## AUDITOR GENERAL AMENDMENT BILL 2022

*Committee*

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

**Clause 1: Short title —**

Committee was interrupted after the clause had been partly considered.

**Hon TJORN SIBMA**: Prior to the question time adjournment, we were talking about the process by which officers of the Office of the Auditor General will obtain access to cabinet material. The answer was along the lines that they will be provided with a digital copy of the documents that they seek, with those documents having certain properties to prevent them from being manipulated. Can I ask, though, how are cabinet documents transmitted within government presently? Are they emailed across the government network? Is there a portal within the network by which the documents are loaded and managed or is there a standalone network by which the sensitivity of the information is protected?

**Hon SUE ELLERY**: It occurs in three ways. I am advised that to some extent it is a work in progress. Currently, some are transmitted by hard copy, some are transmitted through secure e-channels and some are transmitted by email. We are moving to digitise the process more generally. I do not think I would be revealing any state secrets to say that some members of cabinet are more enthusiastic about that than others, which has nothing to do with the security of material but with people's capacity to deal with digital technology.

**Hon TJORN SIBMA**: The reason I asked is that obviously a premium is being placed on managing access to information without there being a defined clear right to know and access that information. The answer to my question as it related to the proposed mechanism by which this material will be conveyed to an auditor from the OAG is that it will be via a digital mechanism. Does that necessarily mean that there will be an extension of the tripartite digital pathway that is operating in parallel at the moment or will this necessitate the creation of some other bespoke application to provide the Auditor General with that access?

**Hon SUE ELLERY**: It will be a bespoke application, honourable member. The current arrangements allow certain agencies to manipulate—I think that is the word that Hon Tjorn Sibma used—some of the information as part of what they have to do, but the process, as I am advised, to give effect to the provisions in this bill will be bespoke.

**Hon TJORN SIBMA**: That is interesting. By way of background—I am sure that this is still the case—at least 15 years ago, the commonwealth government had a standalone network called CabNet, by which all cabinet material was managed. One of the benefits of that was there were limited access rights to sit on the terminal to do it. It was managed by bureaucrats, which is the appropriate mechanism, and the ministers got the end product. It did not necessitate any sophisticated capacity to navigate technology even two or three IT generations ago. In 2008, I made the observation to the then director general of the department, Peter Conran, that it was a good system for Western Australia because it at least gave ministers the capacity to know that the documents were being managed in a secure pathway prior to cabinet having the opportunity to deliberate on them. The observation was that we are very protective about cabinet documentation after the event, but I do not necessarily think the requisite attention or caution was put into the front end of proceedings so I suggested that the government expedite its process to deal with that issue. What I am trying to get to is that seeing as there are three different mechanisms by which cabinet submissions and memos are managed through the system presently, what is the need to circumscribe a particular mode of conveying that information to the Auditor General when we are establishing a statutory right for that office? What is the government attempting? What sensitivity or additional concern does the government have that will necessitate the creation of a bespoke system in this instance? I want to see what the advantage is.

**Hon SUE ELLERY**: I guess it is because we are starting this from scratch. If we were starting the cabinet process from scratch, we might start with the process that Hon Tjorn Sibma so described. But we are not starting the cabinet process from scratch; we are starting this process from scratch. By way of an aside, based on my personal experience they are pretty vigilant in tracking and keeping hold of cabinet material. If, for example, a minister accidentally walked out of the cabinet room with a document that they should not have, from my personal experience, that is chased up pretty quickly. Although there are three variations of how we deal with it now, it would be fair to say on behalf of the government that we are moving towards one version eventually. The bespoke nature is because we are starting from ground zero so we might as well put in place what the member described as best practice.

**Hon TJORN SIBMA**: The minister may not be in a position to answer this question, but I am obligated to ask it since we are talking about the creation of a new channel or mechanism: does the government have any view about how much that might cost?

**Hon SUE ELLERY**: No.

**Hon Dr STEVE THOMAS**: We said that we would have a fairly wideranging clause 1 debate. With the minister's indulgence, I would like to read in the critical section of the legal opinion, which the minister and I agree has issues, so that we can debate it because it identifies the issue that I need addressed. Certainly in supporting the bill, I open myself to a bit of criticism as I go in that I am taking the State Solicitor's word for something. I think that is a pretty safe bet, but I want to cover all my bases.

**Hon Sue Ellery**: That is the invitation I offered. Let us treat clause 1 as an opportunity for you to put on the record some of those matters. I will not be drawing the deputy chair's attention to the fact that that might be broader than normal.

**Hon Dr STEVE THOMAS**: I am happy to sit down and stand up again if necessary. The government has had access to the report. The advisers may have a copy they can access. Sections 43 to 55 are probably the critical sections that I would like to address. It starts addressing the State Solicitor's Office guidelines, which both the minister and I have accepted, along with the *Cabinet handbook*, as a reasonable basis for what inarguably exists right now. We agree that it is a reasonable basis for debate going forward. I will read some of these in. Bear in mind that this is the opinion of Mr C.P. Shanahan, Senior Counsel, not mine. I will come to my part of the debate a bit later. Paragraph 43 states —

> The 2016 SSO 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 … to resist production of certain information and documents sought by the Auditor General pursuant to a s 34 notice (those over which LPP and/or PII is claimed, including Cabinet documents).

He actually includes cabinet documents under public interest documents. It continues —

> That public sector practice has informed the request for elements of this advice.

I read that as the author acknowledging that that is what currently exists. That may not have been the intent of the author, but it is difficult to read that without suggesting that that is the current basis for what goes on. Paragraph 44 states —

> It is interesting that paragraph [6.3] of the SSO Guidelines concludes with the following observation …

He puts emphasis on the word "otherwise". It continues —

> **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 report under s 24 of the AG Act.

His emphasis is on the word "otherwise", and, again, I read that as him saying that, with the exception of what currently occurs, the Auditor General has unfettered access. I read that as Mr Shanahan just reinforcing that the current action is, effectively, what happens now under the requirements of the State Solicitor's Office and the *Cabinet handbook*. Paragraph 45 states —

> As we shall see, this final passage in [6.3] might be read as a reference to the Auditor General's otherwise sweeping powers under s 35 that give *"full and free access"* to Cabinet documents, but the way it is currently drafted suggests to the lay reader either: (i) that **all** the Auditor General's powers to obtain information are conditioned by the reservation of LPP and/or PII at s 36(2), or (ii) that the Auditor General is **not** entitled to immediate access if documents or information are subject to claims of LPP and/or PII (including Cabinet documents).

I guess he asks himself—I was going to was ask whether it was a "he", but it is a Mr, so yes—whether he goes all the way.

He answers himself at paragraph 46, which states —

> Neither proposition, in my opinion, reflects a proper construction of the provisions at Part 4 Division 2. If paragraph [6.3] sought to capture the breadth of the power at s 35 of the AG Act then one would expect **direct** reference to that provision and an account of how it is intended to operate (thereby facilitating the performance of the Auditor General's functions under the AG Act when she seeks to obtain information).

That is one of the first steps with which I have an issue, and I think I disagree with his interpretation. I do not agree that we would expect direct reference if the entire power was sought under that section. In paragraph 47, he continues —

> We can be satisfied that the powers conferred by s 35 of the AG Act were intended to give the Auditor General "*full and free*" (i.e. unfettered) access, to *"**all** accounts, information, documents, systems*

> *and records that* ***the Auditor General considers to be relevant to an audit****", unconditioned* by any claims of LPP and/or PII, merely by reference to the AG Explanatory Memorandum at clauses [58]–[61], which deal with the provision that became s 35 of the AG Act …

There he has that reference again. Paragraph 47 continues —

> **Clause 35: Access to accounts, information, money and property**
>
> 58. This clause entitles the Auditor General or an authorised person, to full and free access at all reasonable times to all accounts, information, documents, systems, records, money and property that is or are in the possession of any person, and to make copies or extracts from any of the accounts, information, documents and records. The Auditor General may also cause a search to be made, and extracts to be taken from, anything in the custody of the Treasurer or in any office of an agency at no cost to the Auditor General.

In his opinion —

> 59. **The clause ensures that the Auditor General has the power to access all information necessary for the performance of his or her functions. Access to Cabinet documents would be available and claims of legal professional privilege would not be maintainable.**

That opinion is very difficult to substantiate because it effectively says that a simple reading of section 35(2), which members will remember—I will not read it in again—states that the Auditor General is entitled to full and free access at all reasonable times.

**Hon Sue Ellery**: And, honourable member, a singular reading of 35—that is, if you don't read 34 and you don't read 36.

**Hon Dr STEVE THOMAS**: Yes, I think that is exactly true. The problem is that reading section 35 is a bit like reading most documents, all the way to biblical debate, wherein if you read one paragraph at a time, you can almost make it mean anything you want it to, and this becomes the issue. Again, we are dealing with a very black and white legal interpretation. In my view, the greatest problem that it has and what it gives lie to, is that the common usage and what happens right now and are in direct conflict with that. He comes to that in a little bit, so I have jumped ahead a little bit further. I have just read in paragraph 59. Paragraph 60 states —

> Under the clause, the Auditor General or an authorised person may, at all reasonable times, enter and remain on any premises to exercise the Auditor General's powers, provided the authorised person produces written authorisation signed by the Auditor General if requested to do so by the occupier.

I think that has been the practice before. The Auditor General generally has not been refused access to any premises or building. Paragraph 61 states —

> Where an authorised person enters, or proposes to enter any premises, the occupier must provide the authorised person with all reasonable facilities for the effective exercise of the Auditor General's powers. A penalty of $50 000 applies if the occupier fails to do so.

I suspect that the $50 000 penalty has never been applied, as far as I can tell. That might be something the minister can come back to later. Paragraph 48 states —

> One would expect that any account in SSO Guidelines of the Auditor General's powers to obtain information would reflect the breadth of s 35 as appears in the AG Explanatory Memorandum (whatever the effect of notices given under s 34). **The Auditor General clearly has *"full and free access"* to Cabinet documents for the purpose of an audit (s 35).**

That section remains immensely problematic. It reinforces the author's view that as soon as we read the words "full and free access" in section 35, it simply means exactly that: full and free access—unfettered.

**The DEPUTY CHAIR**: Leader of the Opposition.

**Hon Dr STEVE THOMAS**: Thank you, deputy chair.

I think that would be a very difficult position to maintain. The minister largely reflected on that in her second reading speech and her reply to the second reading debate. Based on a simple reading of section 35(2), wherein it refers to full and free access at all reasonable times, I do not think it means that there are no restrictions. Again, the problem with Mr Shanahan's argument is that the practice today completely runs against that opinion. Paragraph 49 states —

> Such an account requires that the breadth of s 35 be compared and contrasted to any limitations on the Auditor General's powers to obtain information by way of a notice under s 34. In that context both: (i) the use of the word "*Otherwise*" in the phrase reproduced at [44] above, and (ii) the failure to expressly refer

> to s 35 and its purpose as explained in the AG Explanatory Memorandum, renders the 2016 SSO Guidelines at [6.2] and [6.3] ambiguous, and, at least, *potentially* misleading.

It is interesting that, again, we jump to the word "otherwise", which becomes critically important in the interpretation of this, and I think that is also problematic. Paragraph 50 states —

> Turning to the protocols set out at page 16 of the WA Cabinet Handbook. They appear to be built on the ambiguous position taken in the 2016 SSO Guidelines. I say that because the protocols in respect of Cabinet documents (set out below): (i) do not recognise or refer to, and (ii) make no provision for, as required by s 35 of the AG Act: *"full and free"* access to Cabinet documents by the Auditor General (or an *"authorised person"*), or the power to copy such documents (s 35(2) of the AG Act) rather they provide …

He then lists the protocols for the Auditor General's access. I have read those into *Hansard* already so I do not propose to do that again.

Again in paragraph 50, the author is focused on "full and free access" as though it can be read in exclusivity and, in effect, overrides other sections of the Auditor General Act and other acts. In his view it also appears to override common law procedures like cabinet confidentiality, community interest immunity and, even on this reading, legal professional privilege. Under that strict and absolute ruling that the author tends to go for, there would be no legal professional privilege in government because "full and free access" would override any other part of any other act.

In relation to the protocols for the Auditor General's access, which I have already read into *Hansard* and are part of the *Cabinet handbook*, the author states at paragraph 51 —

> These protocols may merely be superseded accounts of the Auditor General's powers (i.e. pre 2006) that simply need up-dating, but they provide an **inaccurate** account of the Auditor General's powers, and may lead public servants to commit an offence under s 35(5) of the AG Act … That is to the extent that they ignore the power of the Auditor General, or a *"authorised person"*, under s 35(2)(a) of the AG Act—

That is the section to provide all information —

> to have *"full and free access"* … including the right to search for and copy such documents for *"the purpose of an audit"*.

Again, the author is happy to suggest that the State Solicitor's Office advice and the *Cabinet handbook* is simply inaccurate and that that inaccuracy puts at risk the reputation and legal standing of public servants. Paragraph 52 states —

> Both the 2016 SSO Guidelines and the Cabinet Handbook need amendment to recognise, acknowledge and explain the broad powers conferred by s 35 of the AG Act. The powers at s 35 are **not**, unlike s 34 notices, conditioned by s 36(2) …

This is another way that Mr Shanahan suggests that full and free access is unrelated to any other part of the Auditor General Act or any other law. We are nearly finished. Paragraph 53 states —

> The reason why the 2016 SSO Guidelines and the Cabinet Handbook require amendment is not only to clearly comply with the law but also because non-lawyers in the public sector will be likely to rely upon them when lawfully asked by an *"authorised person"* to comply with s 35. That requires such guidelines or protocols to reference and explain the nature of the statutory power, including, *inter alia*, the right to search … make copies … stay on the premises … and for an *"occupier"* to provide *"reasonable facilities"* …

Paragraph 54 states —

> This account of the 2016 SSO Guidelines and the Cabinet Handbook answers Q.2(a) of the matters for opinion.

The author then finishes in paragraph 55 with —

> My suggestion would be that the problem having been identified is then resolved by amendments drafted by the SSO and agreed by the Auditor General. In the interim the Auditor General, or a *"authorised person"*, should exercise the powers conferred by s 35. If there are those who seek to fetter the exercise of such powers then attention should be drawn to the terms of s 35(5) which make it a criminal offence for an *"occupier"* to fail to provide an *"authorised person"* with *"all reasonable facilities for the effective exercise of the powers"* conferred by s 35.

I apologise for reading all that in but, in doing so, it allows me to disagree with the opinion of Mr Shanahan and hopefully allows me to put to bed the debate around whether "full and free access" in section 35(2) of the Auditor General Act is in its own right an entitlement to unfettered access to any document in government. That is a very difficult statement to make and back up, not simply because it is not how the system currently operates, but because it is a very restricted view of that system. The *Cabinet handbook* disagrees with Mr Shanahan's opinion. The minister and I both agree with Mr Shanahan's opinion.

**Hon Sue Ellery**: Don't agree.

**Hon Dr STEVE THOMAS**: Sorry, we do not agree with Mr Shanahan's opinion. Thank you for that. I would like to put that whole argument to bed. Has the State Solicitor's Office made any definitive statements apart from those on the 2016 guidelines that lead to the *Cabinet handbook*? Is there a statement in which the State Solicitor's Office specifically and definitively addresses the issue of reading "full and free access" in section 35(2) as overarching and overriding any other section of law?

**Hon SUE ELLERY**: In my second reading reply, I set out the government's response to the proposition put in Mr Shanahan's advice. The government does not accept or agree with his opinion.

**Hon Dr Steve Thomas**: Is there any specific State Solicitor's Office advice?

**Hon SUE ELLERY**: We have done that on the basis of advice provided by the State Solicitor's Office. I read out the advice provided to me that is written in very lay terms. It is not a legal document. For the purposes of closing the loop, I am happy to repeat what I referred to in my second reading reply.

Section 34 of the Auditor General Act is limited by the operation of section 36 of the Auditor General Act. By its terms, section 36 makes it clear that a person is required to comply with the request of the Auditor General in circumstances in which they might otherwise not be required to because, for example, the information they have been asked to provide is protected by a statutory secrecy provision in another act. An example of that would be if a person were asked to provide information in the context of an audit related to the Department of Education and that information is usually required to be kept confidential under the provisions of section 242 of the School Education Act. In that example, section 36 makes it clear that the statutory confidentiality provision does not prevent the person from providing the information, and section 242 of the School Education Act also supports that by permitting a disclosure that is required by another law. Section 36 does not expressly deal with the effect of privileges and immunities when those privileges and immunities are not created by a written law and instead deals with duties of secrecy and confidentiality under a written law. Neither legal professional privilege or public interest immunity as a broad concept, which includes cabinet confidentiality, are duties of secrecy or confidentiality that exist under a written law. They are fundamental common law privileges. It is an accepted legal principle that very clear and unambiguous words are required to override those fundamental common law privileges. Neither section 34 nor section 36 do that.

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 with section 34 and section 36 that 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 to access premises at reasonable times. It does not compel a public servant to do anything other than to 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, that power does not support the Auditor General having the power to compel the provision of highly sensitive materials. An interpretation of section 35 of the act 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.

The advice that was provided by Senior Counsel was advice to the Auditor General, on instruction from the Auditor General. The government does not agree with the opinion provided to the Auditor General. The government's view is that the act does not abrogate privileges. That view is not new. A number of public reports, including the Langoulant report as well as reports of parliamentary committees, 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 in the Langoulant report. This legislation will address that and will ensure that there is no uncertainty about which materials are required to be provided and what uses those materials may be put to in the future.

**Hon TJORN SIBMA**: I might return to a theme of my second reading speech, which concentrated a little bit on definitions. In the course of the clause 1 debate, I think we might deal with a lot of material here rather than necessarily going clause by clause, but I am not managing the bill. Can I seek some clarification, please? I refer to proposed section 32A(2) under division 2, subdivision 1 on page 5 of the amendment bill. It refers specifically to "protected material", and protected material very much seems to be an analogy for cabinet material.

Proposed paragraph (a) reads —

> it relates to proceedings, deliberations or decisions of Cabinet or of any committee of Cabinet …

I interpret that to mean effectively that a "proceeding" of cabinet or a cabinet subcommittee might be the agenda for cabinet deliberation—basically, it gives an indication that a particular matter is being debated; that "deliberations" in a material sense may well relate to the actual submission or memo and the supporting attachments that are referred to within that submission; and the "decisions" are very clearly the cabinet minute that records the decision for whatever item we are talking about. Am I making a reasonable lay interpretation of what is intended by the words "proceedings", "deliberations" or "decisions" as they relate to cabinet material?

**Hon SUE ELLERY**: Broadly, yes.

**Hon TJORN SIBMA**: Thank you. The reason I ask for that clarification is that proposed paragraph (a) further provides —

> (including proposed or contemplated proceedings, deliberations or decisions) …

I find that class of material difficult to reconcile with a physical object of the kind we have just related, because it seems to be something other than a draft cabinet submission or material, a draft cabinet agenda, or cabinet minutes that record a decision. Can I assume there is another, broader class of material that has a peripheral relationship with a cabinet decision that is being referred to here and is not captured by the three categories I outlined previously?

**Hon Sue Ellery**: Honourable member, can you restate that? I was distracted.

**Hon TJORN SIBMA**: I will restate it; apologies, Hansard. I am referring to "protected material" under proposed section 32A(2) (a), which reads, in part —

> it relates to proceedings, deliberations or decisions of Cabinet or of any committee of Cabinet …

In our previous exchange, we more or less agreed that "proceedings" refers to a cabinet agenda item being listed or an agenda item; "deliberations" refers to a cabinet submission seeking approval and appropriate attachments that are referred to inside the document; and "decision of Cabinet" is pretty clearly manifested in the article of a cabinet decision note, which are all subject to state record keeping provisions. I seek to clarify whether there is a broader range of cabinet or cabinet-related material that might bear some kind of peripheral relationship to those three items I have discussed, which are encapsulated by the text in parentheses—"(including proposed or contemplated proceedings, deliberations or decisions)". Is another, broader range of material being contemplated here? If so, could the minister indicate what that might be?

**Hon SUE ELLERY**: I will make two points. Firstly, whether information is subject to cabinet confidentiality depends on the particular information and the circumstances in which it was created. Secondly, a cabinet submission may evolve over time from policy work undertaken within departments and agencies for the purpose of being advanced to the minister, and, after consideration by the minister, to cabinet. The ultimate evolution of that policy work might be quite hard to define at the time at which the work is undertaken. Although for all intents and purposes it would be nice and neat if we could just limit the coverage to those things the member has outlined, for example, we cannot because a series of work could come before that might end up being part of the final piece, or might influence whether something else is part of the final piece. They may well be captured as well.

**Hon TJORN SIBMA**: Perhaps by way of an example, it might be something that is captured in a family of email exchanges. If ministers X and Y were charged with bringing a joint submission to cabinet for future consideration that required work of two agencies, and director general X emailed director general Y to say, "We have to meet and here is some associated material", we would have not yet hit the threshold of even a draft cabinet note. Would that email traffic hypothetically be captured as a contemplated proceeding, for example, that would have the protective cloak of cabinet-in-confidence thrown over it?

**Hon SUE ELLERY**: It could be. The important thing to note is that, regardless of whether it is captured, the Auditor General will now be provided with access to that type of material. It being considered cabinet material will not be a reason not to provide it to the Auditor General.

**Hon TJORN SIBMA**: If this email traffic possibly applied to a proposed or contemplated proceeding, which then, for whatever reason, did not manifest itself in any cabinet submission or decision—for example, for whatever reason, ministers change or there is a policy shift by government and that work is not continued—would it remain cabinet-in-confidence effectively forever, even though it did not become a cabinet decision? Is there some time within which that connection or relevance to being cabinet-in-confidence would dissipate, or would it be there permanently?

**Hon SUE ELLERY**: It is possible that despite a decision that a particular cabinet submission on that subject matter would not proceed, it could still attract cabinet confidentiality status. Again, I rely on the point that that will not preclude the Auditor General from getting it. I am not trying to be difficult, but it will be difficult to be precise, because it could or it may not.

**Hon TJORN SIBMA**: I accept that there is an organic genesis, and to some degree we need a broader category of reference, but my concern is that the more broad or expansive we try to be with these things, the more opportunities will potentially open up for information to be withheld from an auditor or, not necessarily in this case, withheld from disclosure because of a misapplication of that kind of confidentiality.

**Hon Sue Ellery**: In this case, adopting the very broadest definition of what constitutes a document that attracts the cabinet confidentiality provisions will in fact make it more accessible to the Auditor General.

**Hon TJORN SIBMA**: I will concentrate on departmental or interagency email traffic. Will that information be conveyed to the Auditor General in the same way as more conventional cabinet material will be—by way of a digital access standalone encrypted network—or differently?

**Hon SUE ELLERY**: I am advised that that is part of the process subject to the discussions the Department of the Premier and Cabinet is having with the Office of the Auditor General right now.

**Hon TJORN SIBMA**: Potentially, because the government itself is managing three concurrent cabinet systems, there is an intention to provide the Auditor General at this stage with read-only digital access to something. We could not possibly discount the fact that the Auditor General may be provided with cabinet material or peripheral cabinet material related to the same subject matter in different ways.

**Hon SUE ELLERY**: Yes, that is correct.

**Hon TJORN SIBMA**: Concentrating, again, on terms used under proposed section 32A, I will seek some clarification, because this jarred with me initially, although there may be good justification for it. Why is it deemed necessary to include a definition for "parliamentary privileged material"? I would have thought that matter had been well and truly settled. What potential mischief is attempting to be avoided?

**Hon SUE ELLERY**: It is precisely because it has been settled that we wanted to make the position absolutely explicit. I do not think I would be revealing anything inappropriate, honourable member, if I said that when the Presiding Officers were consulted, that was the first question they asked and that is precisely why it is explicitly expressed in the bill.

**Hon TJORN SIBMA**: I am reassured by that. This might go to the definition under proposed section 36B concerning a specified person, but I am not sure whether that is relevant at this stage. Perhaps this will be encompassed in the protocol that is to be negotiated between the relevant bodies, but I am seeking to understand who the individual decision-maker will be who decides whether a document is sensitive or protected in a cabinet-in-confidence sense or restricted in some other way.

Will that be the director general, for example, of the agency that was responsible for drafting the note? Will it potentially go to whoever is the executive director of cabinet services or cabinet secretary or the director general of the DPC? I just want to determine who the ultimate custodian of all cabinet material will be. Will that be delegated in any way, and who will make the decision about what is a cabinet, protected or restricted document? How will that information be conveyed to the Auditor General when they make the request?

**Hon SUE ELLERY**: In terms of the question about who will be the custodian of cabinet material, it will be the director general of the Department of the Premier and Cabinet, unless something else is specified in regulations. In terms of who will make the judgement about whether material or a train of material is restricted or otherwise, whoever receives the request will say, "I believe it's this" or "I believe it's that". They will make that decision and tell the Auditor General. If the Auditor General has a different point of view and wants to challenge that, that would need to be resolved in discussion with the government of the day. Any disagreement about whether a direction of the Auditor General to provide information must be complied with can ultimately can be resolved by the Supreme Court, although I have to say, nobody wants to be in that position. Having applied the provisions of the handbook during my time in government, negotiation is how these things have been ultimately resolved. Nevertheless, the Supreme Court is there, if needs be, but it is anticipated, and it is the government's intent—I know it is the Auditor General's intent as well—that we will continue to work collaboratively to reach an agreed outcome.

**Hon TJORN SIBMA**: I am interested in determinations because if there is a stamped cabinet decision, it is very clear what that document is. Further on in this bill it refers to regulations—it is beyond a protocol—around how that information can be publicly reported. We will have that discussion then, but I am concerned about that cabinet-adjacent work or pre-work that goes into this. Effectively, it will be the person receiving the request for the material, so, potentially, the author of the material could be the custodian of the material and the determiner of the status of that material, and, potentially, if it is called cabinet-in-confidence, it will have the same status that other cabinet documents have. Aside from a mechanism of potential reconciliation or agreement, the ultimate recourse is a Supreme Court judgement, which is, obviously, inadvisable and, hopefully, unnecessary.

To whom, though, will the Auditor General make the request for the material in the first place? I am looking at the acquisition of these railcars. I will not pick on just Metronet.

**Hon Sue Ellery**: Because you hate it?

**Hon TJORN SIBMA**: I like it. I would like it if the government stuck to what it was at first, and it has to deliver it.

**Hon Sue Ellery**: It doesn't feel like that!

*Sitting suspended from 6.00 to 7.00 pm*

**Hon Dr STEVE THOMAS**: I want to spend a little bit of time working out the approaches of other jurisdictions. The minister commented in her second reading speech —

> Many jurisdictions adopt a position that this highly sensitive information can be accessed only for specified purposes, whether some or all functions of the auditor, or remain silent on how privileged or immune information is to be handled.

Can the minister give some examples of where and in what circumstances that applies?

**Hon Sue Ellery**: Sorry; could you repeat the last part of your question?

**Hon Dr STEVE THOMAS**: The minister said that some jurisdictions adopt a position that highly sensitive information can be accessed only for specific purposes or remain silent on how to access it. Are there any examples of where and how that applies?

**Hon SUE ELLERY**: I will refer to which jurisdictions afford their Auditor General the discretion to release sensitive information, including when it is in the public interest. There is no nationally consistent approach. As with the current practice in Western Australia, it is understood that Auditors General work with agencies to ensure that, if access to this type of material and information is provided, whether by statute or not, the information is not publicly disclosed; instead, it is either reframed or removed whenever possible. In Tasmania, there is no public release of cabinet-in-confidence material unless it is in the public interest, and secrecy provisions apply if the Auditor-General considers it to be against the public interest to disclose. In the Australian Capital Territory, the Auditor-General can include cabinet information in a report if it is considered to be in the public interest, but must consult with the Chief Minister. In Victoria, no public release of cabinet-in-confidence material is permitted unless it is in the public interest and relevant to the subject of the report, and this is subject to a decision of the Victorian Auditor-General.

**Hon Dr STEVE THOMAS**: In the ACT, the Auditor-General consults, but who makes the final decision? Who is the final arbiter of whether cabinet-in-confidence information is included in a report?

**Hon SUE ELLERY**: The advisers are checking on the ACT, but I can say that in Tasmania, it is the Auditor-General who makes that decision.

**Hon Dr Steve Thomas**: I can give you a minute.

**Hon SUE ELLERY**: I am advised that in the ACT, it is the Auditor-General.

**Hon Dr STEVE THOMAS**: Ultimately, in both those cases, the Auditor-General is the decision-maker on the release of that information. I know that in the minister's second reading speech—it might be simple clarification—the minister mentioned that in Tasmania, the Auditor-General is unable to compel the production of materials that are subject to public interest immunity. That is separate to the release of information. We want to get into the differences, but I think we might do the differences in public interest immunity versus the others when we actually get to the clauses that define the two, rather than doing it at clause 1. Is it the case that the Auditor-General in Tasmania cannot compel access to public interest immunity documents, and does that include cabinet documents?

**Hon SUE ELLERY**: I am advised that in Tasmania, the Auditor-General has accepted that cabinet-in-confidence documents are not covered by the broader access to information held by government. It is not included. The member is looking perturbed.

**Hon Dr STEVE THOMAS**: I am interested in how Tasmania deals with access to cabinet documents. What process does the Auditor-General do? Is the Auditor-General restricted completely in their access?

**Hon SUE ELLERY**: I understand that it is managed via protocols, similar to the protocols that apply now in Western Australia.

**Hon Dr STEVE THOMAS**: I guess that makes sense. I suspect that means that sometime in the not-too-distant future, one can assume that Tasmania might go through a similar process of legislating amendments to formalise this. I think there is kind of an Australia-wide trend in this. I note that South Australia looks as though it is going to use a very similar model to that in Western Australia. Is the minister in a position to give us the differences between the Western Australian and South Australian proposals?

**Hon SUE ELLERY**: There have been media reports on whether or not South Australia is moving to a similar set of provisions to those we are debating tonight in this bill. The member has probably read them as well. They took note of comments made by the South Australian Auditor-General. I do not know anything more than that. In terms of how they are managed now and how access is facilitated, it is via a written request to South Australia's equivalent of the director general of the Department of the Premier and Cabinet, who then approves access if it is from a prior government and a different party. If documents are from a current government, or previous governments but of the same party, the Premier approves access. The Premier may consult with cabinet.

**Hon Dr STEVE THOMAS**: We will deal with most of the confidentiality of certain materials when we get to clause 8, which is the substance of that clause. The other issue I am particularly interested in is how the government will manage the reporting process when an Auditor General's report is made without reference to the documents that underpin it. Obviously, a fair degree of that must happen at the moment, so we might just start with that. How does the Auditor General deal with documents that have been viewed? At this point, they are not copied, but notes are made. This is versus the potential to ultimately make copies. What will the difference be in how the Auditor General references or uses the information from those documents without disclosing those documents?

**Hon SUE ELLERY**: What happens right now is that the Auditor General prepares draft reports. The Auditor General's office consults with agencies early on about what material will be relied upon, what needs to be redacted and what can be referred to. Various drafts and opportunities to comment are provided to the respective agencies covered by the proposed report. It is a process of collaboration and negotiation—whatever word you want to use. Towards the end, the agencies are provided with a draft report and the opportunity exists for them to prepare comments to be included as an appendix within the report. It is not proposed to change the practice. How the Office of the Auditor General and the Department of the Premier and Cabinet move forward will be worked out, but it is not proposed to change the practice.

**Hon Dr STEVE THOMAS**: We will deal with the specific wording when we get to clause 8, which is the substantive clause in the bill. We are just about to finish—we are pretty close—the conversation around the Leader of the House's second reading speech. I understand that the proposal is to draft regulations. Can the Leader of the House give us an indication of what regulations we will see and the time frame in which we might see them?

**Hon SUE ELLERY**: The proposal is that agreed protocols will be developed between the Office of the Auditor General and the Department of the Premier and Cabinet. The scheme, as it is set out in the bill, can, and it is intended will, operate without regulations; however, the regulation-making power is being included so that if the parties find it is more helpful to set out certain provisions for part or all of the protocols in regulations, the power will exist to do that. It is the intention of the parties to reach agreement on protocols and to go forward in that fashion. There is no intention to do it initially, but if it is deemed at some point in the future that the parties think it will be helpful to do that in regulations, the power will exist within the legislation.

**Hon Dr STEVE THOMAS**: I will make a comment rather than ask a question. It is interesting that we have got to the point of putting legislation in place that allows for the creation of regulations should they be required sometime in the future. I am not sure how that applies to the definition of a Henry VIII clause, for example. We are not certain that we need regulations; I do not know how often that occurs in legislation. I would be interested to know whether it is standard to put a clause in legislation that says, "We do not think we need regulations, but just in case we do at some point in the future, we will put in a clause that allows the making of regulations". Is that something that is regularly done? I am not aware of it, but I might be missing it.

**Hon SUE ELLERY**: There is a head of power in the existing legislation that has not been used. I am told it is in section 47 of the Auditor General Act 2006. I do not know how often a head of power is put into a piece of legislation and the regulations are not actually prepared. I could not say and I do not think the people at the table could tell me that either. The honourable member would certainly be aware that it is absolutely common practice to have a head of power to make regulations, as is the case with the act we are amending tonight, but it is not necessarily the case that we will then proceed to implement regulations.

**Hon Dr STEVE THOMAS**: Thank you for that. I am just looking at section 47 of the act. It states —

> The Governor may make regulations prescribing all matters and things that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for giving effect to this Act.

Man, you could put that in every piece of legislation invented! It is a pretty broad statement. That is interesting; I thank the Leader of the House for that. It is interesting to see that that is where we have come to.

We are getting to the end of clause 1, but I think we should move on. I will let Hon Tjorn Sibma continue on clause 1.

**Hon TJORN SIBMA**: I want to discuss this protocol issue for a little bit longer. Can the minister explain whether there is presently an extant protocol or set of protocols governing arrangements between the OAG, DPC and the State Solicitor's Office—whether they are codified or informal in any way?

**Hon SUE ELLERY**: Can the honourable member be more specific? There is a longstanding protocol; it is in the *Cabinet handbook* and the State Solicitor's handbook. Are you talking about something else?

**Hon TJORN SIBMA**: No. It is great to once again re-establish that. Can the Leader of the House help me understand what further work is needed to create an additional protocol, bearing in mind that these ones are in effect anyway? Are we looking for a complete rewrite or are we looking for, effectively, an amendment or some sort of annexure to the current arrangements?

**Hon SUE ELLERY**: I guess we are coming off a different base, because an automatic right of access is not in place now. The protocols now have to be about how we determine whether access is made and the process for doing that. We are starting from a different basis. Access will be automatic, so it will be about all the arrangements that will need to be put in place to support that. It might go to the digitisation process that we talked about earlier. Initially, there might be a combination of digitised material and others, so it will go to those sorts of things.

**Hon TJORN SIBMA**: Have any meetings taken place to establish these new protocol arrangements; and, if so, when do we expect them to conclude?

**Hon SUE ELLERY**: Yes; they certainly have started. I think I mentioned earlier that work has begun on the digitised exchange of the material, and that is ongoing. No end point is contemplated. The work will end when it is complete and everybody is satisfied that they understand the protocols, and the protocols cover everything that needs to be covered off.

**Hon TJORN SIBMA**: In reference to the previous discussion that we had on regulation-making powers, does the government have a position, whether inclusive or exclusive, on how it finds it preferable to deal with these kinds of situations? Is it the government's preference to deal with this matter in a more flexible, collegial way than a protocol seems to indicate, or is the government more inclined to safeguard itself, insofar as the protection of information is concerned, with the regulation? Is the government happy with a protocol arrangement? What kind of considerations might it take into account if it decides to effectively transition beyond a protocol and start dealing with black-letter regulation? What would prompt a determination?

**Hon SUE ELLERY**: I kind of addressed this in response to a question from Hon Dr Steve Thomas, maybe five minutes ago. The preferred position right now is that we work on a protocol. It is not our intention to proceed to regulation. At some point, it may well be that both parties form the view that this would be better done by regulation, but that is not the position of both parties now. The government's position is that the best way to do this is to effectively do what the bill before us will do, which is to make the right of access absolutely clear; settle that question, which has bothered the minds of parliamentary committees and others essentially since the act came into force; clarify that; and then work together on protocols about how to give effect to it. Our intention is to proceed with protocols. In respect of regulations, I guess the head of power will be a safety net, and if the parties reach the view that it would be better if the protocols were in regulations, that is what will happen.

**Hon TJORN SIBMA**: I thank the Leader of the House. Is there any intention to review the efficacy of these protocols after they have been established?

**Hon SUE ELLERY**: It may well be that as part of developing the protocols, agreement is reached on looking at them again in 18 months or whenever. The point I am reminded of is the role of the Joint Audit Committee, which has an oversight role, and so I imagine that it would play some part in providing advice to the Parliament on the efficacy or otherwise of the protocols.

**Clause put and passed.**

**Clause 2: Commencement —**

**Hon Dr STEVE THOMAS**: I will give an indication of which clauses I want to look at. The commencement clause is broken into two parts—proposed sections 1 and 2 will come into operation on the day the act receives royal assent, and the rest of the bill will come into operation on a day fixed by proclamation, and different days may be fixed for different provisions. Is there a reason it is broken up? Is there a particular time frame?

**Hon SUE ELLERY**: No, there is no specific plan that part X needs to be dealt with before part Y; it is just to give government flexibility in the event there is some reason to do that. Otherwise, it is a standard provision, without any kind of look into the future and thinking that parts need to come into place separately.

**Clause put and passed.**

**Clause 3 put and passed.**

**Clause 4: Section 4 amended —**

**Hon Dr STEVE THOMAS**: I am interested in why we need a definition of "Parliament" in the act. I guess I would have assumed that "Parliament" would mean both houses; I know the other place is not all that important, really,

but we sort of include it in "Parliament". The bill includes the members and the committees in the definition. Is there a reason it had to be defined as such?

**Hon SUE ELLERY**: That provision is in the current act. All we have done is move where it sits within the bill before us. There is no change to the provision; it is in the existing legislation.

**Hon Dr STEVE THOMAS**: Can the Leader of the House tell me where it is in the existing act?

**Hon SUE ELLERY**: It is in section 7(4).

**Clause put and passed.**

**Clause 5: Section 4A inserted —**

**Hon Dr STEVE THOMAS**: Look at that—we are halfway through the clauses! Clause 8 is the large one; that may take a little longer.

Clause 5 will introduce proposed section 4A, which defines that parliamentary privilege will not be affected. Presumably, this was drafted because of concerns that there might be an impact on parliamentary privilege when people start to gain greater access to documents et cetera. Proposed section 4A(1) is pretty simple. It states —

> Nothing in this Act limits or otherwise affects the operation of the *Parliamentary Privileges Act* …

I am interested in the greater definition in proposed subsection (2), which states —

> Except as authorised by Parliament, a power, right or function conferred under this Act must not be exercised if, or to the extent that, the exercise would relate to a matter determinable by Parliament.

As I read that, I assume that will basically put the power back with Parliament to determine whether an issue will come under parliamentary privilege. I guess we will start with that, and then I might ask the Leader of the House about the process by which that might be determined.

**Hon SUE ELLERY**: It will not put the power back; it recognises that that is where the power is. I responded earlier and said that we want to make it absolutely explicit that nothing in this bill goes to the right of Parliament to determine a matter that is covered by parliamentary privilege. I think I actually said earlier—I do not think I am revealing anything about the consultation—that when the Presiding Officers were contacted as part of the consultation process, that was the very first question they asked. We had two choices: we could have had nothing in the bill and I could have stood up and said that it is not intended, or we could make it explicit that it is not intended to impact on that power. We have chosen to be explicit.

**Hon Dr STEVE THOMAS**: Given that the focus of the bill is to define more fully the roles et cetera, I think that being explicit is the right way to go, because I think it removes any potential doubt that parliamentary privilege is paramount, particularly given the debate we are talking about. Is the Leader of the House aware of any issues that the Auditor General may have? Normally, issues around parliamentary privilege are more likely to be investigated by the Corruption and Crime Commission or the Standing Committee on Procedure and Privileges. Is there any history of Auditors General involving themselves in an investigation that might have related to parliamentary privilege?

**Hon SUE ELLERY**: No, I cannot answer that question. The member would need to ask either the Parliament or the Auditor General. It is not about the Office of the Auditor General conducting an inquiry or a review of the Parliament. It might be that for the purposes of another inquiry or report that the Auditor General is preparing, she comes across material that she might like access to but is covered by parliamentary privilege. It is not about whether she investigates the Parliament, but whether the material she comes across and might need, most likely for looking into some other agency, is covered by parliamentary privilege.

**Hon Dr STEVE THOMAS**: The two are generally very different. With regard to parliamentary privilege, we are talking about the statements made in Parliament and the operations of parliamentary officers and electorate officers et cetera. I suspect it is relatively unlikely to happen unless the Auditor General decided to investigate, dare I suggest it, the accounts of the Legislative Council and the Legislative Assembly. I am not sure that that has ever happened, and I do not want to give the staff a heart attack —

**Hon Sue Ellery**: Well, it did happen once and it wasn't a very good outcome, but not by the Auditor General.

**Hon Dr STEVE THOMAS**: Yes, sorry. It was not done by the Auditor General. It is probably unlikely to happen. Having that explicit rule in there is a good thing. It is unlikely to be tested, but that does not mean that I do not support the fact that it is in there. Making sure that parliamentary privilege is paramount is a reasonable outcome. Although I support the change, I struggle to see how it will be tested. That is not a question that the minister needs to answer but just a comment for *Hansard*.

**Clause put and passed.**

**Clause 6 put and passed.**

**Clause 7: Section 25 amended —**

**Hon TJORN SIBMA**: Can I first ascertain what I will call the protocol, but it might be more explicit than that, that governs the Auditor General's consultation with an agency upon which it conducts an audit. I read the word "consultation" in a charitable way, which means that the agency upon which the office is conducting its audit review is given fair warning as part of the process of natural justice. The office will give the agency an indication of preliminary findings before they are finalised and invite comment back. Is that what is intended here by way of the insertion of proposed paragraph (a) into section 25(2) that states "consult regarding the terms of the report" or does this infer something more beyond that process that currently takes place?

**Hon SUE ELLERY**: I am advised that the terms used here were worked on in collaboration with the Auditor General to clarify the language. One additional bit has been added. I do not imagine that the practice will be any different from what it is now. For example, the Auditor General's Office publishes a list of the inquiries that it is going to do in the immediate future. I certainly know that as a minister I have had meetings with the Auditor General and she has said that she is looking at doing inquiries into X, Y and Z. She has also invited me as a minister to say whether there are any areas that I would find it helpful for her to do inquiries into.

In terms of the precise provisions in clause 7, I am advised that the words "terms of the report" refer to the substantive content of the report as relevant to the person or entity being consulted. It is understood that this is how the summary of findings is currently applied. The language has been changed because it is considered that this will provide greater clarity of the audit process.

The proposed amendment to section 25(2) is to insert a new paragraph (a)(iii) —

> a person who is taken to have a special interest in the report under section 36B(5); …

The addition of legislating a specified person as a person who is taken to have a special interest under section 36B(5) will ensure that with an express right to now have access to highly sensitive information, such as that subject to legal professional privilege, there will be an additional opportunity for the individual who provided that information to ensure that it is not disclosed within the report.

**Hon TJORN SIBMA**: I am not intending to be deliberately obtuse; I am attempting to understand how this section will apply. I have now formed two interpretations of this proposed subsection. The minister's initial response, which was quite generous in the fact that it elaborated on what is intended with regard to consulting about the terms of the report, seemed to suggest or indicate to me that this was an initial piece of advice or consultation that preceded the audit taking place. I want to distinguish two things. Is it consultation on the fact that subject matter X, be it Metronet railcars or whatever, is the focus of the audit inquiry, or is it, as I initially read it to be, consultation on the draft audit report and findings, or is it both?

**Hon SUE ELLERY**: It is the second, honourable member. I probably misled and confused the member. The member was asking about when she is making the decision as to what she might inquire into. If my mother were still alive, she would say "she" is the cat's mother. I should not be referring to the Auditor General in that way, so I will withdraw that and refer to the Auditor General. The provision that we are talking about is the latter of what the member has just described. That is, before signing a report proposed to be submitted—so at the end of the process—the Auditor General must do certain things. It then sets out the provisions that we have been talking about.

**Hon TJORN SIBMA**: This might be dealt with later, but to what degree is the Auditor General obliged to do anything with the information that comes back to the Auditor General as a consequence of that consultation?

**Hon SUE ELLERY**: There are two things. There is nothing new in the provisions in the bill that the Auditor General must include in a report prepared under proposed subsection (1) any submissions or comments made under subsection (2) before the specified day, or a fair summary of them. If the Auditor General provides a copy and asks for comment, that needs to be reflected in some way in a fair summary or the submission or comment directly included in the report. I do not know whether the member's question is broader than this but if, as a consequence of anything the Auditor General finds in material that cannot be published, the Auditor General is of the view that it goes to corruption or something that needs to be referred to the Corruption and Crime Commission or any other investigative body, the Auditor General is obliged to do that regardless of whether the material remains confidential.

**Hon TJORN SIBMA**: For the four individuals and institutions cited in (i) "the Treasurer" through to (iv) "any other person …", is the Auditor General obliged for every report that utilises restricted or protected material in some way to consult with each of those named individuals and organisations?

**Hon SUE ELLERY**: Yes.

**Hon TJORN SIBMA**: May I ask why the Treasurer must be consulted? I can appreciate, for example, subparagraph (ii) "the agency or audited local subsidiary"—that makes perfect sense—but why additionally does the Treasurer need to be consulted on a draft report?

**Hon SUE ELLERY**: It is not a change; it is in the current legislation.

**Hon TJORN SIBMA**: I refer to the insertion of subparagraph (iii). There is reference to a "specified person" in proposed section 36B(1). Forgive my ignorance here but is that person who is taken to have a "special interest" the same as a "specified person", or are they different categories of person?

**Hon SUE ELLERY**: The short answer is yes, they are the same. In proposed section 36B, "specified person" means a person specified in the regulations or, if no person is specified in the regs, "a person in possession or control of the item". Then proposed section 36B(5) reads —

> A specified person —

Who we have already defined —

> who responds to an audit request is taken to have a special interest in the report on the audit for the purposes of section 25(2)(a).

**Hon TJORN SIBMA**: I know this can get eye-watering and painful but I think it is important to clarify what is meant here. I want to establish that, effectively, we are talking about one category of person. In fact, a person who is a "specified person" is also considered to be that same person who has a "special interest" in the topic under discussion. I wanted to establish that because it might save some time as we go through clause 8. I will go back to the initial opening. I think the minister indicated that the Auditor General had been consulted on the drafting of clause 7, "Section 25 amended".

I refer to the document from the Auditor General that was tabled previously by Hon Dr Steve Thomas and note there was a query by the Auditor General on what was actually meant by the word "consult" in the terms of the report. I want to confirm that nothing additional or exceptional is intended here by the word "consult" and it should be taken as its ordinary meaning and is intended in the same way that consultation ordinarily applies.

**Hon SUE ELLERY**: That is correct. It is the ordinary meaning of the word.

**Hon Dr STEVE THOMAS**: I think Hon Tjorn Sibma has stolen most of my thunder on this one. Clause 7, "Section 25 amended", will make what seems like a fairly small amendment to section 25(2) of the act. It is shifting from the original act, which states —

> Before signing a report proposed to be submitted under subsection (1), the Auditor General must —
>
> (a) give a summary of findings to the Treasurer, agency or audited local subsidiary—

It is basically to the same people. The special interest is being added, as is any other person who, in the Auditor General's opinion, has a special interest. My understanding is that a great degree of consultation already occurs around that process. When an Auditor General is preparing a report around, for example, the Department of Education—some of the minister's department—or whatever, there is a high degree of consultation. I remember—I do not have a direct quote—the Auditor General in some form talking about the level of consultation that their office does on this. There is a fair degree of consultation anyway, whether, under the original act, the Auditor General is expected to give a summary or it is called consultation. I suspect that it probably does not look much different in practice, but I am interested to know whether there is a difference. Could the minister give us a comment around the level of consultation on reports that exists currently and whether the government expects there will be any change in that? I imagine it will look very similar when the rubber hits the road and the Auditor General under the original act instigates an investigation and then gives a summary of findings, as you will —

**Hon Sue Ellery**: She does more than that. She provides a draft of the report.

**Hon Dr STEVE THOMAS**: Yes. The act says "a summary of findings". I imagine it is a draft report. I understand from conversations I have had with multiple Auditors General over many years that that results in further consultation. It kind of looks like that is reflected in proposed section 25 where it defines "consult" versus the way it was worded. Is there a definitive difference? Am I correct in saying that significant consultation already occurs? Further to that, is it likely to be a larger consultative process and will more staff be required because suddenly the legislation is calling it "consult" versus "give a report", or will it be the same process titled somewhat differently?

**Hon SUE ELLERY**: It is anticipated to be the same. There is a high degree of consultation now over what will be in the final report. It is not anticipated there will be any substantive change to that.

**Hon Dr STEVE THOMAS**: I thought that would be the case. It reads like that is the intent even though there is a change in the wording. The only significant difference will be the people, if there are multiples of people with a special interest, either under proposed section 36B(5) or any other person. I imagine people of special interest are probably spoken to by the Auditor General anyway if they have information of value. Again, my question is: is there likely to be additional activity that will happen as a result of that definition of a special interest person or is it likely to be absorbed into work that has already been done?

**Hon SUE ELLERY**: I am not sure I can take it much further. It may be that because it has been deemed that an additional person needs to be consulted that additional work would be required, because they are sending it to five people instead of four, but it will only really depend on the circumstances and whether someone is identified as being a specified person of interest. It will depend entirely on the circumstances.

**Clause put and passed.**

**Clause 8: Part 4 Division 2 replaced —**

**Hon Dr STEVE THOMAS**: Clause 8 is the substantive clause in the bill; it is by far the bulkiest clause. I will start with the definitions. I think most of it is reasonable. It introduces new definitions of "protected material" and "restricted material". I think we need to flesh out precisely what they mean. My cursory reading of it suggests that protected material includes cabinet-in-confidence and the bill states that it relates to proceedings and deliberations or decisions of cabinet. Protected material is defined by that community interest component and that the other component, which is legal professional privilege, is covered under restricted material. Can the Leader of the House confirm whether there are other parts of that? Restricted material also includes interactions between state and commonwealth. Maybe it would help if the Leader of the House had a more fulsome definition of the two so that we can divide up which bit goes where.

**Hon SUE ELLERY**: The definitions are set out in the provisions of the bill. "Protected material" has the meaning given in proposed section 32A(2) and, as the member just referred, sets out that something is protected material if —

> … it relates to proceedings, deliberations or decisions of Cabinet or of any committee of Cabinet …

Restricted material is set out in subclause (3), that it —

> … is ***restricted material*** if —
>
> (a) it is subject to legal professional privilege; or
>
> (b) its disclosure could —
>
> …
>
> (iii) damage relations between … the State and … Commonwealth …

The provisions are set out in the bill before us.

**Hon Dr STEVE THOMAS**: What is the difference between proposed subsection (2)(b)(ii) that states —

> divulge any material communicated in confidence by or on behalf of the Commonwealth, a State or a Territory …

And (3)(b)(iii), restricted material, if it could —

> damage relations between the Government of the State and a government of the Commonwealth, another State or a Territory;

**Hon SUE ELLERY**: To divulge any material communicated in confidence means just that—the ordinary meaning of those words. Under subclause (3), "restricted material" means a judgement is made whether it would damage relations, whether the material was shared in confidence. It goes to the nature of what impact that disclosure would have on the relationship between the commonwealth and the state.

**Hon Dr STEVE THOMAS**: That indicates that it is a judgement call. Who will be making the judgement about whether it will damage relations?

**Hon SUE ELLERY**: As I outlined in part of the debate much earlier, the person who receives the request will have to make a judgement on whether what they are being asked to provide meets the definitions of either "restricted material" or "protected material". We talked before about the process from there.

**Hon Dr STEVE THOMAS**: There is obviously a judgement call in that and that is unavoidable. We will get to the process in a bit. Over the page, proposed section 32A(3)(b)(iv) states that it is restricted if disclosure could —

> reasonably be expected to unfairly prejudice the commercial interests of a person or body.

I find that to be a fairly broad provision. I imagine that lots of things could be said to unfairly prejudice a commercial interest. How do we define that? Is an example if the Auditor General investigates a piece of material that suggests that a government department, for example, is operating beyond its budget and it should not be? In terms of commercial interests, it is probably more likely to be a contract that is made. Anyone with a contract could argue that exposure to that could unfairly prejudice a commercial interest. Is there a more set definition of what the government is trying to expose under proposed subparagraph (iv)?

**Hon SUE ELLERY**: No, there is not a narrower way of defining it. Although the term "commercial-in-confidence" has been a bugbear of oppositions forever and a day, at every level of government, contractual arrangements are entered into and, in many of those circumstances, to reveal certain elements of those contractual arrangements may

well have a negative commercial impact in the marketplace of whatever the contract is covering. Although I can appreciate that the member might be interested in narrowing that down, it is really not possible to do that. As has always been up to this point and is anticipated to continue, it is expected that the relevant agency, the Department of the Premier and Cabinet and the Office of the Auditor General will work together and try to negotiate whether elements of the information can be provided or it is not possible to make that material available because it goes to some commercial sensitivity. It will not be possible to narrow that definition, really, any further than is already there. I have been in opposition. I understand the annoyance when someone says commercial-in-confidence, but that is a fact when doing business.

**Hon Dr STEVE THOMAS**: I absolutely accept that it is an issue of opposition and that is not so much of government. Does proposed section 32A(3)(b)(iv) exist in the existing Auditor General Act; and, if it does, can the Leader of the House point out where?

**Hon SUE ELLERY**: No, it does not.

**Hon Dr STEVE THOMAS**: That is a really interesting component. For the first time, when the Auditor General bill becomes law, as it will because it will pass, for the first time commercial-in-confidence will be enshrined in the Auditor General Act. I think that is a really interesting component that we have now got to. In the same way that for the first time parliamentary privilege and cabinet-in-confidence will be more fully defined, for the first time we are finding that commercial-in-confidence will be enshrined in the Auditor General Act.

How do we know that we are not going to see an expansion of the use of commercial-in-confidence that the Auditor General will for the first time have to deal with, now that commercial-in-confidence is being inserted into the act? It will be an exemption because it will mean that it will be restricted material. When we get a little further on in the bill, we might debate proposed section 36B, which deals with audit requests relating to protected and restricted materials. Again, there is some regulation-making power there.

**Hon Sue Ellery**: I know the point you are trying to make, honourable member.

**Hon Dr STEVE THOMAS**: Okay; I will let the minister respond to that.

**Hon SUE ELLERY**: Commercial-in-confidence is my expression. That is not the language used in the bill in front of us. What is in the bill in front of us is that whether or not something is protected, it is deemed to be restricted if its disclosure could reasonably be expected to unfairly prejudice the commercial interests of a person or body. I am advised that although there is nothing in the protocol now, nor in the existing act that goes to this, governments—I use the plural "governments"—have withheld information that fits within that definition for exactly the same reasons. It could be prejudicial to a commercial entity or to an individual. It is not set out in a protocol and it is not set out in the act, but it is the practice.

**Hon Dr STEVE THOMAS**: Thank you; that does help. I guess there is a simple question then, because I am trying to work through the bill. Proposed section 36B refers to audit requests relating to protected material and restricted material. It states —

> (2) An audit request relating to an item of protected material or restricted material must be addressed to the specified person for that item.
>
> (3) The regulations may make further provision …

Again, we will come back to the regulations, because more will be made in the way this is put together —

> (4) The specified person is not excused from responding to an audit request on the ground that it relates to protected material or restricted material that —
>
> (a) is within the … control; or
>
> (b) is provided to the specified person.
>
> (5) A specified person who responds to an audit request is taken to have a special interest …

I get that. Is it the case, therefore, that a request from the Auditor General for restricted material that includes commercial-in-confidence will still fall under the section of the act that requires that material to be produced? Proposed section 36B(7) states —

> The person has a reasonable excuse for the purposes of section 33B(5) or 34(5) for failing to provide facilities or failing to comply with a direction, as the case may be, in relation to the material believed to be protected material or restricted material.

Are we saying that despite the fact that we are giving access to cabinet-in-confidence documents, the Auditor General can be prevented from receiving information that is restricted material due to it being reasonably expected to unfairly prejudice the commercial interests of a person or body?

**Hon SUE ELLERY**: The honourable member kind of jumped around a fair bit there. I am advised that the bit that the member just relied on at the end of his comments applies to proposed section 36B(6). If an audit request is addressed to the person and the person believes in good faith that it is protected or restricted, and the person is not the specified person for an audit request relating to that protected or restricted material —

**Hon Dr Steve Thomas**: Proposed subsection (7) is different.

**Hon SUE ELLERY**: Yes. Without me telling the member how to do his job, why do we not deal with proposed section 32 and then we will go to proposed section 33? Otherwise, we are jumping around and I think the member is mixing up things that do not apply to each other.

**Hon TJORN SIBMA**: I will stick to proposed section 32A(2). This is not intended to be an asinine question; it is an attempt to get to the heart of the process. How is it that someone acting on behalf of the Office of the Auditor General could be advised that the information they sought in order to conduct their audit had been categorised as protected or restricted?

**Hon SUE ELLERY**: Sometimes it will be self-evident that the material is in fact cabinet material and sometimes it will not, and so the person who receives the request will need to say that a series of emails is covered by this definition because it was part of the cabinet process. I should probably add that it is anticipated the protocols that will be developed collaboratively between the Department of the Premier and Cabinet and the Office of the Auditor General will step through all those processes and of who says what to whom and how that is communicated.

**Hon TJORN SIBMA**: I thank the minister. The reason for the question is that I think it gets to the heart of the intent of the bill—certainly its purported heart—which is to provide the Auditor General with all the information the Auditor General is required to access to fulfil its statutory role and function. I can absolutely take for granted that the scenario that the minister has just outlined is probably the ordinary practice. The Auditor General determines a subject for review or for audit and presumably then approaches the lead agency, ordinarily, and asks for all pertinent information relating to the terms of reference relating to the subject matter. It is only at that time, presumably, upon the response from that agency, that potentially the existence of either protected or restricted information relevant to that inquiry would be divulged. Is that a fair rendering of how the process of discovery might work?

**Hon Sue Ellery**: Divulged to the Office of the Auditor General?

**Hon TJORN SIBMA**: Yes.

**Hon SUE ELLERY**: The answer to that question is yes. It may be that under the protocols that are being worked on that it goes to the specified person, who may be the director general of the Department of the Premier and Cabinet.

**Hon TJORN SIBMA**: Presently, under the existing act is there an obligation on the respondent, whether it is to be called the specified person or whomever, to provide, effectively, a full catalogue of relevant protected or restricted information that may be relevant to the inquiry? Applying the principle of charity, but also the principle of real life, how could an Auditor General be satisfied that all relevant information as it relates to the subject matter has actually been provided?

**Hon SUE ELLERY**: There is nothing in the act, but by way of practice, it occurs in a variety of ways. The Office of the Auditor General and the relevant agency may negotiate exactly what it is the Auditor General is looking at. I am trying to think of an example; let us say the recent report the Auditor General did on school psychologists. It might be that there is a whole range of information about schools and mental health that actually has nothing to do with the school psychology service, so a series of discussions and conversations occurs about what exactly it is that the Office of the Auditor General is looking for. It is either narrowed down or expanded, depending on what the nature of the report is. It could also be that material is provided, the Auditor General does an assessment and consumes that material, and decides that for completeness she is going to need further additional information that is relevant but was not clear to her at the time she made the first request, so she would need to look at that as well. It is a process of collaboration and negotiation.

**Hon TJORN SIBMA**: I reasonably expected as much. My last question on proposed section 32A(3)(iv) touches upon the issue identified by Hon Dr Steve Thomas concerning prejudice to the commercial interests of a person or body. The Leader of the House's shorthand language for that was "cabinet-in-confidence", but —

**Hon Sue Ellery**: Commercial-in-conference.

**Hon TJORN SIBMA**: Sorry, commercial-in-confidence. What we are potentially dealing with here is a class of additional documentation. It might be unfair to ask this, but is there a corresponding limitation or consideration that applies to the Corruption and Crime Commission?

**Hon SUE ELLERY**: Sorry, honourable member; I do not have that advice at the table.

**Hon TJORN SIBMA**: Okay. One of the reasons I ask is that I think it is fair and reasonable to operate on a level playing field, however that might potentially cause some issues for an organisation like the CCC. I think this is

a worthy inclusion just to illustrate my point, but I absolutely accept the argument of Hon Dr Steve Thomas that it is important not to apply these things way too broadly. In 2017 or 2018 there was a CCC report into what I might generously call irregularities in the procurement practices of a specific subsection of the North Metropolitan Health Service; I think it went to trial. If I recall correctly, a range of companies were mentioned in a not particularly favourable way as a consequence of the commissioner handing down that report. It was drawn to my attention that one of the companies named in the report had actually changed ownership between the point at which the alleged misdeeds occurred and the point at which the report was published. The government took the prudent step of invoking certain contractual clauses that meant every company lost their contract and no further government instrumentality would be permitted to deal with them again, which was understandable. However, in the case of this one particular company, it could be argued that it was actually a prejudicial decision because the entire governance chain at that company had actually changed between reports. Is this sort of prejudicial behaviour or outcome the kind of thing that is envisioned with the inclusion of proposed section 32A(3)(iv), in addition to what we would strictly call a contract commercial-in-confidence item? I am just trying to understand how this might be applied more generally.

**Hon SUE ELLERY**: I think we are coming at this from two different angles. The powers of the CCC and the role of the CCC in that inquiry into the procurement practices of the North Metropolitan Health Service were very different from the role and function of the Auditor General, which is to provide a critique in respect of financial matters, financial management and where the office goes into particular policy settings. That is the job of the Auditor General. If the Office of the Auditor General comes across material that it determines could be the subject of criminal activity, its job is to pass that on. The Corruption and Crime Commission has a much greater set of powers and far greater reach, because it deals with potentially criminal matters. We are coming at it from two different angles. One would expect there to be a difference in the powers of the Auditor General versus the powers of the CCC. I am not sure whether that answers the member's question, but we are dealing with two different roles.

**Hon Dr STEVE THOMAS**: I take the minister back to proposed section 32A(3)(b)(iv), which is the commercial interests component. Will there be any restriction on the commercial interests of a person or body, which I presume will include a body corporate, a company or a trading enterprise?

**Hon SUE ELLERY**: No.

**Hon Dr STEVE THOMAS**: I will try to stick to proposed section 32A(3)(b)(iv) before I go to proposed section 36B and restricted materials. As the minister said, it is a new component; it has not been in the Auditor General Act before. How does the Auditor General currently deal with the commercial interests of a person or body? Are they taken into account at all? Is this something that has been done in practice but has not been in the legislation, and it will suddenly be in the legislation? What will change in terms of its application? If nothing will change, is it simply the fact that it will now be recorded?

**Hon SUE ELLERY**: It will be codified in the legislation. It is currently not codified, but the practice has been that the information is treated as restricted material. We have to put this in a broader context. The Auditor General will get access to this material. What we are talking about is what can be published.

**Hon Dr STEVE THOMAS**: That is coming up under proposed section 36. I will move to proposed section 33, "Auditor General may authorise people to perform functions", and proposed section 33A, "Delegation". Proposed section 33 states —

> The Auditor General may, by written notice, authorise a person … to perform functions under this Division.

I presume that, in practice, this will be staff within the Office of the Auditor General. We know that staff do audits, but is anybody else —

**Hon Sue Ellery**: It is in the current legislation.

**Hon Dr STEVE THOMAS**: It is in the current legislation. Is it generally restricted to staff? I presume there is no external sourcing of this, but I thought I would check.

**Hon SUE ELLERY**: I am advised that the Auditor General can contract external providers and issue them with the delegation powers referred to here—can and, I think, does. I think that is what that office is doing, particularly with the current shortages in the labour market. There is nothing new about that.

**Hon Dr STEVE THOMAS**: I suspect we might find that local government audits in particular are ones that the Auditor General might contract out and have an authorised person do some of that work. Is that the kind of thing we are talking about?

**Hon SUE ELLERY**: I do not have a list of the things for which the Auditor General might use external contractors. The member would need to put that question to her.

**Hon Dr STEVE THOMAS**: I know that the Office of the Auditor General does a certain number of local government audits in house and contracts out a fair proportion of them. I am going to assume that that is the sort of thing

that is referred to under proposed section 33, and particularly proposed section 33A. I presume that, for the "written authority" mentioned in proposed section 33B(1), a simple letter, stating that the person has been authorised to exercise these powers, will suffice. Is proposed section 33B(3), beginning "No search or other fee", the same as what exists in the current law? I think it is a continuation of the existing act, but I just want to check.

**Hon SUE ELLERY**: It is not new. It is the same as the existing section 35(3).

**Hon Dr STEVE THOMAS**: Proposed section 33B(5) will set the penalty for failing to provide an unauthorised person with the facilities they need. Has that ever been applied? If it has, where has it been applied?

**Hon SUE ELLERY**: I am not aware of any instances.

**Hon Dr STEVE THOMAS**: I thought that would be the case. It shows that there is a fair degree of compliance with the actions of the Auditor General. Over the page, proposed section 34, "Power to obtain information", remains interesting. I think proposed section 34 replaces the old section 34; it has the same heading and it reads very similarly. Could the minister give a quick run-down of any differences between the existing section 34 in the act and the proposed section 34 in the bill? Effectively, it is a written notice to do almost anything. What is the difference between the two?

**Hon SUE ELLERY**: I am happy to assist. Amendments to this section include the requirement for a specified time frame for compliance, being no less than 10 business days, and clarification that the power to direct can be used in relation to proposed section 33B. This section will also provide that the powers conferred under this section and the obligations of people receiving directions under this section have effect subject to subdivision (3), and requests made under this provision will need to be consistent with the requirements set out in subdivision (3).

**Hon Dr STEVE THOMAS**: Has the period of 10 business days been selected for a particular reason? I do not think any time frame was previously specified. I guess it is two working weeks. Is there a specific reason why that number was picked?

**Hon SUE ELLERY**: It is effectively the same number of business days. The current act refers to 14 days; this refers to 10 business days.

**Hon Dr STEVE THOMAS**: It is effectively the same. Other than that, there is very little difference between the existing section 34 and proposed section 34. We will get to the interesting part. Proposed section 35 is about the preparation of section 24 reports. Can the minister give an explanation of what is intended in proposed section 35? The existing section 35 is about access to accounts. Proposed section 35 seems to roll in proposed sections 33B and 34. Proposed section 36 ultimately corresponds to existing section 36. Proposed section 35 is an important part of the bill. It was central to the legal advice that we talked about. It has now been reduced to a paragraph.

**Hon SUE ELLERY**: The provision was added to provide clarity that the powers conferred by proposed sections 33B and 34 may be exercised for the purpose of reporting to Parliament under section 24(2)(c).

**Hon Dr STEVE THOMAS**: Proposed section 35 then jumps, I think, across to proposed subdivision 3, which includes proposed sections 36A, 36B and 36C. Is that the way we are to read the changes to the legislation? Section 35 of the act deals with access to accounts, information, money and property.

**Hon SUE ELLERY**: Will the honourable member let me respond? I think he is a bit confused. Proposed section 33B is about access to information, records, systems, money and property. Proposed section 33B is broadly reflective of the existing section 35. Proposed section 35 in the bill that is in front of us is as I just described; it is not related to existing section 35.

**Hon Dr STEVE THOMAS**: I thank the minister for that correction; she is quite right. I note that proposed section 33B will remove the words "full and free access", which I suspect is the cause of much angst for those people who think that the advice that the legal report gave us needs to be taken into account.

**Hon Sue Ellery**: We have dealt with that.

**Hon Dr STEVE THOMAS**: I am not going to go back to that. Proposed section 36, "Duty to give information overrides other duties and rights", basically runs very similar to existing section 36 of the act. The other thing I did note is that in current subsection (2) of the act, it states —

> 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 …

The phrase "under another written law" seems to have been reworded, as such, to state —

> A person must comply with a direction under section 34 despite any duty of secrecy or confidentiality imposed by law.

Does proposed section 36(2) pick up that common law component that we were sort of missing and discussing? Is that the reason that the wording has been changed?

**Hon SUE ELLERY**: All those questions that we dealt with earlier when we were debating the legal opinion provided to the Auditor General and the government's view on whether or not that should be accepted are captured in proposed section 36A in proposed subdivision 3. I think the member was trying to ask about written law. I am going to stop there. I think what the member was thinking that this bit referred to was those things that we have already dealt with. There is something new that the member sees in proposed section 36 in the bill in front of us. I am happy to take that question, but it does not go to all those issues that we canvassed when we were talking about the legal opinion provided to the Auditor General.

**Hon Dr STEVE THOMAS**: I guess the minister may not answer this. I read proposed section 36 as corresponding to section 36 of the act. I presumed that there was a similarity in section 36(2), as it relates to the duty to give information overriding other duties and rights. Section 36 has the same title and heading as proposed section 36. I think it is a good change. Proposed subsection 36(2) states that a person must comply with a direction despite any duty of secrecy imposed by law as opposed to any written law. That is a positive change because that deals with the issue of whether cabinet-in-confidence, legal professional privilege and community interest are written laws. They are not written laws. I simply presumed that that is what was aimed at with this change. I think it is a positive change and I agree with it.

The Leader of the House does not need to answer, necessarily. As far as I can tell, that is what is attempted to be done, and that is a reasonable thing.

**Hon TJORN SIBMA**: This might be the opportunity to kill two birds with one stone. The query relates to proposed section 36C and concerns extracts from and copies of protected material and restricted material. Proposed subsection (1) states —

> Despite anything else in this Act, the Auditor General or an authorised person must not take extracts from, or make copies of, an item of protected material or restricted material, except with the written approval of the specified person in relation to that item.

I would have thought that the opportunity for that to occur would be in some way circumscribed by the adoption of this new protocol, which will provide access, but not full access, to the documentation, and that this provision is included as a fail-safe.

**Hon Sue Ellery**: Yes. The honourable member will recall that we had a conversation about the kind of secure software that might be used.

**Hon TJORN SIBMA**: Nevertheless, proposed section 36C(2) states —

> If the Auditor General takes or receives an extract from or copy of protected material or restricted material for the purposes of an audit, whether under this Division or otherwise, when the audit is completed the Auditor General must —
>
> (a) give the extract or copy to the person in possession or control of the material; or
>
> (b) destroy the extract or copy and inform the person in possession or control of the material that it has been destroyed.

I take it that a positive obligation will be placed on the Auditor General that if, for whatever reason, material of a protected or restricted nature inadvertently ends up in their hands, they have an obligation to advise and destroy. What I seek clarification on is how that will correspond with obligations on the Auditor General presently to notify an agency, specialised person or whomever that such material has been inadvertently obtained, because, as I understand it, proposed section 33B(2), as it relates here, is largely a rearticulation of existing powers that the Auditor General may access, search, take extracts from and make copies of information—blah, blah, blah—but the important thing that may get to the heart of this is that on page 7, under proposed section 33B(2)(c), the Auditor General will have the capacity to access public property or other property in possession or control of that person. I presume, minister, that this could also include, effectively, going into an IT department of a department and ripping out a server and taking possession of it. Hypothetically speaking, the Auditor General may gain or circumvent, unintendedly, access to a range of protected and restricted material because it is contained on the departmental server. Is that the means by which it is anticipated that, potentially, the Auditor General will get access to a range of material that they otherwise would have to make special application to obtain?

**Hon SUE ELLERY**: From time to time there is inadvertent disclosure. There is no standing obligation for the Auditor General to return that material. We are not anticipating that someone from the Office of the Auditor General will go into a department and rip out a server, and it would be very awkward, I think, if it got to that. It is not anticipated and I do not think I can take it any further, really.

**Hon TJORN SIBMA**: The issue of regulations hangs over this now positive obligation for the Auditor General to disclose when they have inadvertently taken information that they should not have. Would this be the kind of obligation that is codified by way of this new protocol? If I may, once the protocol is settled between the three parties, is there a potential opportunity for it to be tabled in Parliament at some later stage?

**Hon SUE ELLERY**: It is not the government's view that it would need to be spelt out in the protocol whether there are provisions that clarify how, in what form and when the Auditor General might be required to return material that inadvertently comes into the office's possession; it is codified in the bill before us. In answer to the other question about whether it is anticipated that these protocols will be made public, the *Cabinet handbook* will be updated and that will be made public. I also understand that, in discussions with the Department of the Premier and Cabinet, the Auditor General has indicated that it is her intention to publish the protocols, so I suspect they will become public documents.

**Hon Dr STEVE THOMAS**: I think we are coming close to the end of the debate on this particular bill. A relevant person cannot disclose any confidential material, so that will come under the categories of parliamentary privilege and restricted cabinet-in-confidence et cetera. I refer to proposed section 36D(5), which notes subparagraph 36D(2)(c) and the disclosure of confidential material. The relevant person is not supposed to disclose confidential material in any report or communication to the Parliament, but that does not prevent the Auditor General from including a statement to Parliament that confidential material has been omitted from a report. Will it be standard for the Auditor General to say that confidential material has been omitted from their reports? Is it a standard process now that the Auditor General notifies Parliament that confidential material has been removed, or is it just assumed? Does Parliament have to chase up whether it has or has not?

**Hon SUE ELLERY**: It will be entirely up to the Auditor General to determine whether that is included in a report. The bill before us makes it clear that there is no prohibition on the Auditor General noting in any report that is provided to the Parliament that confidential material was relied upon but omitted.

**Hon Dr STEVE THOMAS**: It is at the discretion of the Auditor General; that is fine. But does the Auditor General put notes in her reports that this information has been omitted or is it up to Parliament to question whether material has been omitted?

**Hon SUE ELLERY**: The bill in front of us indicates that nothing in it will prevent the Auditor General from noting in a report that is provided by her office to the Parliament that confidential material or information about the substance of confidential material has been omitted from the report. Therefore, this clause proactively indicates that there will be no prohibition on the Auditor General noting that the document that is being made public does not include everything that the Auditor General was able to access during her inquiry.

**Hon Dr STEVE THOMAS**: I understand what the minister is saying—the Auditor General will make a choice as to whether she puts that material in place. I am asking whether that happens.

**Hon Sue Ellery**: Now?

**Hon Dr STEVE THOMAS**: Yes. Does that happen now? Does the Auditor General notify anybody?

**Hon SUE ELLERY**: We are losing track of what is in place now. Under what is in place now, the Auditor General does not have an automatic right to a whole range of information. I do not know whether in the course of any of the reports prepared by this Auditor General or previous Auditors General, they were made aware of material that they could not rely on in those reports. The member would have to go and search those reports to ascertain that. The point of this is that in a brand new context with an automatic right to certain information, one of the checks and balances against that is that although the Auditor General can see and consider that material, not all of it can be published. It cannot be referred to in the report. But this clause is stating that nothing in the bill prevents the Auditor General from saying, "In reaching the conclusions that I have reached, I also had access to confidential material, which I have not been able to publish." The clause makes it clear that although the confidential material cannot be published, the Auditor General will be able to indicate publicly that there was confidential material that her office could not publish.

**Hon Dr STEVE THOMAS**: I think we are actually in agreement up to a point. I agree that the Auditor General should have the power to put that statement in her reports. I agree that the Auditor General should have prescribed access to that which she did not have prescribed access before—I accept that. I also the accept the comments in the debate we had earlier that, by negotiation, the Auditor General has largely had access to that material anyway. As we debated previously, we are not aware of instances whereby information was denied. Again, I probably do not need an answer on this because I think we have gone around the bush a couple of times, but I am trying to work out whether it is likely that we will see the Auditor General say, "I was unable to obtain additional information" versus simply giving her the power to do so.

**Hon Sue Ellery**: I don't know the answer to that.

**Hon Dr STEVE THOMAS**: And that becomes the issue. What I would like to see as a part of the debate is us empowering—it would almost be worth requiring—the Auditor General to say, "There was information that I relied

on in my report, which I am unable to reference in the document, so you are just going to have to take my word for it." I accept that that is a point that we will not know until we test it, and I think we have probably come as close to the answer as we are going to get. With that, I think I am done with the committee stage of the bill. I will make a small third reading contribution before we finish for the night.

**Clause put and passed.**

**Clause 9 put and passed.**

**Title put and passed.**

*Report*

Bill reported, without amendment, and the report adopted.

[Leave granted to proceed forthwith to third reading.]

*Third Reading*

**HON SUE ELLERY (South Metropolitan — Leader of the House)** [8.45 pm]: I move —

That the bill be now read a third time.

**HON DR STEVE THOMAS (South West — Leader of the Opposition)** [8.45 pm]: I do not intend to make a particularly long contribution to the third reading debate on the Auditor General Amendment Bill 2022, but given that we have got through a fairly technical bill in one day, I think there is an opportunity to make a small contribution. I note the parliamentary secretary checking the clock.

**Hon Matthew Swinbourn**: Go for as long as you like!

**Hon Dr STEVE THOMAS**: I thank the Leader of the House for her contributions tonight, and Hon Tjorn Sibma for his contribution to the debate. The Auditor General Amendment Bill 2022 is intended to improve the clarity with which the Auditor General undertakes that very important role. We started the day by acknowledging that the Auditor General is an officer of the Parliament rather than the government, and I think we have all agreed on that. I think we have also all agreed that greater clarity of the role of the Auditor General is important. I note and I read into the second reading debate particular comments from the Auditor General along those lines, particularly the right of access to materials considered cabinet-in-confidence, but also legally privileged documents and this sort of vague definition of community interest immunity have all been, to some degree, better defined, and will be absolute entitlements of the Auditor General and tools that they can use. I guess there are still some questions remaining. Of course, one thing that is always an annoyance to the opposition is that the actual functioning of much of this stuff needs to be put together. We look at it in advance; we say, like many things, this is empowering legislation that will have operational components that are still being developed. Some of those may be in regulations. It was interesting to learn a bit about regulatory empowerment in legislation, even in situations in which no regulation is expected to be delivered. There have been a couple of very interesting parts of the debate tonight. It is very interesting that we can prepare for legislation we never expect to put in.

In my view, it is certainly the case that the Auditor General's explicit access should be defined in legislation rather than not, and that is a good outcome. I know there are some question marks around that, and we have spent some time talking about legal advice to the contrary. It is interesting that both the government and the opposition take a very similar view of the legal advice that has been given. I would suggest that it is a fairly brave person who discounts the advice of the State Solicitor's Office for other advice. Having said that, that is not what I have done. I have not automatically assumed that the State Solicitor is correct in its process. I have taken the time to consider the advice that I have read from other legal avenues, and I have compared that carefully with the statements that have been made around the advice from the State Solicitor's Office. It is very hard not to conclude that the State Solicitor's briefs and opinion on this seem to be much more defendable. I know that a person can seek legal advice for whatever position they want, and I am sure that Clive Palmer had very solid legal advice that said he would be successful, but I could demonstrate, if we worked our way through this, that the legal advice from the State Solicitor's Office in this case was not all that bad.

My final comment is that going forward there needs to be a close working relationship with the Office of the Auditor General around how the changes to the act are going to be implemented. It is absolutely the case, as has been put many times, including by the Auditor General herself, that much of what the Auditor General does is by negotiation with government departments, ministers and the cabinet. It is telling that we had a conversation, for example, about how there had never been to anybody's knowledge a denial of request for information from cabinet, despite the fact that the power exists. That tells us a fair bit about the negotiating powers of the Auditor General's office in relation to the cabinet and others.

I suspect that the Auditor General would not have minded if these things continued to be done as much by negotiation as by legislative definition. To some degree, I understand that if we have a system that seems to be working reasonably well, it is sometimes difficult to adjust to the need to change that, despite the fact that the joint audit committee made

that recommendation in 2016. When a system has worked relatively well, it would probably be considered that change is not required or necessary. But in this case, there is agreement that the clarity is an improvement. The proof will be in the pudding when we come to the implementation phase. As I said earlier, Auditor General reports are usually much more useful to the opposition than they ever are to the government, and long may that be the case, and long may we continue to put out media releases along those lines because they are fantastic.

**Hon Dan Caddy**: Long may you continue in opposition.

**Hon Dr STEVE THOMAS**: It always cycles, member, give me time. We are slowly bringing down the government one step at a time. Generally speaking, it is always the purview of opposition to make use of Auditor General reports. They are very useful and I look forward to the time that government members find out exactly how useful they are. Hopefully, the government will continue to have a well-serviced and operating Auditor General's office.

Despite this legislation that we will pass tonight having received some criticism, if it is well applied and continues to be well negotiated between the Auditor General's office and government, which is exactly how the Auditor General and others perhaps think that they have reached a good outcome, one would think that the Auditor General Amendment Bill 2022 before the house will continue to improve the process rather than make it go backwards. If that is the case, we have done our job here tonight.

I join with the government in commending the bill to the house.

Question put and passed.

Bill read a third time and passed.