



Justice

Office of the Secretary  
Justice Precinct Offices  
Locked Bag 5111  
PARRAMATTA NSW 2124  
Tel 02 8688 7777  
[www.justice.nsw.gov.au](http://www.justice.nsw.gov.au)

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

Dear Ms Main

I refer to the summons served on me yesterday, Monday 29 October 2018 under the *Parliamentary Evidence Act 1901* (“the *PE Act*”).

As set out in my letter to the Committee dated 24 October 2018, the Government has received legal advice from the Acting Crown Solicitor that requiring the draft report of the Inspector to be produced is inconsistent with the statutory scheme, established by Parliament under the *Inspector of Custodial Services Act 2012*, for the preparation and finalisation of the Inspector’s reports. I refer, in particular, to paragraphs [4.28]-[4.34] of the advice of 24 October 2018 attached to my letter.

I have also now received further advice that the *PE Act* does not confer power on the Committee to compel production of documents. This advice from the Acting Crown Solicitor concludes that the provisions of the *PE Act* indicate that it is concerned only with the attendance and examination of witnesses to give oral evidence, not the production of documents. I attach (with the consent of the Inspector) a copy of that advice, dated 29 October 2018.<sup>1</sup>

I have formed the view, having regard to the legal advice I have received, that I am unable to provide a copy of the draft report to the Committee. I note that, as a public servant, I am bound to accept the advice of the Acting Crown Solicitor: see M2016-04, Core Legal Work Guidelines.

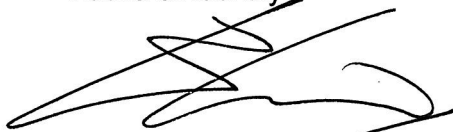
I will be attending to give evidence at 11.15 am tomorrow, 31 October 2018. However, it may be that the purpose of requiring production of the draft report, although not apparent, would be better considered in light of the final report. Accordingly, I request that the Committee consider standing over the Summons, to the extent that it purports to require production of the draft report, until after the final report has been tabled in Parliament.

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<sup>1</sup> I have since been advised that the reference in footnote 1, on p. 1, is incorrect. The correct reference is “Parliament of New South Wales, Legislative Council: Orders for papers from bodies not subject to direction or control by the Government”, 18 November 2015”.

I would welcome the Committee's response to this letter at the earliest opportunity having regard to the summons issued.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Andrew Cappie-Wood  
**Secretary**



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](mailto:lida.kaban@justice.nsw.gov.au) / [fiona.rafter@justice.nsw.gov.au](mailto: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.<sup>1</sup>

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

<sup>1</sup> "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.<sup>2</sup>

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.

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<sup>2</sup> 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*<sup>3</sup> 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**

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