Agencies should ensure that any documents considered confidential by the Minister or CEO are not placed on an open file.

All those points are reasonable. There are some specific comments, though, about the operations of the Auditor General and their access in the *Cabinet handbook*, and so I will take the opportunity to tell members what currently exists there. It is under the heading, "Protocols for Auditor General access", which is very pertinent in the debate before the house today. It states —

> The Auditor General will write to the Director General, DPC specifying the Cabinet records required and outlining the reasons for his/her request.
>
> The Director General will write to the Minister responsible for the required records outlining the Auditor General's request and informing the Minister that s/he must obtain a Cabinet decision on whether Cabinet agrees to waive privilege and make the records available.
>
> The Minister will prepare an item for Cabinet's consideration during 'informals' —

It is in inverted commas; I do not think Hansard can pick that up —

> outlining the Auditor General's request and providing a recommendation on whether Cabinet should allow the Auditor General to view the documents.
>
> The Director General will inform the Auditor General of Cabinet's decision and, where Cabinet has agreed to waive privilege and make the records available, provide contact details for a DPC officer to arrange Auditor General access to the documents.
>
> The Auditor General and/or his/her staff may make notes from the documents, but may not take any copies.
>
> The Auditor General will also direct any requests for access to Cabinet documents from previous governments in writing to the Director General, DPC. The request will outline the date and subject of the submission/s and decision/s and detail the reasons why access is required. The Director General will then refer the request to the leader of the party that created the record and advise the Auditor General of the leader's decision.

That is the end of the "Protocols for Auditor General access" section. When we get to the committee stage, we will ask about previous governments and how the new bill and the proposals to amend the act will impact on that, but we do not need to do that at this stage. It seems that the minister obviously has some very good staff who are listening to this. If that is not the most up-to-date version of the *Cabinet handbook* —

Hon Sue Ellery: By interjection, honourable member, it is.

Hon Dr STEVE THOMAS: I guess they were probably reading it with me, which is great. Thank you very much. It will reinforce my point that section 34 of the existing act seems to read that the Auditor General has the power, without exception, to obtain information, and section 35 reinforces that, as I read in earlier. Therefore, sections 34 and 35 appear to grant unlimited, unrestricted access to the Auditor General, but in practice it does not. I hope members will therefore accept, based on the *Cabinet handbook*, that irrespective of their personal reading of the Auditor General Act 2006, it has been the practice—I also expect the practice of multiple governments, and I have never had the joy of being in cabinet, so I cannot tell members —

Hon Sue Ellery: That is correct.

Hon Dr STEVE THOMAS: Yes, so I suspect multiple governments have had the same advice. As I said at the start of my address, most governments are always a bit frightened of an Auditor General—it does not matter which side of politics they are on—so they are always a bit cautious about understanding that. Governments of both persuasions have run using the set of guidelines in the *Cabinet handbook*. I suspect that the reason this can be done is that cabinet-in-confidence has never been determined in legislation, and that becomes one of the issues. For members who are interested, I looked for references to the term "cabinet-in-confidence" in other legislation. It is incredibly limited. I was keen to test what level of legislative support there is for the term. The Freedom of Information Act 1992 mentions it in schedule 1, clause 1, "Cabinet and Executive Council, deliberations etc. of" —

> (1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it —
>
> (a) is an agenda, minute or other record of the deliberations or decisions of an Executive body; or
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> (b) contains policy options or recommendations prepared for possible submission to an Executive body; or
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> (c) is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy …
>
> (d) was prepared to brief a Minister in relation to matters —
>
> (i) prepared for possible submission to an Executive body; or
>
> (ii) the subject of consultation among Ministers relating to the making of a Government decision …
>
> (e) is a draft of a proposed enactment; or

(f) is an extract from or a copy of, or of part of, matter referred to in any of paragraphs (a) to (e).

Although the Freedom of Information Act has a definition, it is not called cabinet-in-confidence specifically. It was as close a definition that I could come to in my research on what cabinet-in-confidence means in the Auditor General Amendment Bill. Interestingly, in the Evidence Act 1906, section 20K(3)(d)(iii) refers to the principle of cabinet confidentiality. Again, that is not exactly the same as cabinet-in-confidence, but it is a reference to something along similar lines. The only other reference I found to cabinet-in-confidence was in the National Gas Access (WA) Act 2009 in which it refers to having access to information. Section 42(9) states —

> This section does not require a person to —
>
> (a) provide information that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet of the Commonwealth or of a State or a Territory; or
>
> (b) produce a document prepared for the purposes of a meeting of the Cabinet or a committee of the Cabinet …
>
> (c) provide information, or produce a document, that would disclose the deliberations of the Cabinet …

That was the only other reference I found in Western Australian legislation that effectively describes what cabinet-in-confidence means. This comes back to the definition, which is the critical part of the debate before the house.

There are many other important components of the bill to discuss. I may seem focused and fixated on this, but it is because it is such a critical component of the bill. That is not to say that there are no other opinions on whether the changes before the house improve access to cabinet-in-confidence, community interest or legal professional privilege documents. There are alternative opinions.

Members are probably not aware that some research has been done in a number of areas. Consultation was done on the draft of the bill, and we will be asking about that in a little more detail. With regard to consultation, the Leader of the House said in her second reading speech —

> … the government consulted with key stakeholders, including the Office of the Auditor General, the Office of the Information Commissioner, the Corruption and Crime Commission, the Ombudsman … the Public Sector Commission, the State Records Office, the Solicitor-General and the Presiding Officers of the Parliament. All feedback was taken into account in the development of this bill.

We might work out the level of consultation once we get to the committee stage of the bill.

Members may not be aware that the Office of the Auditor General commissioned some legal advice on the bill before the house today. One of the issues with legal advice is that a person can generally purchase legal advice to tell them anything they want. Heaven forbid that I should cast aspersions upon the legal profession, but much is the same in my own profession. Different vets in a room will often provide different diagnoses. I suspect that many members of the legal profession would have differing opinions on parts of law. Much will depend on whether the person is what I understand to be commonly referred to as a black-letter lawyer; that is, what is in black and white is absolutely legal tenure, or whether they move towards interpretation in their deliberations.

I have been informed by the Standing Committee on Estimates and Financial Operations that the document that I am going to raise is a public document. I was apprised by the advisory officer to the estimates and financial operations committee that the committee has made public the legal opinion of Mr C. Shanahan, Senior Counsel, on the powers to obtain information under the Auditor General Act.

Hon Sue Ellery: Honourable member, would you take an interjection?

Hon Dr STEVE THOMAS: Certainly.

Hon Sue Ellery: Did you ask for it or were you provided with it?

Hon Dr STEVE THOMAS: I was provided with it. I certainly made sure of and asked whether it was a public document before I decided to use it.

Hon Sue Ellery: Honourable member, again, by interjection, if you will take it, are you aware if anybody of the committee advised anybody else?

Hon Dr STEVE THOMAS: In terms of this document, no, I am not aware. I checked to make sure that it was made a public document. Apparently it was made a public document last week. If the member likes, I am happy to table the advice from the committee adviser —

Hon Sue Ellery: If you are able to. I do not know what you can and cannot do.

Hon Dr STEVE THOMAS: That is a good question. I might seek advice from the President to see whether tabling advice from a committee staff member is appropriate. I am not entirely sure. Perhaps the President might want to come back to me with that one. I do not want to get the staff member in trouble if it is inappropriate, that is all. If it is appropriate that the document be tabled, I am happy to table it. If the President wants to seek advice on that and come back to me, I will potentially table it at the end. I will get advice, Leader of the House, and if it is deemed appropriate and within the rules, I will table it. I remember when I potentially pushed the boundaries last year about the parliamentary privilege of committees. I would hate to have to write another apologetic letter to the President. The first time might be deemed an accident, but the second time is potentially a trend. Far be it for me to cause mischief.

Hon Tjorn Sibma: It is not a Thursday.

Hon Dr STEVE THOMAS: True. If it were a Thursday, it might be different. I will put that document to one side for the minute and will seek some advice on that.

The Auditor General commissioned a legal opinion on the review of the Auditor General Act. The second point of the opinion states —

> I am briefed by letter dated 25 March 2022 to advise the Auditor General on her powers to obtain information in the context of both: (i) an audit under the *Auditor General Act 2006* … as well as (ii) s 37(1) of the AG Act (being information the subject of a notice given under s 82 of the *Financial Management Act 2006* (WA)…

That was the intent to which Mr C.P. Shanahan, Senior Counsel, took on the role. I do not propose to read in massive amounts of this report but I think some things are particularly pertinent. There is a background history of the role of the Auditor General and the legislative history. We might jump to some of the more pertinent parts of the act.

From the outset, I should say that I personally take the view that the advice of the State Solicitor's Office is probably to be weighted higher in this debate than the advice received by Mr Shanahan, Senior Counsel. That is not just because I think the State Solicitor's Office's is correct, which I do. I think so because of those things I have read out already as part of this debate, in particular the section from the cabinet handbook that says cabinet-in-confidence exists and is maintained and that cabinet handbook is still being used today. Mr Shanahan, Senior Counsel, takes an opposing view on that but it is very difficult to argue that the Auditor General Act, as it currently exists, empowers the Auditor General to access all documents, including cabinet-in-confidence, community interest and legal professional privilege when the current government and, I presume the previous government, both operated with a handbook that says it does not. From my perspective, it is very difficult to make that jump. I have not interviewed the State Solicitor's Office to work out how it came to that conclusion but I accept that it came to that conclusion.

In relation to the counsel's opinion, some of which I will use further in debate, I think paragraph 59 was interesting. It reads —

> I have been unable to locate any court decision regarding the nature or effect of s 35 of the AG Act.

Members would remember that section 35 of the Auditor General's Act is that which we have been discussing, "Access to accounts, information, money and property". I read out this part before from subsection (2) —

> For the purpose of an audit the Auditor General, or an authorised person, is entitled to full and free access …

Mr Shanahan, SC, takes a great deal of interest in that particular section of the act. He makes repeated reference to, in his view, the power that that section grants, as he does with section 34. He briefly acknowledges the State Solicitor's Office's guidelines for contemporary practice. The State Solicitor's Office's guidelines, as I understand it—the minister can correct me—pretty much match the cabinet handbook on the operations of cabinet-in-confidence. My reading of the two is that they are very close.

Hon Sue Ellery: We think so, but the honourable member might want to ask me that question again in committee.

Hon Dr STEVE THOMAS: Yes, we might come back to that when we get into it in more detail. My memory and reading of it is that they effectively run the same argument; that is, that cabinet-in-confidence does exist. Mr Shanahan, Senior Counsel, is very focused on sections 34 and 35 of the existing act. Under section 3.3, "Public sector practice: Significance of section 35" he refers to the current guidelines. It is under section 6.2 and 6.3 of the current State Solicitor's Office's guidelines on the subject, which comes out of this report. I quote —

> **6.2 Power to obtain information**
>
> Under s 34 of the AG Act, the Auditor General may, by written notice, direct a person to provide any information or explanation, attend and give evidence or produce any documents in their custody or control. The Auditor General may exercise any of these powers for the purpose of forming an opinion under s 24 ...

Under section 6.3, it reads —

> Although the Auditor General has an express statutory power in section 34 of the AG Act to obtain information, this power does not extend to obtaining information that is subject to legal professional privilege or cabinet in confidence information.

Ms Shanahan, SC, confirms that the State Solicitor's Office takes the position, as I mentioned before, that legal professional privilege and cabinet-in-confidence do form an exemption. The report continues —

> Although s 36(2) states that a person must produce a document or answer a question despite *"any duty of secrecy or confidentiality the person has under another written law"*.

Which we discussed before. The report continues to state that legal profession privilege and public interest —

> … are common law doctrines and do not fall within the definition of *"written law"* under s 5 of the *Interpretation Act 1984* … Section 36(2) therefore does not exclude their operation. Otherwise, the Auditor General has, effectively, unfettered access to information in the possession of government departments and agencies to permit the examination of the process of reasoning undertaken by a Minister. The Auditor General will use those powers for the purposes of a report under s 24 of the AG Act.

It therefore appears to me that the State Solicitor's Office has quite plainly said that those two exclusions exist; in particular, public interest and cabinet-in-confidence. Legal professional privilege is dealt with in a slightly different way. I quote —

> The … Guidelines provide the basis for contemporary public sector practice in Western Australia, they are based on a construction of s 36(2) as preserving the right in recipients of s 34 notices to rely upon common law obligations (not written laws)—such as legal professional privilege … and public interest immunity …

The State Solicitor's Office basically takes all three sections as being exempt from the law as it applies in sections 34 and 35 of the Auditor General Act.

Hon Sue Ellery: Honourable member, it also says they must be read together.

Hon Dr STEVE THOMAS: Yes, and that makes sense to me. This becomes a difficult part of the opinion that Mr Shanahan has provided because he takes the view that the legislation that currently exists provides for access and should be read independently of any of those other components.

Wow; this is why I wanted unlimited time. It is a really important bill.

Hon Sue Ellery: Honourable member, we can take a generous view of the clause 1 debate. I am relaxed about doing that.

Hon Dr STEVE THOMAS: Yes. I am not deliberately trying to extend the debate just for the joy of extending the debate. I am passionate about the issue. I will take the little bit of time I have left and the minister might not be aware of this point.

Again, I have sought the opinion of the committee which, as I understand it, released a letter today from the Office of the Auditor General to the Standing Committee on Estimates and Financial Operations. I will seek to table it so that the minister can have a copy of it. I have been informed that as of today, it is also a public document. It is interesting because —

Hon Sue Ellery: Can I clarify that it was provided to you?

Hon Dr STEVE THOMAS: Yes.

Hon Sue Ellery: Are you aware that the committee provided it to anybody else?

Hon Dr STEVE THOMAS: No, I am not aware. It was provided to me, and I did check to see whether it was a public document. In the same way that we might seek a legal opinion from Mr Shanahan, Senior Counsel, I will find out whether I can table the document confirming that the committee has said it is a public document. I will leave those there for later.

The DEPUTY PRESIDENT: Honourable member, do you want to deal with that now? Your time is escaping you. I am advised that it would be preferable that if there is a relevant extract from the email from the committee that it be read in, as opposed to being tabled, so as to protect the personal contact information, amongst other things, of the staff involved.

Hon Dr STEVE THOMAS: Thank you, Deputy President. Of course, that does mean that everybody has to take me at my word.

Point of Order

Hon SUE ELLERY: I am conscious of the time. I do not want to hold it up now. However, I find myself in an extraordinary position where I am being told that the committee has released certain information and has taken it

deliberately to the opposition, but not to the minister with carriage of the bill or, as far as I am advised—I went and checked—to the government in any other form. There was another minister dealing with this in the other house, for example, so I went to check. Has anybody been communicated with, by direct provision, of the advice that the Auditor General commissioned? This is the first time I am hearing about this subsequent letter released today, directly to a member of the opposition and not to the government. I find myself in an extraordinary position. In more than 20 years in the Parliament, I have not seen something like this. Maybe there is nothing untoward here and communication is en route or something, but it is not being provided to me.

The DEPUTY PRESIDENT: I am coming up to speed on this matter, as I have not been in the chair for the entire period of the debate. I understand the point. I am not sure exactly what the point of order is. However, if I can say this, any member is entitled to seek leave to table a document. It is up to the chamber whether or not leave is granted. I understand that the only caution that is given in this regard is that if the Leader of the Opposition does seek to table a document, which I understand is an email between him and a member of staff from the committee, is that that email may disclose contact information for the staff. The Leader of the Opposition might have regard to that if he seeks that course of action.

Debate Resumed

Hon Dr STEVE THOMAS: I can read it in, but it will not mean much without it being visual. I might seek further advice on whether a redacted copy might, at some point during the committee stage of the bill, be sought to be tabled. I will read this in —

> The Committee made public the legal opinion by Mr C Shanahan SC on the power to obtain information under the *Auditor General Act 2006.* Unfortunately, the document is too large to attach to this email, so please advise if you require a hard copy.

Sorry, I have been dropping things today. The second one, which is from today at 1.42 pm, reads —

> Yes. I can confirm the letter you have referenced is a public document.

I know that is a bit meaningless and I will seek further advice on how far I can go with that. I just want to be a little bit careful. The minister will be pleased to know that I read the letter from the Auditor General as very supportive of the legislation before the house. That might make it somewhat easier. In relation to the access powers, I might just read in the whole thing—I know I am going to run out of time. The Auditor General wrote this —

> The bill contains a range of provisions based on several key principles including the Auditor General's express right to access materials that are subject to Cabinet confidentiality, other public interest immunity claims and legal professional privilege for the purposes of performing statutory audit functions. Rights of access to such materials will no longer require Cabinet or Ministerial endorsement, as has been the custom in Western Australia.

I think that reinforces what we have said in the debate so far. It continues —

> Nor will the provision of sensitive materials waive any privileges or immunities attached to them, which allays a common concern across the State sector.
>
> The recognition of these issues as proposed in the Bill, all appear to be very positive developments that should provide clarity to the sector and thereby give effect to the original intent of the *Auditor General Act 2006* to entitle the Auditor General to full and free access at all reasonable times to information relating to an audit. I trust these provisions will have a positive impact on our audit efficiency, and particularly where it relates to legal advice, our audit effectiveness. A smooth transition during implementation is critical to avoid any undue impact on our ongoing annual program of financial and performance audits. Therefore, it is important that our Office—and the more than 300 entities we audit—promptly acquire an agreed understanding of the OAG's rights of access.

The Auditor General's letter, which we will get to in committee stage, also asks for a few bits of clarification. Minister, there is certainly no condemnation of the bill in the letter. I think I can comfortably provide the minister with a copy of it. If I can read it in, surely I can provide the minister with a copy of it.

Hon Sue Ellery interjected.

Hon Dr STEVE THOMAS: I actually think that there is.

There are some questions that I think will be useful to get through during the committee stage of the bill. I have got to be honest, I could have easily spent another hour talking about the Auditor General bill. I am going to be sat down very quickly so let me conclude my second reading remarks in this way. In my view, the intent to clarify the access that the Auditor General has to cabinet-in-confidence, community interest and legal professional privilege documents is welcome. The way that it will be done is something that we should debate in more detail in the committee stage of the bill. I have not even got close to some of the issues that I have with the bill. I want to raise

this one in the two and a half minutes I have remaining. It is the way that the reporting will occur. I think that the way the reporting occurs will be absolutely critical.

I put out a media release on this the same day that the bill was dropped into the lower house as I like to be on top of these things. There are not many people who sit there and wait for Treasury press releases, but I want to be right on top of this. As the Auditor General hopefully gets greater access to cabinet documents—the Auditor General may well argue that they get reasonable access to cabinet documents anyway—we have to remember that the Auditor General is not, under any legislation including the cabinet handbook, prevented from attaining cabinet-in-confidence documents. It is simply a process that they may not be able to navigate. It is up to cabinet ministers to present that information. I do not know if the government has a record of how often requests have been denied. That might be another interesting part of the debate. A request can certainly be applied and asked for.

The bill before the house will mean that the application will be automatic and it will actually be almost impossible for the government to refuse that information. What will happen is that the capacity of the Auditor General to include that information in reports will be incredibly limited. To some degree, it is limited already. However, it will remain limited and might be even more limited. We will have a situation in which the Auditor General will make a report based on information, and they may well have greater access to cabinet-in-confidence documents and others than they had previously, but they cannot necessarily tell the Parliament, of whom they are an officer, what the information was that leads them to the conclusion they make. That is something that we will have to look at, probably in the clause 1 debate, to make sure that we are dealing with that particular issue. To some degree, it risks the politicisation of the Office of the Auditor General if they are making comments that they cannot justify. That was the point of my press release at the time. I have not yet had time to get to it today, but that is the critical part of this bill that we need to address. I wish I had another hour to talk about it.

HON TJORN SIBMA (North Metropolitan) [3.19 pm]: I also rise to speak to the Auditor General Amendment Bill 2022 and to amplify some of the key messages contained in Hon Dr Steve Thomas's contribution that we just heard. It behoves responsible oppositions, like responsible governments, to think comprehensively about how public interest is preserved and actively defended.

I am finding it difficult to hear myself, Deputy President.

Hon Dr Steve Thomas: Sorry.

Hon TJORN SIBMA: That necessitates a reassurance that the Auditor General, who has very specific powers to serve the public interest, is unencumbered in their role. It also needs to preserve the principle of cabinet confidentiality. Hon Dr Steve Thomas talked about one of the key principles enshrined within the cabinet handbook, which was the need-to-know principle; that is, the need to know in order to fulfil a statutory function, which is effectively what we are talking about, whether that statutory function is one as a cabinet minister or a parliamentary officer.

One of my very first roles in professional public service was effectively as a steward of the cabinet process on behalf of the Department of Defence. This goes back some nearly 20 years. I am sensitive to the need to protect sensitive information. The sort of information that I was responsible for protecting, but also facilitating so that a government's policy decisions could actually be enacted, was more circumscribed than that; it actually reflected on the business of the National Security Committee of the cabinet. The kinds of issues that we were dealing with were the purchase of military platforms, the deployment of troops and the acquisition of all kinds of specialist kit. Even within that context we were not absolved from external scrutiny by the Australian National Audit Office. I used to work in a little concrete and steel secure compartment information facility that I had to buzz in and out of, but one of my jobs was to also facilitate auditors accessing the cabinet documentation that they required to fulfil their function. I only bring this up because there is always an opportunity for the Western Australian jurisdiction to be a best practice jurisdiction in its governance and administration. What struck me when I came back to Western Australia, and in particular the fact that we have this discussion now on this bill, is whether the Auditor General here has been encumbered or prevented in a positive way from accessing the kinds of cabinet information that is essential for that office to fulfil its function. That is on one reading of certain sections of the existing legislation that seems to be there, but there also seems to be accounts of availing pressure or perhaps the injunction of cabinet-in-confidence as somewhat of an impediment. I might just reflect a little more on some of the other issues that lurk beneath the surface of this bill. They are effectively definitional ones, and we will attempt to refine the definition of some key terms as we debate this amendment bill. There is also a cultural set or cultural bias; I do not mean that in a pejorative sense, I just mean it in the terms of a culture being the way that an agency conducts its business and a culture in the way that a minister is expected to conduct their business; this is a bipartisan perspective.

I also briefly reflected on my time within the Department of Defence for this reason. Outside that specific function I held other functions. It was routinely acknowledged, at least at the level of the desk officers within that department, that information or documents were routinely upscaled in their actual national security codification. Effectively, there are multiple levels. There was completely unrestricted information, restricted, confidential, secret, top secret and within top secret there were a variety of other subcompartments.

Hon Sue Ellery: Top top secret and top top top secret!

Hon TJORN SIBMA: There are things that I will take with me to the grave.

That being said, it was routinely the practice of officers within the Department of Defence to effectively throw the cloak of national security confidentiality around information that they should not have. That was partly the result of training, practice or expectation. Partly, it was a result of fear; we do not want information getting out inadvertently, which I think is a reasonable fear to have. But I think that cloak of confidentiality or that bias towards being secret extends beyond the Department of Defence or any of the institutions of a national security bias in the commonwealth system and exists across various state and territory and local government jurisdictions as well, for whenever somebody has access to information, they imply that they are also obligated to control the access of others to that information. That is sometimes for the good, but I think often also out of practice rather than necessity. I am reminded of an address provided by Peter Harris of the Productivity Commission—this goes back some 10 or so years—who made an observation about the way that state governments reported on major project delivery and the provision of information. He said there was a routine, almost reflexive bias by all state governments, irrespective of their political composition, about providing information to the public that would inform public understanding of why certain decisions were taken. In fact, he took the view that the injunction of things such as cabinet confidentiality at a state level, even commercial confidentiality, was far too liberally and reflexively applied. I have taken a similar view having witnessed not only the McGowan government's process, but also the preceding Barnett government. I worked in the former Premier's office and have an understanding of how the cabinet process worked there as well, and also had an insight, I think, that has not been disabused of the main or the dispositions of large and well-funded agencies of state. I only bring this up because the clauses of the bill that define restricted and protected material as effectively material whose unauthorised disclosure would imperil the public interest in some way, bear some reflection. It gets to actually the technical nature of the implementation of the intent behind this bill.

I just want to reflect on two matters. Firstly, the cloak, I will call it, of cabinet confidentiality was invoked to thwart the disclosure of relevant information, and secondly, there was a disagreement between executive government and the agency about the very nature of the information being sought. I will refer to the former matter first and it concerns the acquisition of the radio systems replacement project by the Public Transport Authority. I do not intend to go over the wisdom or otherwise of that particular acquisition, but I want to focus on the way in which cabinet-in-confidence was invoked as a shield against disclosure, because I think it is pertinent to how we define information.

On 14 August 2018 the then Leader of the Opposition in the other place, Dr Mike Nahan, asked the Premier why a $136 million contract was awarded to the company Huawei without it going to cabinet. The Premier replied that it did not need to and that there were reasons for it, and effectively then said that the opposition had done the same sorts of things when it was in government. That was a curious response, because the *Cabinet handbook* that Hon Dr Steve Thomas referred to includes the kinds of matters that should be referred to cabinet. I think this is pertinent to our debate on the Auditor General Amendment Bill 2022, because we are actually trying to determine what specific forms of information it is proposed that this amendment bill will give the Auditor General a positive statutory right to access.

I refer to a relevant paragraph in the most recent version—I think it is largely unchanged, or does not change very much over the years—of the *Cabinet handbook*, paragraph 1.5 on pages 2 and 3. It provides guidance as to what business should go to cabinet, and states —

> The volume of Cabinet business needs to be monitored and contained because of the demands on Ministers' time. This consideration needs to be balanced, however, against the need to refer to Cabinet major issues of policy and other matters requiring collective consideration.

Again, the preservation of the common law principle of cabinet-in-confidence is grounded in collective decision-making; I think that reinforces that point. The paragraph continues —

> The following issues usually require Cabinet approval:
>
> - Politically sensitive and policy issues with significant financial implications, particularly new policy themes and variations to existing policies.

To interpret some of that politically sensitive matter—one with serious financial implications—I thought, at the time of asking a question on 15 August 2018, that the decision to award such a significant contract to a consortium of which Huawei was a member, which had been mentioned in the international press, was a potentially politically sensitive matter. Because the contract price was north of $100 million—it actually got closer to $200 million—it also qualified as being a significantly financial decision for a government to make. I asked the Leader of the House representing the Premier whether or not it had always been the practice of the McGowan government to refer "politically sensitive and policy issues with significant financial implications" to cabinet for noting or approval. The answer I received was —

> The guidelines in this section of the "Cabinet Handbook" —

Which I have just read out —

> are the same as those that applied under the former Liberal–National government. Matters with a financial impact are first considered by the Expenditure Review Committee. In addition, cabinet has delegated authority to the Treasurer to make decisions on genuine parameter adjustments defined as routine, non-discretionary changes to an agency's budget parameters that are outside the agency's control but within existing policy settings. These adjustments must be agreed between Treasury and the agency, and considered by the Treasurer to be both unavoidable and non-contentious.

I apologise for the length of this answer, but it is important. It continues —

> When it is determined that approval under the Treasurer's delegated authority is appropriate, and with the concurrence of the Premier, the relevant minister will receive a letter signed by the Treasurer outlining the extent and content of his approval. This approval is immediate, and does not require Expenditure Review Committee or cabinet endorsement. The Treasurer may determine that a request is contentious, and refer the matter to the Expenditure Review Committee for consideration.

The Expenditure Review Committee is, of course, also referred to by its acronym, the ERC, and is a cabinet subcommittee.

The following day I asked whether, considering it had not gone to cabinet, I could receive the information that had underpinned the decision, which was a very naive question from a first-term member. Hon Stephen Dawson, as the minister representing the Treasurer, provided an answer, and it was no reflection upon him, because it was the answer he received. It stated —

> In line with the "Expenditure Review Committee—Handbook", the Treasurer has delegated authority from the ERC to consider financial adjustments of a parameter nature that are considered non-contentious. Although dealt with under the Treasurer's delegated authority, these matters still form part of the ERC process and, therefore, are cabinet-in-confidence.

I was effectively left with a situation in which even though the decision to award a quite significant contract to a particular company never went to cabinet, there was absolutely no way that I could access the documents because they were considered to be cabinet-in-confidence. I am not going to make a cheap partisan point, because the previous government and previous governments probably made similar determinations. When a minister refers a question to an appropriate agency for answering in the morning, they are effectively given the agency's advice, so that answer did not necessarily reflect upon the advice of the then Treasurer, Hon Ben Wyatt, nor that of Hon Rita Saffioti or the Premier; it represented the advice of departmental logic and culture. But from the perspective of attempting to uphold the public interest, or to shine a light on why a particularly odd or contentious decision has been made, no future light can possibly be shone unless the documents are sought via a freedom of information request. That is what I ended up doing over the next 12 to 18 months before I got the information I sought, although it was heavily redacted.

Why have I identified this? I have identified this because I think the very terms that we are dealing with here, which are integral to debate around this bill, are and have been routinely abused. I think we need to be quite specific about what a cabinet document is. Is it the cabinet minutes, which record a decision made on a submission that has been provided with its attachments, or does it also encompass other ancillary material? I think, as unintended as it might have been—or it may have been intended—that there has been, over time, a deliberate conflation of the public interest with political interest. By that I do not just mean the capital P political interest of a political party or a particular government; I mean the organisation's political interests, as loosely or clearly defined as they might be, and known only to them and them alone. This is the value of having an independent officer of the Parliament like the Auditor General to try to penetrate and understand. But if we are to enable that office, in the collective sense, in the way that is proposed via this bill, we need to be very precise about the kinds of terms we use. I think, to some degree, there is always going to be a nebulous quality to what we are doing, and that can only change through culture.

I might cite another issue. I am not so much concerned about the strict definition of whether some documents or information is actually confidential because it has been or will be considered by cabinet. I am more concerned about what the executive government—by which I mean the cabinet and individual ministers—understand information to be and what the agency itself considers the information to be. In August, we debated the Railway (METRONET) Amendment Bill 2022. We are a bit odd in this state in that we need an amendment bill whenever we make a variation to a piece of rail. That might be a piece of future reform.

Hon Sue Ellery: But then you wouldn't be able to talk about Metronet!

Hon TJORN SIBMA: I love talking about Metronet!

In the course of debating in the committee process the changes around the Byford rail extension and some other matters that pertain to works on the Armadale line generally, I asked the Leader of the House, who represented the Minister for Transport, whether the intent of the bill reflected the content of a document called the rail growth plan. I hope Hansard forgives me when I read the *Hansard*. I do not know whether there is a particular view about it in the offices but I am about to find out.

In the course of that debate on 9 August, I asked the Leader of the House —

> The last I checked, that rail growth plan was not publicly available on the Public Transport Authority website, so unless I am navigating cyberspace inexpertly, would it be possible to ask for a copy of the rail growth plan to be tabled?
>
> **Hon SUE ELLERY**: That is a good try. I am told it never has been made public. It is an internal working document that the agency relies on, so no.

As the representative minister, she was not going to give me access to a document from an agency that was not hers to administer, which was fair enough.

Hon Sue Ellery: Honourable member, in accordance with standing orders, you just need to identify whether you are referring to the corrected or uncorrected *Hansard*.

Hon TJORN SIBMA: Corrected *Hansard*.

A couple of weeks later, I tried again during question time. I quote parliamentary question 753, asked on 31 August. It was a very straightforward question —

> I refer to the rail growth plan. Would the minister please table the plan?

It was as simple as it could get and asked with the kind of brevity that would find favour with the President.

Hon Sue Ellery replied —

> I thank the honourable member for some notice of the question. The rail growth plan is an internal working document produced by the Public Transport Authority. It is not a document that is approved or reviewed by government, or used by government for future investment decisions. The document is currently undergoing review and will be updated as a matter of course.

I make absolutely no reflection on the answer that was provided by the Leader of the House. That was the answer that was signed off by the Minister for Transport and presumably drafted for her by officers of the Public Transport Authority or other people in her office. However, I found it interesting that that response completely contradicted my understanding of what that document does. I had to refer to the PTA website. It states —

> The Rail Growth Plan … is the Public Transport Authority's … response to the forecast population and patronage growth and forms the long-term strategy for the evolution of the existing Perth metropolitan passenger rail network through to 2051.
>
> The RGP sets the framework to make the best use of existing rail assets and guide staged improvements and future investment in order to continue to meet long-term passenger needs.

RGP is the acronym for the rail growth plan. I do not cite this to embarrass anybody; all this is here to do is point out that, at times, there is an unfortunate occurrence where there are mutually inconsistent interpretations of a document's role and function or purpose. On the one hand, I am told I do not need to see this because it is an internal working document of the PTA and I do not need to worry about it because it does not guide any investment decisions, but when I actually look into it and remind myself why I was interested in this document in the first place, the website tells me that it is there to make the best use of existing infrastructure, and to guide staged improvements and future investment. Why do I bring this up in relation to this particular bill? I think we are dealing with a lot of opacity and murkiness and we are seeking to clarify the actual forms of information and the kind of access that the Auditor General might have. That is a very cumbersome way of expressing it. If we are uncertain about the purpose of documents, their classification and whether they are actually genuine cabinet documents drafted expressly for that purpose, we can have little reassurance that the intent behind this bill, which I do not for one moment disagree with or disparage, will actually be achieved in its implementation. We in opposition, as the people charged with holding the government to account and scrutinising bills, are in a very difficult, if not invidious, position to genuinely know whether the intent of this bill will find its fulfilment.

I am also interested in this because, as much as the second reading speech extols the virtues of this as an incremental step forward in accountability and transparency to allow the Office of the Auditor General to access the documents it needs to ensure that the public interest is fulfilled, we cannot do that when there is absolute murkiness around defining precisely the kinds of documents that we are dealing with. I think there is also a culturally embedded practice around conflating public interest with political interest as a reason not to provide information. I make that point because the last half of the second reading speech takes not a discordant tone but rather a defensive tone about

setting prescriptive practices to reassure the government that the Auditor General is not going to use or abuse that information in any unintended way. I think this will possibly have a constraining impact and the Auditor General will be, effectively, gagged from revealing the truth about certain decisions, which I do not think is necessarily in the public interest. If the Office of the Auditor General cannot refer directly to the document that it has cited and it cannot provide evidence to substantiate the claims that it makes on a report, it is effectively disempowered at the moment it publishes the review.

With that, I think we will have to spend some time in committee, as has been foreshadowed, to attempt to understand the dynamics of this bill and how it will actually be implemented. At the moment, although the intent is positive, I am reluctant to believe that this will actually materialise in a step change improvement in accountability and transparency in the Western Australian jurisdiction.

The ACTING PRESIDENT (Hon Peter Foster): I give the call to the opposition—Leader of the House in reply. I almost stopped myself!

Hon Dr Steve Thomas interjected.

HON SUE ELLERY (South Metropolitan — Leader of the House) [3.48 pm] — in reply: What did the member say?

Hon Dr Steve Thomas: We are keen to change that.

Hon SUE ELLERY: It will not be in my political lifetime, honourable member.

I thank Hon Dr Steve Thomas and Hon Tjorn Sibma for their contributions to the debate on the Auditor General Amendment Bill 2022. I also thank the opposition for its support of the bill. It is well agreed that the Auditor General has a crucial role in the audit of government agencies and entities, and is indeed an officer of the Parliament, not of the government. It is the government's intention that this bill will help to clarify certain aspects of the Auditor General's information gathering powers, which have historically—the honourable member referred to this—lacked clarity. Once any sensitive information is provided to the Auditor General, it may be fully utilised as part of any audit, including by informing any audit findings or opinions. However, the information itself may not be further disclosed. For example, although the Auditor General has the right to access all cabinet documents, the documents themselves cannot be attached to an audit report and published. Since the act first commenced, access to cabinet materials has been provided in a similar way—both members referred to this—under cabinet protocols and it has not hindered the ability of the Auditor General to perform the functions of the office.

Although recommendations have been made over the years about other elements that might be subject to change, the Auditor General Amendment Bill 2022 does not purport to address those. This is a narrow and targeted reform designed to address specific matters relating to information access, and we are doing that as a priority. As Hon Dr Steve Thomas pointed out, section 7 of the Auditor General Act 2006 enshrines the status and independence of the Auditor General. It is important to note that these amendments do not affect that status or independence; in fact, they will strengthen the independence of the Auditor General by providing them with an express statutory right to access cabinet materials and other sensitive documents without requiring approval from government. The Auditor General's access to highly sensitive information will no longer be at the discretion of the government of the day.

I am advised that only last month during a parliamentary hearing, the South Australian Auditor-General suggested that South Australia should adopt laws like the ones we are debating today. The honourable member queried one view that the act already provides those. We will get into that in a minute because it comes to reading three sections together, understanding common law and written law and the position that Hon Dr Steve Thomas made on behalf of the opposition that it shares the government view that the legal opinion commissioned and provided to the Auditor General is not the way that those three sections and written and common law ought to be viewed.

The government's view is that the act does not abrogate privileges, and that is not a new view. A number of public reports, including the Langoulant report and parliamentary committee reports, identify that there are competing views on the effect of the legislation. The need to amend the act to ensure that the right of access to highly sensitive materials is entrenched in law has been recommended by Parliament and the Langoulant report. This legislation will address that and remove any uncertainty about what materials are required to be provided and what uses those materials may be put to in the future. The government is acting in accordance with those recommendations to put any question beyond doubt. This will provide clarity for the Auditor General, the Parliament and the government, including public servants. It is no longer satisfactory to have such important matters left open for interpretation.

Hon Dr Steve Thomas made the point that we ought to give some thought to exactly what is intended to be captured by the definitions of "cabinet-in-confidence", "legal professional privilege", "public interest immunity" and the like. He, too, referred to section 35 of the Auditor General Act and queried its scope. The government's position on section 35 is this: although section 35 of the Auditor General Act is expressed in broad terms, it must be read in light of the rest of the provisions of the act, including sections 34 and 36. Section 35 does not contain any express

words abrogating privileges and immunities. It makes no reference at all to the effect of other privileges and immunities, which contrasts sections 34 and 36 because they articulate how the Auditor General's powers intersect with privileges and immunities. The section supports the Auditor General having access to information systems and accounts and premises at reasonable times but it does not compel a public servant to do anything other than facilitate access, and it creates no specific offences for not providing any particular information or documents. Given that section 34 is a very clear power to compel a public servant to provide information and documents, and that power does not support the Auditor General having the power to compel the provision of highly sensitive materials, an interpretation of section 35 that suggests that the Auditor General has the ability to access all privileged and immune information as a matter of course is inconsistent with both the express words and sections 34 and 36 of the act. Any argument about the scope of the existing information-gathering powers will become largely academic because the government has committed to provide the Auditor General with a clear express statutory right to obtain this material, which will resolve any uncertainty about the scope of the provision.

Hon Dr Steve Thomas also mentioned the purported broad scope of the information-gathering provisions in section 34 of the act. By way of general explanation, the Auditor General Act confers upon the Auditor General specific powers to access accounts, information, money and property and the power to compel people to provide information and documents. Those powers are limited by the terms of the act. The act does not contain any clear and unequivocal words abrogating privileges and, therefore, does not clearly confer on the Auditor General the power to access a full range of information that the Auditor General considers is required to perform their statutory functions, including highly sensitive materials, such as cabinet documents, and the legal advice provided to government.

The member also referenced section 36(2). The government's position on that provision is that although the mention of "written law" is certainly problematic, the solution would not be to simply delete the word "written" for the following reasons: those words in section 36 only have the effect of abrogating written laws about confidentiality and secrecy. Even if the word "written" were removed, not all privileges and immunities can be characterised as laws about secrecy and confidentiality. Legal professional privilege, for example, is a fundamental common-law right that attaches to the provision of legal advice. It does not require secrecy or confidentiality. It operates to enable the holder of privilege to resist the production or disclosure of privileged material, but it is a matter for the holder of the privilege to decide whether they wish to assert or waive it. A law about secrecy or confidentiality is a different concept. An example is section 52 of the Disability Services Act 1993, which creates a prohibition on disclosing information obtained through the performance of a person's statutory role under that act, except in the circumstances that are specifically set out in that section. Proposed section 36 will operate to ensure that section 52 does not prevent a person from disclosing information to the Auditor General. Further amending section 36 would not clarify the operation of section 35.

The member referred to legal advice commissioned by the Auditor General. For the record, the Auditor General provided the government, as part of the discussions about the prospect of a bill, with a copy of legal advice that she had commissioned. That is her advice, and although I have been able to access it in my role to deal with this bill, I am not in a position to table it. The government does not have her express permission to do that. I am well aware of its contents, but I am not in a position to table legal advice sought by somebody else. The member referred to advice commissioned by the Auditor General and advised us that a committee of the Parliament deemed that to be publicly available. The government does not agree with the opinion provided to the Auditor General in that advice. I note and welcome Hon Dr Steve Thomas's comments that he shares the view of the State Solicitor. I think the words he used were "The State Solicitor's view on that advice is correct."

The government's view is that the act does not abrogate privileges; that view is not a new one. A number of public reports, including the Langoulant report and parliamentary committee reports, identify that there are competing views on the effect of the legislation. Further, as it has already been indicated, it is not satisfactory as a matter of policy or practice to have such significant matters left open to interpretation. The fact that the Auditor General has obtained an opinion suggesting that there is an alternative view to the government's position supports the decision to fix it by legislation. We are putting matters beyond doubt and providing express statutory rights where before there were none. As the member pointed out, that alternative legal view would also appear to be contrary to the rationale for the current *Cabinet handbook*, which is in place currently and has been in place under previous governments. For the benefit of members, I confirm that my advice is that this protocol has in fact been in place in successive cabinet handbooks since 2007, which members will note was the year following the enactment of the Auditor General Act 2006, so I am happy to have a broad-ranging discussion in the debate on clause 1 about other matters that the member might want to raise.

I also want to thank Hon Tjorn Sibma for his contribution. I guess I would characterise his comments this way: he queried whether the Auditor General is positively restricted from accessing cabinet-in-confidence information. He outlined his view about definitional issues, but also potentially a cultural bias in how an agency or minister conducts business. The examples that he referred to, based on his experience of handling matters of national security when he worked in the Department of Defence, was that there was a culture, or pattern, of behaviour to overcompensate,

or elevate, the description of documents as cabinet-in-confidence, which ought to be restricted by security provisions in the case of the area where he worked, when that was perhaps not necessarily applicable. He gave examples of those, and he described it as the creation of an illegitimate shield. He then gave two examples of what he said were the bureaucracy and perhaps ministers in Western Australia adopting that approach. I cannot comment on the two examples that he gave; I am not the minister responsible for those. However, I note the point that he made, but I am not in a position to take that much further. The honourable member also talked about the cloak of confidentiality.

The bill before us today will enshrine the right of the Auditor General to access these types of information and will confirm that this will no longer be a reasonable excuse not to provide the information. The member also specifically asked what documents would be considered cabinet-in-confidence. As he would well be aware, there is no prescriptive list setting out what is or what is not cabinet-in-confidence. It will depend on the particular type of information and the circumstances in which it was created, and although we can probably identify categories of documents that typically attract cabinet-in-confidence status, the bill does not propose to set the limits of what is or what is not cabinet-in-confidence.

With those comments, I thank members for their contribution, and I thank the opposition for its support. I thank the opposition for articulating its view on the legal opinion that was provided to the Auditor General, noting that the opposition shares the government's view that that is not the way this process should be dealt with. I look forward to further discussion in the committee stage.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Peter Foster) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon Dr STEVE THOMAS: This is likely to be a fairly broad-ranging conversation, minister. I will start with some of the minister's second reading speech. I am interested in the consultation process. Part of the speech states —

> During the development of these reforms, the government consulted with key stakeholders, including the Office of the Auditor General, the Office of the Information Commissioner, the Corruption and Crime Commission, the Ombudsman …

How much of the advice to government are we able to talk about or perhaps look at? I am happy to do them one at a time if necessary. I am interested in the advice that the Auditor General gave the government about that consultation. Are we in a position to know the extent of that advice? Is the minister in a position to tell us what that advice was?

Hon SUE ELLERY: I am advised that it was an iterative process. There were face-to-face discussions and some exchange of correspondence, but as matter X was discussed, changes may well have been made, and then they moved on to discuss other things. The Department of the Premier and Cabinet and the Office of the Auditor General have been working collaboratively on the bill and will continue to do so. I cannot speak on behalf of the Auditor General; I would not propose to do that. As with any legislative drafting process, we undertake the shaping of the policy positions confidentially. A significant amount of feedback from the key stakeholders to whom the honourable member referred was received and incorporated into the policy decisions and iterative drafts of the bill, particularly from the Office of the Auditor General, and we thank her for that. It is not possible to distil this consultation into a few key points. It has, throughout, been focused on ensuring a balance between the provision of greater access to highly sensitive information and the need to include some safeguards for the management and use of that information, and protections for those individuals who are provided.

Hon Dr STEVE THOMAS: Thank you for that, minister. I guess it is probably hard to distil it down into a particular document. I am interested in this because the Office of the Auditor General received a legal opinion, particularly about sections 34, 35 and 36 of the existing act and the proposed amendments. I understand from the minister's second reading in reply speech that the government had access to that legal advice. Is that right?

Hon Sue Ellery: Yes.

Hon Dr STEVE THOMAS: Yes, that is right, and I accept that the minister does not have a copy with her et cetera.

Hon Sue Ellery: Honourable member, I just want to make it very clear. I do have access to a copy. I cannot table it. It is her legal opinion; it is not ours.

Hon Dr STEVE THOMAS: That is the same reason that I did not seek to table a copy of the document. That is perfectly reasonable. I have been reliably told that it has been made public, but I do not seek to table it either because I have not been given express permission to do so.

In consultation with the Auditor General, a question was raised about section 34, "Power to obtain information", section 35, "Access to accounts, information, money and property", and section 36, "Duty to give information overrides other duties and rights", of the Auditor General Act. Was there a discussion between the Department of the Premier and Cabinet and the Office of the Auditor General on whether the existing legislation, as potentially indicated in the legal advice, provided across-the-board access; and, if so, is it possible to get an indication of where that discussion landed?

Hon SUE ELLERY: I referred to this in my second reading reply. The Auditor General provided the government with a copy of the legal opinion. That legal opinion was discussed in a meeting. I am advised that in that meeting, the government made it clear that it took a different view from that which had been provided in the legal opinion. It is accurate to say—I said it in my second reading reply and I think the member even used the expression himself—the matters that were debated are arguable. But when we combined the three sections and the concept of common law and written words—that is, when we had the conversation about all those things, and we added to that the existence of the *Cabinet handbook* since 2007—we could not accept that the legal opinion provided to the Auditor General ought to be accepted.

Hon Dr STEVE THOMAS: The minister and I agree on that part of the process. I refer to my quote that I read in earlier about the final recommendation of the Auditor General who suggests that there is a change. I am interested to find out whether the legal advice—I guess I am trying to find out whether the government is aware. Perhaps the minister cannot answer it. Perhaps it is too hard a question to answer because it requires an answer from the Auditor General rather than government. I would be interested to know whether the view of the Office of the Auditor General, having received the legal opinion that it presumably paid for—I do not imagine that these things are cheap—changed at any time during this process. The office obviously raised a question whether sections 34, 35 and 36, as read, empower or do not empower the Auditor General to have unfettered access. I have put it on the record that my view is that the existing act is confusing and does not necessarily ascribe the level of access that it potentially sets out to achieve, and we will come to that later in the debate. I am interested to know whether the government's view is that the Auditor General's office was convinced by that argument, which would, to some degree, be indicated by the Auditor General's letter, as follows —

> Rights of access to such materials will no longer require Cabinet or Ministerial endorsement, as has been the custom in Western Australia.

I am not sure whether I have the power or the right to seek to table that document. I have provided a copy to the minister so that we can debate the issues held within. In the second paragraph of the letter, after "Access powers", the Auditor General seems to indicate a change and that the rights of access will be improved. Is the minister in a position to tell us whether that is the position, as she understands it, from the government's interaction with the Auditor General?

Hon SUE ELLERY: The first point I will make is that it is entirely inappropriate for me to comment on what her view might be. I cannot do that. That question is properly directed to her. Has the letter that the member provided me been tabled?

Hon Dr Steve Thomas: No.

Hon SUE ELLERY: Honourable member, this is an extraordinary debate. The member has given me a copy of the letter. The rest of the chamber has to trust that the member and I are describing this document accurately, but members have no way of testing that. As far as I can tell from the document that the member provided to me today, the Office of the Auditor General provided to Hon Peter Collier, the Chair of the Standing Committee on Estimates and Financial Operations, a letter headed, "Preliminary thoughts on Auditor General Amendment Bill 2022". That letter has not been put to government. The first I saw of it was when the member provided me with a copy of it behind the chair. I immediately gave it to my advisers. I have not had the opportunity to consider it because I have been listening to the debate. That letter has not been put to government. I find this extraordinary, but that is the position we find ourselves in. I would not dare, regardless of whether that letter existed or not, to presume to speak for the Auditor General and nor can I speak to the government's view of this letter. The government has not been paid the courtesy of having time to consider it.

Hon Dr STEVE THOMAS: Let us jump to the actions of the Auditor General Act, as it currently exists. As we have debated to date, the current Auditor General Act gives some access to cabinet-in-confidence documents with the approval of cabinet, effectively. Regardless of whether that is in the act or not, it does not matter. It is in the *Cabinet handbook* and it is in the State Solicitor's advice.

Hon Sue Ellery: It is practice.

Hon Dr STEVE THOMAS: Yes, it is practice. Can the minister tell us how often that seeking of information has been refused? She might have to take the question on notice. The process in the *Cabinet handbook*—my copy has been taken off to Hansard—is that the Auditor General seeks documents from the Department of the Premier and Cabinet, the request goes to cabinet for a discussion and a decision is made and the appropriate officers appointed

by the Auditor General are contacted about viewing those documents. At this point, they cannot take copies but they can view and take notes. How often has one of those requests been refused?

Hon SUE ELLERY: Bear in mind that I served as a minister in 2007 and 2008. I cannot recall what happened back then. I have also served as a minister since 2017. During my time as a member of cabinet, I do not recall us ever refusing to provide material that was requested. I am advised by my adviser from the Department of the Premier and Cabinet that as far at their records indicate, cabinet has never refused to provide material sought by the Auditor General. I can absolutely clarify that that is in relation to cabinet material.

Hon Dr STEVE THOMAS: Thank you. We might come back to other materials in a minute but I am happy to do it a bit at a time. That is really interesting because I expected the answer would be a very small number of documents, if any at all and I think that is the case. That relates to the discussion about whether there is adequate access to these documents under the current regime or whether the changes proposed in the bill will make it more plain—more black and white—that the access is actual rather than implicit. That being the case, if cabinet-in-confidence has not been used to refuse access, would it be reasonable to say that these things have, to date, effectively been done by negotiation between cabinet and the Auditor General? I might start with that before we progress down this line.

Hon SUE ELLERY: Yes, I think it is accurate to say that it is by negotiation. It is also right to say that cabinet material is currently provided, pursuant to protocols and as set out in the *Cabinet handbook*. Those protocols, though, do not provide a legal right. For other confidential material, what is before us now is a vast improvement on the Auditor General's current powers—for example, having access to the government's legal advice, which was not previously accessible, and the removal of the ability for cabinet to refuse simply because information is highly confidential. There may be other instances in which material has been provided in the absence of the power to compel it. However, that would be on a case-by-case basis and it does not change the underlying legal position that this legislation seeks to address. I think it is fair to describe the process as being one of having to negotiate the scope of what information is being sought. It certainly takes time at cabinet meetings to discuss this. Removing the reliance on a protocol and instead referring on a mandated right to access will be far more efficient and will settle the question of whether members of cabinet can argue about whether something should be released. That argument will not happen.

Hon Dr STEVE THOMAS: I am advised that it is perfectly reasonable for me to table the advice from the Office of the Auditor General to the Standing Committee on Estimates and Financial Operations. I seek leave to table that document.

[Leave granted. See paper 1871.]

Hon Dr STEVE THOMAS: The original process now is that if the Auditor General seeks information, a decision is made by cabinet. It has not been refused as far as we can remember. Will the process under the new proposal look the same in that the Auditor General would still seek documents, advise the secretary of the Department of the Premier and Cabinet and that cabinet process would still be involved, even though they have a statutory right to that information now? What will the new process look like?

Hon SUE ELLERY: The fundamental difference is that cabinet will not be involved in the process at all. I am advised that currently, DPC and the Office of the Auditor General are working through what the appropriate forms and processes ought to be. I understand as well that they have been working on a provision that will occur as a result of this bill, which will make information digitally available. That will be much easier than the current system. I understand that that work has commenced between the Department of the Premier and Cabinet and the Auditor General. I cannot lay out for the member now what all the processes will look like because that work needs to happen. I can tell the honourable member some of that work has commenced and I am advised that cabinet will not be involved in that process.

Hon Dr STEVE THOMAS: That is a really interesting answer. It is interesting that will there will be no cabinet involvement, so there will not be a cabinet discussion about documents that come forward.

Hon Sue Ellery: By interjection, a key part of the bill before us is the automatic right of access. It is not a discretionary right. It will be automatic.

Hon Dr STEVE THOMAS: I will come back to that in a minute. I was interested in the minister's response about information being digitally available. Being digitally available is an interesting new development as part of this process. Under the provisions in the new bill, will the Auditor General have the capacity to make copies, which did not exist before?

Hon SUE ELLERY: I am advised that making copies would be allowed only with approval. I will get as much information as I am able. I will let the member ask the question again then I will see whether I can get a more precise answer.

Hon Dr STEVE THOMAS: Probably a better way to phrase this is under proposed section 36C in the bill. It reads, in part —

> (1) Despite anything else in this Act, the Auditor General or an authorised person must not take extracts from, or make copies of, an item …

Access to digital copies is much more difficult to manage. Apart from an honesty system, if a digital copy were made available to the Auditor General, is there a way that the government could manage the security of the document?

Hon SUE ELLERY: I am advised that it will be via the use of secure software, which will technically, I am told, prevent copying and the like, including printing.

Hon Dr STEVE THOMAS: I think I have hit the generation gap here, because it is not a system I am aware of. I might have to ask Hon Wilson Tucker!

Hon Sue Ellery: By way of interjection, when the honourable member opens a document now and the computer says "Read-only access", there are variations of that software that will prevent whoever is looking at it from doing anything other than read it.

Hon Dr STEVE THOMAS: Okay, yes. The fact I do not know about it does not mean it does not exist. There are lots of things in IT that I do not know about. We will not sit here and discuss all the things I do not know about information technology. The bill will make an automatic assumption of access in the act. Is there an opportunity for a minister to appeal that system going forward? If an application for information was put in by the Auditor General and they will have, on the passing of this bill, an automatic right to access, is there an appeal process anywhere that a minister or the CEO of a department can reach in which they can try to convince somebody that there is a reason that information should not be made public? I do not mean just for cabinet-in-confidence but I am thinking in particular of legal professional privilege.

Hon SUE ELLERY: I am advised that the short answer is no.

Committee interrupted, pursuant to standing orders.

[Continued on page 5601.]