

**From:** [David Blunt](#)  
**To:** [Madeleine Foley](#); [Rebecca Main](#)  
**Subject:** Portfolio Committee No 4 - production of documents  
**Date:** Thursday, 25 October 2018 4:57:30 PM  
**Attachments:** [image001.png](#)

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Dear Madeleine and Rebecca

I refer to our discussions this afternoon concerning the resolution of Portfolio Committee No 4 earlier this afternoon to issue summonses to the Inspector of Custodial Services and the Secretary of the Department of Justice to attend and give evidence next Wednesday 31 October, "such evidence include(ing) the answering of questions and the production of the draft report..."

As you are aware, I have written to Bret Walker SC to seek his advice on this matter. You both have access to the letter I sent to Mr Walker containing the request for advice, and attachments (thank you both for your assistance in putting them together in such a short time-frame in view of Mr Walker's availability this afternoon). I have no objection to you circulating the request for advice to the members of Portfolio Committee No 4, together with this email message.

Mr Walker called a short time ago and provided some brief initial advice. His advice can be summarised as follows:

- The summonses are appropriately worded – the key issue being to ensure that they clearly crystallise the matters at hand, including that the two witnesses are being summonsed to give evidence, including to answer questions and to produce the document in question. This provides sufficient clarity to the witnesses and also, should it come to this, enables the issue as to the power of the committee to require the production of the document to be dealt with in litigation
- The author of the advice (the A/Crown Solicitor) is greatly respected and his views should be accorded due deference. In this regard, the proposition that seems to be put forward, namely that for all the reasons set out in the advice the Inspector of Custodial Services Act 2012 does impliedly displace parliamentary privilege (in terms of the power of the committee), is arguable
- However, whilst arguable it is not a view with which Mr Walker is sympathetic: the threshold to be crossed for a statute to abrogate or displace parliamentary privilege (including the powers of a committee) is a high one. It is very rarely that a statute will meet this threshold and there are few that come to mind. The reasons set out in the advice as to why this statute should be so construed are not persuasive. There may be legitimate reasons for a committee wishing to inquire into the content of a draft report of the Inspector. Whether it is wise or appropriate in any set of circumstances for a committee to seek to inquire into a draft report is a matter of judgement. The suggestion that a committee is precluded from doing so (ie does not have power to do so by requiring the production of the document) is, however, not supported.

Mr Walker is happy to provide further advice on this matter if required. Please feel free to pass this advice on to the Chair and members of the Committee, or otherwise I am happy to do so in person on Wednesday.

Kind regards

David

**David Blunt**

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LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

25 October 2018

Mr Bret Walker SC  
Fifth Floor  
St James' Hall Chambers  
169 Phillip Street  
SYDNEY NSW 2000

Dear Mr Walker,

#### **Production of documents**

Earlier this afternoon Portfolio Committee No. 4 resolved to issue summonses to two witnesses to attend and give evidence, such evidence to include the answering of questions and the production of a document, next Wednesday 31 October 2018.

The committee's actions in issuing such a summons, as with the actions of Portfolio Committee No. 5 in May this year to issue a summons in similar terms to the Secretary of Transport for NSW, followed on from advice you had provided concerning section 4 of the *Parliamentary Evidence Act 1901* in 2015. In response to the summons issued by Portfolio Committee No. 5 the Secretary of Transport for NSW did attend and produce the documents, however, he asserted that he did so voluntarily and without "any concession to the committee's power". On that occasion, the committee Chair however stated that as the document had been produced following the service of the summons, as far as the committee was concerned, it had been produced in response to the summons.

Last Friday the Auditor-General tabled her *Report on State Finances*. In accordance with Section 52(2) of the *Public Finance and Audit Act 1983*, the report included a number of legal opinions received by the Auditor-General during the last 12 months. Two of these dealt with the powers of parliamentary committees, copies are attached. The report has now been published on the Audit Office website and is available at the following link:

<https://www.audit.nsw.gov.au/publications/latest-reports/state-finances-2018>

It would appear from those advices that the Solicitor-General has recently provided advice that has preferred the views long held by the Legislative Council and supported by your advice over many years in relation to the powers of committees, both in respect of the production of documents and statutory secrecy. The Solicitor-General's advice has not been made public. The Crown Solicitor defers to the Solicitor-General's advice on these matters.

[I note that your 2015 advice is referred to and there is some discussion as to the most likely source of the power of a non-statutory committee to compel the production of documents with the Crown Solicitor concluding that the power is more likely to be found in the principle of reasonable necessity and the standing orders, rather than in the *Parliamentary Evidence Act*. Nevertheless, that view is expressed only tentatively.]

Portfolio Committee No. 4 is currently inquiring into the Budget Estimates. Following an earlier hearing the committee resolved to order the production of a draft report of the Inspector of Custodial Services. A copy of the order of the committee is attached. The due date for the return of the document was Wednesday 24 October 2018. No documents were returned, instead the committee secretariat received correspondence from those to whom the order had been directed attaching advice from the Crown Solicitor which expressed doubt as to the power of the committee to order the production of this particular document. This advice is largely on the basis that:

“Requiring production of the draft report which has been provided to the Minister would involve a significant degree of inconsistency, if not interference, with the operation of the statutory scheme established by the Inspector of Custodial Services Act 201 (the ‘Act’) under which the Inspector reports to each House.”

In response the committee has this afternoon resolved to order that the Inspector of Custodial Services and the Secretary of the Department of Justice be summonsed to give evidence, including the answering of questions and the production of the document next Wednesday 31 October 2018. I attach for your information relevant extracts from the Minutes of Proceedings of the committee and the two draft summonses. Also included is the Crown Solicitor's advice attached.

On behalf of the committee, I would appreciate your urgent advice as to the terms of the draft summonses to ensure they are appropriately worded to achieve the end of requiring the production of the document. In due course I would also appreciate any further advice you may wish to give in response to the three opinions of the Crown Solicitor to which reference has been made above.

Yours sincerely,



**David Blunt**  
Clerk of the Parliaments