



Our ref: ICS18/141

Ms Rebecca Main
Committee Clerk
Portfolio Committee No. 4 - Legal Affairs
Parliament House
SYDNEY NSW 2000

Dear Ms Main,

I refer to our previous correspondence and the summons dated 28 October 2018, issued by the Chair of Portfolio Committee No. 4 - Legal Affairs: Inquiry into Budget Estimates 2018-2019 (**Committee**), that I appear to give evidence before the Committee in respect of my draft report, *Use of force, separation, segregation and confinement of detainees in NSW Juvenile Justice centres* (**draft Report**). The summons also calls for the production of the draft Report.

I confirm that I have agreed to appear to give evidence on Wednesday 31 October 2018.

I also confirm that I will not be producing the draft Report requested. I am in receipt of two advices from the Crown Solicitor's Office, dated 24 October 2018 and 29 October 2018 respectively (**attached**). For the reasons provided in those advices, I will not be producing my draft Report to the Committee. In particular, the advice of 24 October 2018 states:

Requiring production of the draft report which had 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 2012 ("the Act") under which the Inspector reports to each House.

On 30 October 2018, I provided to the Minister my draft Report as required by section 14(1) of the *Inspector of Custodial Services Act 2012* (NSW) (the **Act**). Under the Act, the Minister is to be afforded a reasonable opportunity to make submissions, either orally or in writing, in relation to the draft Report. I will take those submissions into account in finalising the report. However, I am not bound to amend the report in light of any submissions the Minister may wish to make.

Additionally, as a courtesy, I wish to advise the Committee that I intend to make an opening statement at the outset of my evidence.

Yours sincerely

Fiona Rafter
Inspector of Custodial Services

Cc: Andrew Cappie-Wood, Secretary, New South Wales Department of Justice
Melanie Hawyes, Executive Director, Juvenile Justice, New South Wales



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Draft Report of Inspector of Custodial Services

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Prepared for: PRE128 Department of Premier and Cabinet
Date: 24 October 2018
Client ref: Karen Smith
CSO ref: 201803809 T08 Tom Chisholm

1. Summary of advice

- 1.1 You seek my very urgent advice in relation to a resolution of the Legislative Council's Portfolio Committee No. 4 – Legal Affairs ("the Committee"), requiring production of a draft report of the Inspector of Custodial Services ("the Inspector") provided to the Minister for Corrections.
- 1.2 I defer to the opinion of the Solicitor General that it is more likely than not that a court would find that a committee of the NSW Parliament has the power to call for the production of documents. The Solicitor General also considered that this would be subject to claims of privilege, such as public interest immunity and legal professional privilege that might be made.
- 1.3 I do not think, on balance, that the Committee has power to require production of this draft report. Requiring production of the draft report which had 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 2012* ("the Act") under which the Inspector reports to each House. I do not think, in such circumstances, that production of the draft report to the Committee is reasonably necessary for the House to exercise its scrutiny functions.
- 1.4 I also prefer the view that the Council would not have power to compel production of the draft report, if an order for papers were made under Standing Order 52. This view, however, is subject to significant doubt, and must also be understood having regard to the very limited time available.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You seek my very urgent advice, in your email of 23 October 2018, relating to the following resolution of the Committee of 17 October 2018:

"1. That, under Standing Order 208(c), Portfolio Committee No. 4 – Legal Affairs be provided with the following documents in the possession, custody or control of the Inspector of Custodial Services, the Minister for Corrective Services, and the Department of Justice:

- a) the draft report on Juvenile Justice following the Royal Commission into the Protection and Detention of Children in the Northern Territory, prepared by Ms Fiona Rafter, Inspector of Custodial Services and provided to the Minister for Corrective Services; and
- b) any legal or other advice regarding the scope or validity of this order of the committee created as a result of this order of this committee.

2. That the documents be provided to the committee clerk by **4.00 pm, Wednesday 24 October 2018.**"
- 2.2 I am instructed that in late December 2017 the Inspector wrote to the Executive Director of Juvenile Justice, providing a copy of her draft report. On the same date, that letter was copied to the Secretary of the Department of Justice, who was also provided with a copy of the draft report. The Inspector provided a copy of the draft report for the purposes of ensuring, in accordance with her obligations of procedural fairness, that the relevant agencies had an opportunity to respond to matters identified in the draft report.
- 2.3 On the same date, the Inspector also provided a copy of the draft report to the Minister for Corrections, through his office. I am instructed that this draft report was provided to the Minister "as a courtesy". The report was *not*, in particular, provided in accordance with s. 14(1) of the Act, which requires the Inspector to provide a copy of the draft of a report to the Minister, and to give the Minister a reasonable opportunity to make submissions, either orally or in writing, in relation to the draft report. No draft has yet been provided to the Minister in accordance with s. 14(1), although that is expected to occur shortly.
- 2.4 These instructions are consistent with evidence given by the Inspector before the Committee on 4 September 2018.¹ I note in particular that the Inspector said: (p. 9)
- "I would describe it as an officer level report. As part of our usual process, I provided that to the executive director of Juvenile Justice to provide some extra information and also to provide feedback. At the same time that I did that I provided a copy to the Minister's office. But it is not the final report. It is part of the process of feeding back to me additional clarification on matters, additional information and some feedback around potential recommendations."
- I also note that, when asked by the Chair to describe her purpose in providing a copy of the report to the Minister, the Inspector said "[a]s a courtesy" (p. 10). The Inspector also confirmed that she was "not seeking any feedback at that stage from the Minister"; but that she sent it "to Juvenile Justice for agency feedback".²
- 2.5 I understand that the draft report is inaccurately described in the Committee's resolution, but I proceed on the basis that the draft report provided to the Minister is within the scope of the Committee's resolution.

3 Advice sought

- 3.1 You seek my very urgent advice, in your email of 23 October 2018, on the following questions:

¹ See pages 4, 9-11 of the transcript, which is available on the Parliament's website.

² See also p. 11 of the transcript.

1. Whether the draft report of the Inspector is required to be produced in response to the resolution of the Committee on 17 October 2018.
 2. Whether the draft report would be required to be produced to the Legislative Council if a resolution was passed under Standing Order 52.
- 3.2 I note that, whilst I have had an earlier opportunity to consider Question 1, I have had extremely limited time to consider Question 2.

4. Advice

Question 1 – whether the Committee can require production of the report

Whether a committee can require production of documents

- 4.1 Legislative Council Standing Order 208(c) provides that a committee has power to “send for and examine persons, papers, records and things”. Section 15(1) of the *Constitution Act 1902* permits, relevantly, the making of Standing Orders regulating the orderly conduct of the Council.
- 4.2 In *Egan v Willis*, the High Court found that the Legislative Council has power to compel the Executive Government to produce State papers, as this power is “reasonably necessary” for the Council to exercise its functions.³ There is no Australian judicial authority on whether a House may authorise one of its non-statutory *committees* to require production of documents to it.
- 4.3 A former Crown Solicitor, Mr Ian Knight, had taken the view that it should not be conceded that Parliamentary committees have the power to require the production of documents. He considered that the terms of Standing Order 208(c) are ambiguous; and that, if Standing Order 208(c) does purport to empower a Parliamentary committee to require the production of documents, there is doubt as to whether it is authorised by s. 15(1)(a) of the *Constitution Act*.
- 4.4 However, the Solicitor General has recently indicated that, in his view, it is “*more likely than not*” that, if the question were to be the subject of a decision of a court, a finding would be made that a committee of the NSW Parliament has the power to call for a witness to attend and give evidence, including by the production of a document. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness. This power would most

³ (1998) 195 CLR 424 at 453-454, [45]-[51] (Gaudron, Gummow and Hayne JJ); and at 495, [137]-[138] (Kirby J).

likely⁴ be found to derive from the Standing Orders and the principle that each House has all the powers that are "reasonably necessary" to exercise its functions.

4.5 I defer to the opinion of the Solicitor General.

4.6 In the Court of Appeal proceedings in *Egan v Willis* (1996) 40 NSWLR 650, Gleeson CJ said: (at 664: emphasis added)

"There is no statute which declares or defines the powers, privileges and immunities of the two Houses of Parliament in New South Wales. Section 15 of the *Constitution Act 1902*, which authorises the making of Standing Orders, is not a source of power of the kind presently in question. Standing Order 18 and Standing Order 19 *assume the existence of a power, but do not operate as a source of power*; rather they regulate in certain respects the exercise of a power which, if it exists, must have some other source."⁵

4.7 In the High Court, the validity of these Standing Orders was not directly questioned. It appears that the Court proceeded on the same basis as outlined by Gleeson CJ in the Court of Appeal, which was not questioned in the High Court.⁶

4.8 I therefore proceed on the basis that the power of a committee to "send for" papers and records, as reflected in Standing Order 208(c), derives from the fact that such a power is reasonably necessary for the Council to exercise its functions. Each House exercises the constitutional functions of making laws (pursuant to s. 5 of the *Constitution Act*), and the parliamentary function of reviewing executive conduct, in accordance with the principle of responsible government.⁷ In *Egan v Willis*, the power to require production of State papers from Ministers was found to be reasonably necessary for the performance of both of these functions.⁸

The Committee's terms of reference

4.9 The resolution of the Committee has been made in the course of the Committee conducting its current "Estimates inquiry", in accordance with the Budget Estimates Resolution of the Legislative Council of 20 June 2018. The Council resolved that, "upon tabling, the Budget Estimates and related papers for the financial year

⁴ It is not necessary to consider here the recent opinion of Mr Bret Walker SC that a committee may compel a person required to attend to give evidence to produce documents under the *Parliamentary Evidence Act 1901*.

⁵ Standing Order 18 at that time provided that:

"Any Papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order."

⁶ See eg the judgment of Callinan J at 508 [174]. See also the opinion of the Solicitor General and Ms Mitchelmore, SG 20 14/05 (which was tabled in the Legislative Council on 6 May 2014), at p. 2.

⁷ See the summary of *Egan v Willis* by Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563; at [2] 565.

⁸ *Egan v Chadwick* at [2] 565.

2018-2019 presenting the amounts to be appropriated from the Consolidated Fund be referred to the Portfolio Committees for inquiry and report".⁹

- 4.10 The Committee is therefore, in accordance with the Council's resolution, exercising the Council's parliamentary function of reviewing executive conduct.

The Inspector and her reporting functions

- 4.11 The office of Inspector has also been established for the purpose of scrutinising executive conduct. The executive conduct to which the Inspector's functions relate is, in general, conduct of detaining persons in custodial centres, juvenile justice centres and juvenile correctional centres: s. 6.

- 4.12 The Inspector is an independent statutory officer, appointed by the Governor (see ss. 4; Sch. 1 cl. 8), who is not subject to Ministerial direction or control. The Inspector is, however, subject to oversight by the Joint Committee.¹⁰ The functions of the Joint Committee include, in particular, to "examine each annual and other report to Parliament of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report": s. 17(1)(c).

- 4.13 The principal functions of the Inspector, specified in s. 6(1), include: (emphasis added)

- "(a) to inspect each custodial centre (other than juvenile justice centres and juvenile correctional centres) at least once every 5 years,
- (b) to inspect each juvenile justice centre and juvenile correctional centre at least once every 3 years,
- (c) to examine and review any custodial service at any time,
- (d) to **report to Parliament** on each such inspection, examination or review,
- (e) to **report to Parliament** on any particular issue or general matter relating to the functions of the Inspector if, in the Inspector's opinion, it is in the interest of any person or in the public interest to do so,
- (f) to **report to Parliament** on any particular issue or general matter relating to the functions of the Inspector if requested to do so by the Minister,
- (g) to include **in any report** such advice or recommendations as the Inspector thinks appropriate (including advice or recommendations relating to the efficiency, economy and proper administration of custodial centres and custodial services), ...

- 4.14 Section 14 provides that: (emphasis added)

⁹ See Chapter 1 of the *Budget Estimates Guide 2018-2019*.

<https://www.parliament.nsw.gov.au/committees/Pages/budget-estimates.aspx>; paragraph 1 of the resolution.

¹⁰ The Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission constituted under the *Ombudsman Act 1974*.

"14 Furnishing of draft reports to Minister and others

- (1) The Inspector is to provide the Minister with a draft of each report to Parliament to be made by the Inspector under this Act and **give the Minister a reasonable opportunity to make submissions**, either orally or in writing, in relation to the draft report.
- (2) The Inspector **must not make a report to Parliament** under this Act that sets out an opinion that is, either expressly or impliedly, critical of a Public Service agency (other than an opinion critical of Corrective Services NSW or Juvenile Justice) or any person **unless the Inspector has afforded the following persons the opportunity to make submissions**, either orally or in writing, in relation to the matter:
 - (a) if the opinion relates to a Public Service agency—the head of the agency,
 - (b) if the opinion relates to another person—the person.
- (3) The Inspector is not bound to amend a report in light of any submissions made by the Minister, an agency head or other person, but **must**:
 - (a) **before finalising a report, consider any such submissions** before the report is furnished to the Presiding Officers, and
 - (b) include in the report a statement that the Minister, the agency head or other person concerned has made submissions in relation to the Inspector's draft report."

- 4.15 The reference to the "Minister" is to the Minister for Corrections, as the Minister who administers the Act. It is not entirely clear why s. 14(2) applies to an opinion that is, either expressly or impliedly, "critical of a Public Service agency (*other than an opinion critical of Corrective Services NSW or Juvenile Justice*)". Part of the explanation may be that the provision of a draft report to the Minister, under s. 14(1), would give both Corrective Services NSW ("Corrective Services") and Juvenile Justice the opportunity to respond, through any submissions made in response by the Minister.
- 4.16 The Inspector is, plainly, required to provide procedural fairness to Corrective Services and Juvenile Justice when examining the conduct of those agencies for the purposes of preparing a report. I do not think that s. 14 could be said to *preclude* the Inspector from taking other measures, in addition to providing a draft report to the Minister under s. 14(1), for the purposes of providing procedural fairness to Corrective Services and Juvenile Justice.
- 4.17 The Inspector was not under any express statutory obligation to provide a copy of her draft report to the Executive Director of Juvenile Justice or to the Secretary for the purposes of inviting comment and feedback; and I am not asked to advise on whether it was open for her to do so. I am, however, comfortable in proceeding on the basis that it was open for the Inspector to provide a copy of the draft report to the Executive Director of Juvenile Justice and to the Secretary, for the purposes of ensuring procedural fairness (having regard to my view expressed at [4.16] above).

- 4.18 The Inspector must not disclose information in a report to Parliament if there is an overriding public interest against disclosure: s. 15(1). Subsections (2) – (4) of s. 15 make detailed provision in relation to what information may be subject to an overriding public interest against disclosure.
- 4.19 Section 16 relates to the provision of the Inspector's reports to Parliament, and relevantly provides that:

"16 Provisions relating to reports to Parliament

- (1A) Any report to Parliament made by the Inspector under this Act is to be made by furnishing the report to the Presiding Officer of each House of Parliament.
- (1) A copy of a report furnished to the Presiding Officer of a House of Parliament under this Part is to be laid before that House within 15 sitting days of that House after it is received by the Presiding Officer.
- (2) The Inspector may include in a report a recommendation that the report be made public immediately.
- (3) If a report includes a recommendation by the Inspector that the report be made public immediately, a Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.
- (4) If such a report is made public by a Presiding Officer of a House of Parliament before it is laid before that House, it attracts the same privileges and immunities as if it had been laid before that House."

Whether the Committee's powers are restricted by the Act

- 4.20 A resolution of a House, or one of its committees, may not make or alter the law. The Standing Orders of each House, for example, require approval from the Governor before they become "binding and of force": *Constitution Act*, s. 15(2). Legislation must, of course, be passed by each House and assented to by the Governor before it has the force of law.
- 4.21 The Solicitor General has previously provided an opinion that dealt with the effect of an inquiry by a non-statutory committee on an investigation being conducted by an independent statutory officer. The Solicitor General considered that the ambit of the committee's inquiry could not be confined by any impact it might have on the ongoing investigation by the statutory officer "unless perhaps its inquiry was to prejudice or hinder the ongoing investigation to such an extent" that the statutory officer was prevented from carrying out the officer's statutory functions (SG 2014/25).
- 4.22 The Solicitor General stated that, whilst it is uncontroversial that the scope of executive power is susceptible to control by statute, it is unlikely that impairment or curtailment of the statutory officer's investigation powers is susceptible of control by the non-statutory Committee. It was doubtful, however, that merely causing "delay" to the investigation would fall within this category.

4.23 It is not necessary in this advice to consider the ways in which courts have determined whether non-statutory executive (or prerogative) powers have been displaced by statute. I simply note that Kiefel J (as her Honour then was) has stated that:¹¹

"In *Attorney-General v De Keyser's Royal Hotel Ltd*, it was argued that the prerogative power was maintained despite a statute dealing with the same subject matter. Lord Dunedin described as 'unanswerable' the response of Swinfen Eady MR in the Court of Appeal: 'what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?' An intention to this effect, on the part of the legislature, is not readily inferred."

4.24 There are numerous instances where legislation *indirectly*¹² restricts the capacity of Ministers, other government agencies, and statutory bodies, to take actions they would otherwise have been lawfully able to take. It has also been said, more broadly, that "ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation".¹³

4.25 I am not aware of judicial consideration of any of these issues in relation to the powers of a House of Parliament or one of its committees.

4.26 I also note that the Solicitor General has expressed the general view that a statutory prohibition on disclosure of information will only apply to disclosure to a Parliamentary committee if that is done *expressly* or by *necessary implication*. As noted above, I defer to the views of the Solicitor General, adding only that this principle has been accepted in several Australian cases.¹⁴

4.27 It is not entirely clear whether, or if so how, this principle applies in the context of a power or "privilege" of a House which must derive from the principle of "reasonable necessity", and in relation to which there is at least some doubt. I will proceed, however, on the basis that the power of a committee to require the production of papers or records, as recognised in Standing Order 208(c), may not be displaced by statute unless that is done expressly or by necessary implication.

¹¹ *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at [284]; (2015) 255 CLR 514; references omitted.

¹² I use the term "indirectly" here in contrast to legislation which expressly prohibits a person or statutory body to take a particular action. Such legislation can be said to directly restrict the capacity of the person or body to take the prohibited action.

¹³ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5; [2017] 1 All ER 593; ("the *Brexit decision*"); at [51].

¹⁴ *Criminal Justice Commission v Parliamentary Criminal Justice Commission* (2002) 2 Qd R 8 at 23; [2001] QCA 218; *Aboriginal Legal Service of Western Australia Inc. v State of Western Australia*; (1993) 9 WAR 297 at 304; (1993) 113 ALR 87 at 108; and see also *R v. Smith, ex parte Cooper* [1992] 1 Qd R 423 at 430.

Analysis and conclusions

- 4.28 Reporting to Parliament is the central mechanism under the Act by which the Inspector is to exercise her statutory functions of scrutinising and overseeing the detention of adults and juveniles. Reports are to be provided to the Presiding Officer of each House: s. 16(1A). The Act establishes a reasonably detailed and prescriptive scheme for that process of reporting.
- 4.29 The Inspector may not present her report to Parliament without having taken the measures required by s. 14, including providing a draft report to the Minister in accordance with s. 14(1). I think it is foreseeable, or even likely, that the Inspector may not – after considering submissions in response by the Minister – include in the final report allegations or proposed findings against Corrective Services or Juvenile Justice, in particular, which had been set out in the draft report.
- 4.30 It is also foreseeable, or likely, that the Inspector may not – after considering the responses from other persons or agencies to whom procedural fairness was provided – include in the final report allegations or proposed findings against individuals or agencies which had been set out in the draft report.
- 4.31 The Inspector must also ensure that certain matters are *not* included in the report provided to Parliament, in accordance with s. 15.
- 4.32 It appears, as outlined above, that the draft report was provided to the Executive Director of Juvenile Justice, and to the Secretary, in accordance with the Inspector's general obligation to provide procedural fairness, and not specifically in accordance with s. 14(1) or (2).
- 4.33 Nonetheless, in my view, the resolution of the Committee requiring production of the Inspector's draft report has the obvious potential to interfere with, or frustrate, the operation of the statutory scheme relating to the preparation and finalisation of the Inspector's report to Parliament. Premature disclosure to a committee of the Council appears to be inconsistent with the careful statutory scheme, which is designed, amongst other things, to provide procedural fairness to those against whom the Inspector is considering making adverse findings.
- 4.34 It is also relevant that the Act provides for the Inspector to be subject to oversight by the Joint Committee. I do not suggest, consistent with a previous opinion of the Solicitor General, that the mere fact the Joint Committee has statutory oversight functions prevents a non-statutory committee from also inquiring into matters relating to the Inspector's statutory functions. Nonetheless, the fact that the Joint Committee has carefully defined statutory functions, including to monitor and review the exercise of the Inspector's functions, and to examine finalised reports to Parliament, also

highlights the inconsistency with the statutory scheme of a non-statutory committee purporting to order production of a draft report.

- 4.35 Accordingly, I do not think that it is reasonably necessary, for the exercise of the Legislative Council's functions, for a non-statutory committee to require production of a draft report, in circumstances where this involves a significant degree of inconsistency, if not interference, with the operation of the statutory scheme pursuant to which the Inspector is required to report to each House. I prefer the view that the statutory scheme demonstrates a "necessary implication"¹⁵ that a power the Committee may otherwise have had to require production of records does not extend to such circumstances. This conclusion is, however, not beyond doubt.
- 4.36 It is arguable that the Committee would not be undermining the statutory scheme because it need not make the draft report public. It could be argued that the Committee could deal with any problems of unfairness to those mentioned in the draft report, or with any other possible prejudice to the Inspector's ongoing inquiries, by ensuring the confidentiality of these aspects of the draft report.
- 4.37 I doubt, however, whether the significant inconsistencies with the Act I have identified could be "remedied" simply by assuming that the Committee would treat information contained in the draft report in this way. It would be difficult for the Committee to determine whether unfairness, or other prejudice to the Inspector's ongoing inquiries, would be caused by disclosure of information in a draft report. It would seem that the only way the Committee could ensure that such unfairness or prejudice would not arise, would be to ask the Inspector to provide detailed information to the Committee about the current status of the investigation to which the draft report relates. That such an approach would be necessary only highlights the inconsistency with the statutory scheme, particularly given that it is the Joint Committee which has the statutory functions of monitoring and reviewing the Inspector's functions.

Question 2 – whether the Legislative Council could require production of the draft report

- 4.38 Since the draft report is held by the Minister, and within the Department of Justice, it is unnecessary to consider whether, in response to such an order for papers under Standing Order 52, the Minister could require the Inspector to provide him with a copy of the draft report, or whether the Inspector could be required to respond directly to an order.
- 4.39 The power of the House to compel Ministers to produce "State papers" has been confirmed by the decision of the High Court in *Egan v Willis*. It appears quite possible, deferring to the opinion of the Solicitor General, that the scope of the power of the

¹⁵ See above at [4.23]-[4.24].

Council to order production of documents may be greater than the power of a non-statutory committee of the Council. This conclusion may arise from the Solicitor General's view (as outlined above) that a person called to attend to give evidence and to produce a document to a committee may make a claim of privilege, such as public interest immunity and legal professional privilege. Such claims of privilege, except for public interest immunity claims relating to Cabinet documents, are not generally available to resist production of documents under an order for papers.¹⁶ (Whilst Standing Order 52 recognises that a claim of "privilege" may be made, if such a claim is accepted, the documents are still required to be produced and may be inspected by members of the Council, but are not to be published or copied by anyone other than a member.)

- 4.40 As the Solicitor General (advising jointly with Ms Mitchelmore) has noted, in the *Egan v Willis* proceedings in the Court of Appeal, Gleeson CJ noted that the then equivalent of Standing Order 52 referred to "what are sometimes called State papers, that is to say, papers which are created or acquired by ministers, officeholders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales". The High Court, on appeal, appeared to adopt this definition,¹⁷ and it may therefore be accepted that the reference to "documents" in Standing Order 52 is to State papers: SG 2014/05 at p. 2.
- 4.41 Chief Justice Gleeson's description of "State papers" includes documents "acquired" by ministers and public servants by virtue of the offices they hold. The draft report of the Inspector would therefore appear to be a State paper in this sense, on the basis that it was "acquired" by the Minister and the public servants when the Inspector provided them with a copy.
- 4.42 Nonetheless, I would note that in the *Egan v Willis* and *Egan v Chadwick* proceedings the courts were not required to determine any issues relating to documents created by independent statutory officers such as the Inspector. I do not think that the Inspector holds office under, or in the service of, the Crown in right of the State of New South Wales. Instead, the Inspector, as an independent statutory officer conferred with functions of scrutinising the Executive, could be considered to be part of the "integrity branch" of government, which Chief Justice Spigelman has suggested could be considered to be a fourth arm of government (in addition to the Executive, Legislative, and Judicial branches).¹⁸

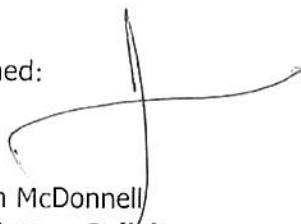
¹⁶ See *Egan v Chadwick*, discussed elsewhere in this advice.

¹⁷ *Egan v Willis* (1998) 195 CLR 424 at 442 per Gaudron, Gummow and Hayne JJ citing *Egan v Willis* (1996) 40 NSWLR 650 at 654 per Gleeson CJ

¹⁸ J.J. Spigelman *The integrity branch of government* (2004) 78 ALJ 724; and Bathurst CJ speech.

- 4.43 In *Egan v Chadwick*, the Court of Appeal considered whether the Executive could rely upon certain *common law* claims of privilege in response to an order for papers. The Chief Justice considered that it is not reasonably necessary, for the proper exercise of its functions, for the Legislative Council to call for documents the production of which would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension. The existence of an inconsistency or conflict constitutes a qualification on the power itself, because the power ultimately derives from the doctrine of ministerial responsibility.¹⁹
- 4.44 It was not necessary for the Court to consider whether any statutory provisions could be relied upon to resist production under an order for papers.
- 4.45 It is, therefore, not entirely clear that the House has power to compel production of documents created by an officer such as the Inspector or - if the House does have that power – that it could only be displaced in a statute by express provision or “necessary implication”. Assuming that both those propositions are correct, however, I would prefer the view, although the matter is finely balanced, that the statutory scheme relating to the preparation of reports by the Inspector would establish such a necessary implication. I would prefer that view for essentially the same reasons outlined in my answer to Question 1, particularly at [4.28]-[4.37].
- 4.46 In conclusion, I prefer the view that the Council would not have power to compel production of the draft report. This view, however, is subject to significant doubt, and must also be understood having regard to the very limited time available.

Signed:



John McDonnell
A/Crown Solicitor

¹⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 574 [55]. No reliance was placed on *individual* ministerial responsibility in that case: 571 [40], 576 [71]. Meagher JA agreed with Spigelman CJ, with some short additional comments. Priestley JA dissented.



29 October 2018

Ms Lida Kaban
General Counsel
Office of the General Counsel
Department of Justice
DX 1227 SYDNEY

Ms Fiona Rafter
Inspector of Custodial Services
Department of Justice

By email: lida.kaban@justice.nsw.gov.au / fiona.rafter@justice.nsw.gov.au

Dear Ms Kaban and Ms Rafter

Request by Committee for draft report of Inspector of Custodial Services

I confirm that Committee staff have indicated that both the Secretary, and the Inspector, will be summoned to attend to give evidence before the Committee on 31 October, and also to produce a copy of the draft report. The summonses are expected to be served today.

In these circumstances, you seek my very urgent advice whether the Committee would have power to compel production of the draft report, by issuing a summons under the *Parliamentary Evidence Act 1901* ("the *PE Act*").

I confirm the oral advice provided by Tom Chisholm of my Office on 26 October 2018. In my view, the *PE Act* does not confer any power on a committee to compel the production of documents.

Analysis

Mr Bret Walker SC has advised that s. 4(2) of the *Parliamentary Evidence Act 1901* ("*PE Act*") enables a committee to issue a summons requiring the production of documents from a witness.¹

The former Crown Solicitor, Ms Lea Armstrong, recently provided a draft advice (in another matter) to the Solicitor General which considered this issue. The Solicitor General observed

¹ "Parliament of New South Wales – Legislative Council Select Committee on Ombudsman's 'Operation Prospect'" of 14 January 2015.

that (whilst the Walker view is arguable) there is a good argument that the *PE Act* itself does not confer power on a non-statutory committee to compel the production of documents.²

I also prefer the view that the *PE Act* does not confer power on a non-statutory committee to compel the production of documents. Section 4(2) provides that any person (other than a Member of Parliament) may be summoned "to attend and give evidence before a committee". As noted by Mr Bret Walker SC in his opinion (at [36]), the language of "attend and give evidence before" a House or a committee conveys the notion of spoken testimony, as opposed to the production of documents.

In addition, in my view there is a number of other significant textual indications the *PE Act* is concerned only with the attendance and examination of witnesses to give oral evidence:

1. The long title of the *PE Act* is an Act "to consolidate the law relating to the summoning, attendance, and *examination* of witnesses before House of Parliament or any Committee thereof".
2. Section 11 provides for the consequences of a witness who "refuses to answer any *lawful question* during the witness's examination".
3. Section 12 provides that no action shall be maintainable against any witness who has given evidence, under the authority of the *PE Act*, whether on oath or otherwise, "for or in respect of any defamatory words *spoken by the witness* while giving such evidence".
4. Section 13 provides for the consequences for a witness who "wilfully makes any false statement, knowing the same to be false". Whilst this section may extend to a false statement made, for example, in a written submission which a witness gives to the committee whilst giving oral evidence, I doubt it would extend to a statement in a document (other than such a submission) which a person was required to produce to a committee.

If the *PE Act* did confer power to compel production of documents from a witness, it could be expected that it would at least also have addressed:

1. the consequences for a witness who refused to produce a document required to be produced as part of the giving of his or her "evidence" (cf s. 11); and
2. protection against defamatory words in any document produced (or required to be produced) by a witness as part of the giving of his or her "evidence" (cf s. 12).

There also does not appear to be anything in the legislative history or other extrinsic materials to support the view that the legislative "purpose" or "intention" of the *PE Act* was to confer power to compel production of documents.

The *PE Act* was a consolidation Act and it does not appear that there was a second reading speech given for that Act. The *Parliamentary Evidence Act 1881*, appears to be in substantially similar terms to the *PE Act* as enacted in 1901; and there do not seem to have been any material amendments to the *PE Act* since its enactment.

² The Solicitor General considered that power is, instead, more likely to be found to derive from Standing Order 208(c) and the principle that the Legislative Council has all the powers that are "reasonably necessary" to exercise its functions.

I note that, in the second reading speech for the Bill which became the 1881 Act, Mr Wisdom stated that: (*Hansard*, Legislative Assembly, 18 August 1881, p. 727)

"The object of the Bill is to enable either House, and committees of the Houses – including select committees – to examine witnesses on oath with regard to matters which Parliament may deem it desirable to inquire into."

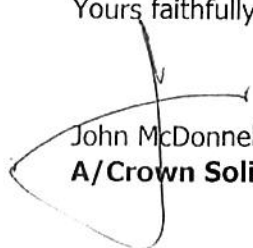
There is nothing in that speech (nor in the contributions from other members) to suggest the 1881 Act was intended to address the production of documents by witnesses.

Finally, I note that it is said in the recent *Annotated Standing Orders of the New South Wales Legislative Council*³ that:

"Historically, it was rare for committees to order papers, and these orders were not always complied with."

Please do not hesitate to contact Tom Chisholm on (02) 9224-5229 if you have any queries in relation to this matter.

Yours faithfully



John McDonnell
A/Crown Solicitor

³ Want, S, Moore, J. (2018) *Annotated Standing Orders of the New South Wales Legislative Council* The Federation Press; p. 688.

