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Inspector of
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19 November 2018

Our Ref:ICS/18/107

Ms Rebecca Main
Secretariat
Budget Estimates Committee
Parliament of NSW
Macquarie Street

Dear Ms Main

I refer to my appearance to give evidence the Legislative Council, Portfolio Committee No 4: Legal Affairs (**Committee**) on 31 October 2018. During my evidence I took some questions on notice. I note that I have not been asked to provide a response to any supplementary questions.

On 5 November 2018 you emailed me requesting that I provide the answers to the questions I had taken on notice and corrections to the transcript of the Committee hearing by 5pm today. My response to the questions on notice and corrections to the transcript are **attached** to this letter.

Also **attached** is a memorandum of advice prepared by Ms Anna Mitchelmore, Senior Counsel, on 'Powers of Legislative Council Portfolio Committee No 4 in the context of its inquiry into Budget Estimates 2018-2019', dated 19 November 2018.

I further report that since my appearance before the Committee on 31 October 2018, the Minister has responded to my request for a submission in accordance with section 14(1) of the *Inspector of Custodial Services Act 2012* (NSW) and I have requested a tabling date for the report.

Should you or the Committee require any further clarification please do not hesitate to contact me.

Yours faithfully

Fiona Rafter
Inspector of Custodial Services

Attachments:

1. Responses to questions taken on notice, by Fiona Rafter, Inspector Custodial Services, before Legislative Council, Portfolio Committee No 4: Legal Affairs on 31 October 2018, dated 19 November 2018.
2. Corrections to the transcript of the Committee hearing on 31 October 2018.
3. Memorandum of advice, Ms Anna Mitchelmore, Senior Counsel, on 'Powers of Legislative Council Portfolio Committee No 4 in the context of its inquiry into Budget Estimates 2018-2019', dated 19 November 2018.

Responses to questions taken on notice by Fiona Rafter, Inspector Custodial Services, before Legislative Council, Portfolio Committee No 4: Legal Affairs on 31 October 2018 (Committee Hearing)

Question 1 (see page 8 of the Transcript of Committee Hearing):
"How did you make it clear to the Minister that this was not your fulfilment of section 14(1) of the Act? You provided him with a copy of a draft report; how did you make it clear to him that you were not fulfilling section 14(1) of the Act?"

Response:
I refer to my opening statement of 31 October 2018 where I stated as follows: *"I provided to the Minister a copy as a courtesy so that he had visibility as to the status of the inspection – particularly in light of his request that I consider broadening the terms of reference."*

A member of the Inspector of Custodial Services (**ICS**) staff contacted the Minister's office and arranged to deliver a courtesy copy to the Minister's office on the same date the draft report was provided to the Executive Director of Juvenile Justice for feedback. I tasked a member of my staff personally with hand delivering the drafts to Juvenile Justice and the Minister's office. My staff confirmed delivery had occurred.

A submission under s 14 (1) of the *Inspector of Custodial Services Act 2012* (NSW) (**ICS Act**) was not requested from the Minister at that time.

A request to the Minister for a submission under s 14(1) occurs after procedural fairness has been provided to all agencies or persons who are potentially affected by adverse opinions which I may express. Section 14(2) requires that I not produce to Parliament a "report 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 or Juvenile Justice) or any person" unless I have given them the opportunity to make submissions. This is done by way of provision of the draft report, or an excerpt of the draft report, and a formal request for any submissions they might wish to make.

Although I am not required to do so under the Act, in relation to the draft report I wanted to ensure that Juvenile Justice had an opportunity to provide their feedback in respect of its contents.

The Minister was aware that a copy was provided to Juvenile Justice for feedback because, as outlined above, the Minister was provided with a copy as a courtesy at the same time.

I understand that the Minister is generally aware that feedback is sought from agencies and other persons before a copy of the report is formally provided to him for his consideration for the purpose of s 14(1). The basis of my understanding as to the Minister's awareness of this procedure is due to the wording of ss 14(1) and 14(2) of the ICS Act, and also because the Minister has received copies of draft reports from me in relation to other inspection matters.

A copy of the draft report was formally provided to the Minister for comment for the purposes of s 14(1), on 30 October 2018. The Minister has since responded to my

request for a submission in accordance with s 14(1) of the ICS Act, and I have requested a tabling date for the report.

Question 2 (see page 18 of the Transcript of Committee Hearing):
"Not only as to a report you provide to the Government but also to satisfy ourselves as to your role as an independent inspector of those facilities. So in asking you whether your independent undertakings confirm that the data you have provided is the same or different, I do not think you can refer to a report; otherwise a "report" will systematically cover everything."

Response:
I refer to page 17 of the transcript of the Committee Hearing where I stated: "*I have powers under my legislation to request data and information from Juvenile Justice and I do that to obtain information in relation to these types of matters. That is what I have done on this occasion, requested data, which has informed my response.*"

Under section 7(a) of the ICS Act I am entitled to full access to the records of any custodial centre.

The ICS has access to the Juvenile Justice Client Information Management System (**CIMS**) on a 'read-only' basis, and is able to access and cross-check data recorded in CIMS in relation to individuals. The ICS can check individual records in CIMS regarding how long a young person may have been confined, and does this on occasion to verify information provided by a young person or staff member during inspection.

The ICS is unable to extract from CIMS large amounts of data about the rates and duration of confinements. The ICS requests Juvenile Justice to provide raw quantitative data about rates and length of confinement, and the ICS conducts its own quantitative analysis of this data.

As part of its investigation and reporting function, ICS independently verifies segregation and/or confinement records in relation to some, but not all, individual detainees. We conduct checks, based on information, and sampling of records in relation to a number of detainees. It is beyond the resources of the ICS to validate every instance of confinement and/or segregation and we rely on the data from Juvenile Justice to an extent to assist in this process.

Given the limited resources available to the ICS, the process of cross-checking and validating the data in the context of every instance of segregation and/or confinement would take a significant diversion of these resources and to verify the accuracy of the data provided by Juvenile Justice by searching each individual's confinement records in CIMS.

The ICS may check CIMS for records of segregation for individual young people who are on Detainee Risk Management Plan with segregation. The ICS does not receive an automatic notification when segregation exceeds 24 hours.

Question 3 (see page 20 of the Transcript of Committee Hearing):
"I asked on notice, through the Minister, how many strip searches were conducted on juvenile prisoners in the last financial year. The answer I was given was that not all strip searches are required to be recorded. 'Were you aware of the fact that strip searches were not required to be recorded? Are you aware of any data in relation to strip searches of juvenile detainees?'"

Response:
I am not aware that strip searches are not required to be recorded. The new 'Searching Young People Policy (October 2018)' and 'Searching Young People Procedure (October 2018)' replaced two policies 'Searching Detainees Procedures (2012)' and the 'Searching Detainees Procedure Resource Documents'. These policies of Juvenile Justice require strip searches to be recorded in the search register.

I have not requested data in relation to strip searches. I have requested data in relation to use of force to search a detainee in circumstances in which the detainee refuses to submit to being searched. The data indicates that it is rarely the case that use of force is used to conduct any kind of search.

Question 4 (see page 21 of the Transcript of Committee Hearing):
"Have those recommendations been implemented?"

Response:
Recommendation 10 of the '*Making Connections*' Report provided – *"The Inspector recommends that JJNSW should not carry out strip searching on a routine basis and should replace this practice with a rigorous risk-based assessment process to target the trafficking of contraband"*.

The ICS requires six monthly reporting on implementation of recommendations from Juvenile Justice. The Inspector of Custodial Services reports in its 2018 Annual Report that the recommendation has been partially achieved. This report is based on the six monthly monitoring and reporting process.

Juvenile Justice has implemented policies to bring about the reduction of strip searching. Detainees at Juvenile Justice Centres are no longer routinely strip searched after any portion of leave, or after a visit with a family member or significant other.

However, routine strip searches still occur when a detainee is being admitted to a detention centre or returning to a detention centre following day leave or overnight leave.

This is in accordance with clause 11A(9) of the *Children (Detention Centres) Regulation 2015.*

"A partially clothed search of a detainee must not be conducted as part of the general routine of a detention centre, except in the case of a detainee being admitted to a detention centre or returning to a detention centre following day leave or overnight leave."

Dated 19 November 2018

MEMORANDUM OF ADVICE

POWERS OF LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO 4
IN THE CONTEXT OF ITS
INQUIRY INTO BUDGET ESTIMATES 2018-2019

Introduction

1. My instructing solicitors act for Ms Fiona Rafter, the Inspector of Custodial Services (**Inspector**). I have been briefed to advise on the power of a committee of the Legislative Council, Portfolio Committee No 4: Legal Affairs (**Committee**), to require the Inspector to produce to it the draft of a report into juvenile justice issues that she provided to the Executive Director of Juvenile Justice and the Minister for Corrective Services in December 2017 (**Draft Report**). I have not been briefed with a copy of the Draft Report, and my instructing solicitors do not have a copy.

2. The request for my advice follows comments that the Chair of the Committee made at the conclusion of a committee hearing on 31 October 2018, inviting the Inspector to consider in particular previous advice of the Solicitor General about the interaction between the powers of Parliament to require the production of documents and legislative secrecy provisions. I have been briefed with the documents to which the Chair of the Committee referred in his remarks, one of which is a copy of the advice of the Solicitor General and myself, dated 9 April 2004, and the other of which is a copy of advice of the Crown Solicitor to the Auditor-General dated 10 August 2018, which summarises advice of the Solicitor General.

3. I have been briefed with a number of other advices on the subject of the powers of Parliament and Parliamentary committees to require the production of documents, including advice that the Acting Crown Solicitor gave to the Inspector and to the Department of Justice (**Department**) in relation to production of the Draft Report. The Acting Crown Solicitor advised first in relation to a resolution of the Committee under standing order 208(c), and subsequently in relation to a summons issued to the Inspector pursuant to s 4 of the *Parliamentary Evidence Act 1901* (NSW) (**PE Act**).

4. In advising the Inspector that, on balance, the Committee did not have the power to require production of the Draft Report pursuant to standing order 208(c), the Acting

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Crown Solicitor focused not on the general non-disclosure provision in the Inspector's constituting statute, the *Inspector of Custodial Services Act 2012* (NSW) (**ICS Act**), but rather on the scheme of reporting to Parliament for which the ICS Act makes provision. I agree, on balance, with the opinion of the Acting Crown Solicitor that requiring the production of the Draft Report "would involve a significant degree of inconsistency, if not interference, with the operation of the statutory scheme…under which the Inspector reports to each House".

5. I also consider that there is force in the opinion of the Solicitor General, apparently recently expressed, and endorsed by the Acting Crown Solicitor, that the better view of the power to issue a summons under s 4 of the PE Act is that it does not extend to requiring the production of documents. However, in light of the availability of alternative sources of power to require the production of documents, it is not necessary to answer this question definitively.

Background

6. The Committee is presently undertaking its Inquiry into Budget Estimates 2018-2019 (**Inquiry**). At a hearing of the Counter Terrorism, Corrections and Veterans Affairs portfolio on 4 September 2018, the Inspector was asked a number of questions about the status of a report on juvenile justice issues. In responding to those questions, the Inspector informed the Committee that in December 2017, she had provided the Draft Report to the Executive Director of Juvenile Justice to provide extra information and feedback. The Inspector also provided a copy to the Minister's office at that time.[1]

7. On 17 October 2018, the Committee resolved that pursuant to standing order 208(c), it should be provided with a copy of the Draft Report in the possession, custody or control of the Inspector, the Minister for Corrective Services and the Department of Justice, along with any legal or other advice regarding the scope or validity of the Committee's order. In an undated response, the Inspector informed the Committee that she would not be providing the documents sought.

8. On 23 October 2018, the Inspector was requested to attend a supplementary hearing of the Committee for the Corrections portfolio on 31 October 2018. By email dated 25 October 2018, the Inspector was notified that the Committee had resolved to summons her to

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[1] Portfolio Committee No 4 – Legal Affairs, Examination of Proposed Expenditure for the Portfolio Area Counter Terrorism, Corrections, Veterans Affairs", Uncorrected Transcript, 4 September 2018 at p 9, 10.

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attend the supplementary hearing, to answer questions and “to produce the document in question”.

9. The Summons is dated 28 October 2018, and is signed by the Committee Chair. It required the Inspector to attend the supplementary hearing on 31 October 2018 “to give evidence as to, and concerning the matters to be inquired into by the committee, and such evidence [to] include the answering of questions and the production of the draft report on juvenile justice prepared by [the Inspector], and referred to at the Budget Estimates hearing for the Corrections Portfolio on 4 September 2018 as per pages 4 and 9-10 of the hearing transcript”.

10. In advance of the hearing on 31 October 2018, the Inspector confirmed by letter that she would not be producing the Draft Report to the Committee. The Inspector stated that she relied upon two advices which she had received from the Crown Solicitor’s Office, dated 24 October 2018 and 29 October 2018, copies of which she provided to the Committee. In the same letter, the Inspector informed the Committee that on 30 October 2018 she had provided a draft of the report to the Minister pursuant to s 14(1) of the ICS Act.

11. At the hearing on 31 October 2018, the Inspector made an opening statement to the Committee in the course of which she confirmed that, for the reasons identified in the two advices of the Acting Crown Solicitor, she was not in a position to provide a copy of the Draft Report. The Inspector made particular reference to the Crown Solicitor’s advice of 24 October 2018. Following the Inspector’s opening statement, the Committee adjourned.

12. Upon resuming, the Chair stated that the Committee had resolved to delay taking immediate action to enforce provisions of the summons concerning the production of the Draft Report. Referring to what he described as inconsistencies between advices provided by the Crown Solicitor and the Acting Crown Solicitor, the Chair stated that the Committee would seek further legal advice and would seek an extension of the reporting date to 28 February 2019, noting that it may consider recalling the Inspector or the Secretary of the Department.

13. At the conclusion of the hearing, the Chair described the Inspector as having declined to answer a number of questions in the course of the hearing “apparently on the grounds of statutory secrecy provisions in the [ICS Act]”. The Chair respectfully suggested that the Inspector reconsider her approach in that regard, and urged that, in doing so, she consider the following material:

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(a) The advice of the Solicitor-General, to which reference was made by the Crown Solicitor in paragraphs 3.9 to 3.11 of her advice to the Auditor-General, dated 10 August 2018, and included as appendices to the Auditor-General's report on State Finances, tabled on 18 October 2018.

(b) Pages 7 and 8 of the advice of the Solicitor-General, dated 9 April 2014, tabled in the Legislative Council on 6 May 2014.

14. The Chair stated that the Committee looked forward to the Inspector's further advice in relation to these matters in the context of her answers to questions on notice.

15. For completeness, I note that the Secretary of the Department of Justice had also declined to provide a copy of the Draft Report in response to the resolution under standing order 208(c); and he was also summonsed to appear before the Committee on 31 October 2018 and to produce the Draft Report. In a letter responding to service of the summons, the Secretary informed the Committee that in addition to provision of the Draft Report being inconsistent with the statutory scheme established under the ICS Act, the Crown Solicitor's Office had advised that the PE Act, pursuant to s 4 of which the summons was served, did not confer power on the Committee to compel the production of documents.

The basis for the Inspector declining to answer questions on 31 October 2018

16. On my review of the uncorrected transcript of the hearing on 31 October 2018, the questions from Committee members that the Inspector declined to answer were in connection with the Draft Report that she did not produce, relying on the advice of the Acting Crown Solicitor. In declining to answer those questions, the Inspector referred to her obligations under the ICS Act.[2] The Inspector subsequently said that she relied upon the provisions of the ICS Act in relation to her functions and the processes she had to adhere to.[3]

17. There is a general non-disclosure provision in the ICS Act. Section 25(1) prohibits the disclosure of "any information obtained in connection with the administration or execution of this Act" unless the disclosure is made:

(a) with the consent of the person from whom the information was obtained, or

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[2] See Portfolio Committee No 4 – Legal Affairs, Examination of Proposed Expenditure for the Portfolio Area Counter Terrorism, Corrections, Veterans Affairs", Uncorrected Transcript, 31 October 2018 at p 9.

[3] See Portfolio Committee No 4 – Legal Affairs, Examination of Proposed Expenditure for the Portfolio Area Counter Terrorism, Corrections, Veterans Affairs", Uncorrected Transcript, 31 October 2018 at p 10.

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(b) in connection with the administration or execution of this Act (or any such other Act), or

(c) for the purposes of any legal proceedings arising out of this Act (or any such other Act) or of any report of any such proceedings, or

(d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or

(e) with other lawful excuse.

18. That provision is in similar, albeit not identical, terms to non-disclosure provisions in other legislation which have previously been the subject of advice in the context of the power of the Houses of Parliament to obtain information and documents.[4] In the advice of 9 April 2014, in the passage to which the Chair referred the Inspector at the conclusion of the hearing on 31 October 2018, the Solicitor General and I referred to a number of authorities which "would take the view that a statutory non-disclosure provision could only affect the powers of the Council if it did so by express reference or necessary implication".[5] We were inclined to agree that this view accorded with the role of Parliament in a system of responsible and representative government, but noted that "the matter can hardly be free from doubt and it is not possible to predict with confidence what view a court might take on this issue".[6]

19. The views of the Solicitor General that are summarised in the paragraphs of the Crown Solicitor's advice to the Auditor-General, dated 10 August 2018, to which the Chair drew the Inspector's attention, also relate to the impact of statutory secrecy provisions on parliamentary processes; specifically whether such provisions can be relied upon by a witness to resist answering an otherwise "lawful question".[7] In paragraphs 3.9 and 3.10 of that advice, the Crown Solicitor summarised the opinion of the Solicitor General as follows:

(a) The relevant question is whether the statutory provision is "intended to prohibit the disclosure of information to a Parliamentary committee, and so entitle the witness to refuse to answer a question posed by the committee on the basis that it is not a lawful question".

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[4] See eg, s 148 of the *Casino Control Act 1992* (NSW), which is the subject of the advice of Bret Walker SC of 2 November 2000, to which reference is made in the Solicitor General's Advice of 9 April 2014 (SG 2014/05) at p 7.
[5] SG 2014/05 at p 7.
[6] SG 2014/05 at p 8.
[7] See s 11 of the PE Act.

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(b) Speaking generally, such a prohibition would only be held to apply to such disclosure "if that is done *expressly* or by *necessary implication*", noting that the context included the existence of Parliamentary privileges.

20. In paragraph 3.11 of the same advice, the Crown Solicitor deferred to the opinion of the Solicitor General, whilst noting that the general principle referred to in sub-paragraph 'b' had been accepted in a number of Australian cases.

21. As noted above, the Inspector relied not on a general non-disclosure provision in declining to provide the Draft Report or answer questions as to its contents, but rather upon a number of provisions of the ICS Act which were relevant to her reporting functions, in particular sections 14 and 15 of the ICS Act. That approach was consistent with the advice of the Acting Crown Solicitor on 24 October 2018 (**24 October Advice**). In summary, the 24 October Advice involves the following steps.

22. First, in the context of standing order 208(c), and deferring to the opinion of the Solicitor General summarised in the advice, it was more likely than not that a court would find a committee of the NSW Parliament had the power to call for a witness to attend and give evidence, including by the production of a document (subject to claims of legal professional privilege and public interest immunity). That power derives from the fact that it is reasonably necessary for the Council to exercise its functions, which include the parliamentary function of reviewing executive conduct (in accordance with the principle of responsible government). In conducting the Inquiry, the Committee was exercising that function.

23. Secondly, and again deferring to the opinion of the Solicitor General, 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.

24. Thirdly, the office of Inspector has been established for the purpose of reviewing the executive conduct that is specified in the ICS Act. The principal functions of the Inspector, in s 6(1), expressly contemplate the Inspector reporting to Parliament. The matters on which the Inspector is to so report include each inspection, examination or review the Inspector undertakes of custodial centres, juvenile justice centres and juvenile correctional centres (s 6(1)(d)); any particular issue or general matter relating to the Inspector's functions, if the Inspector is of the opinion that "it is in the interest of any person or in the public interest to do so (s 6(1)(e)); and any particular issue or general

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matter relating to the Inspector's functions "if requested to do so by the Minister" (s 6(1)(f)). Section 16 of the Act prescribes the process by which the Inspector provides reports to the Houses of Parliament.

25. Fourthly, and significantly, the Inspector's reporting to Parliament is conditioned by a number of requirements:

(a) *Section 14*, which is headed "Furnishing draft reports to Minister and others", provides (emphasis added):

> (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 <u>must not make a report to Parliament under this Act</u> 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 <u>unless</u> 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, <u>consider</u> any such submissions before the report is furnished to the Presiding Officers, <u>and</u>
>
> (b) <u>include in the report</u> a statement that the Minister, the agency head or other person concerned has made submissions in relation to the Inspector's draft report.

(b) *Section 15*, subsection (1) of which prohibits the Inspector from disclosing information in a report to Parliament "if there is an overriding public interest against disclosure of the information". The concept of "overriding public interest against disclosure" is explained in s 15(2): there is such an interest "if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure". Section 15(3) provides that there are public interest considerations against

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disclosure of information for the purposes of the Act are "if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally)":

> (a) prejudice the supervision of, or facilitate the escape of, any person in lawful custody or detention,
>
> (b) prejudice the security, discipline or good order of any custodial centre,
>
> (c) prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth),
>
> (d) reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant,
>
> (e) identify or allow the identification of a person who is or was detained at a juvenile justice centre or in custody in a juvenile correctional centre,
>
> (f) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person who is in custody, detained or residing at a custodial centre (including but not limited to systems or procedures to protect witnesses and other persons who may be separated from other persons at the centre for their safety),
>
> (g) identify or allow the identification of a custodial centre staff member or endanger, or prejudice any system or procedure for protecting, the life, health or safety of such a staff member.

26. Fifthly, and having regard to those provisions, the resolution of the Committee requiring production of the Draft Report had the 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 plainly 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.

27. The Acting Crown Solicitor also considered it of some relevance in this respect that the Inspector was specifically subject to oversight by a Joint Committee with carefully defined statutory functions, including to monitor and review the exercise of the Inspector's functions and to examine finalised reports to Parliament.

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28. Sixthly, it was not "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 that involved significant inconsistency, if not interference, with the operation of the statutory scheme pursuant to which the Inspector is required to report to each House. Further, the statutory scheme demonstrated a "necessary implication" that a power the Committee may otherwise have had to require production of records does not extend to such circumstances.

29. The Acting Crown Solicitor noted that this conclusion was "not beyond doubt" (at [4.32]). I note that in initial oral advice to the Clerk of the Parliament (Legislative Council) on 25 October 2018, which is summarised in an email drafted by the Clerk of the Parliament of that date, Mr Walker of Senior Counsel considers the proposition put forward by the Acting Crown Solicitor to be arguable, but he does not support it. According to the summary of the Clerk of Parliament, having regard to the high threshold to be crossed for a statute to abrogate or displace parliamentary privilege, Mr Walker did not, in his initial advice, consider the reasons of the Acting Crown Solicitor as to why the statute should be so construed to be persuasive.

30. The reasoning that underpins the opinion of the Acting Crown Solicitor is, in my view, consistent with the series of advices which has previously been given on this issue, and which are either publicly available or summarised in publicly available documents. That includes the advices to which the Chair of the Committee drew the Inspector's attention, the focus of which was statutory prohibitions on disclosure. The general principle, as noted above, is that legislation will be presumed not to diminish the privileges of Parliament or its committees unless it does so expressly or by necessary implication.[8] Noting that the ICS Act does not abrogate the privileges of Parliament or its committees expressly, whether the presumption is rebutted as a matter of necessary implication involves a process of statutory construction.

31. As Mr Walker indicated in his discussion with the Clerk of Parliament on 25 October 2018, the threshold for abrogation of parliamentary privileges is high. Nonetheless, I consider that there are features of the ICS Act which, while not expressly abrogating parliamentary privilege, are inconsistent with the scheme of reporting to Parliament for

[8] See *Criminal Justice Commission v Parliamentary Criminal Justice Committee* (2002) 2 Qd R 8 at 23; *Aboriginal Legal Service of Western Australia Inc v Western Australia* (1993) 9 WAR 297 at 304; *R v Smith; ex parte Cooper* [1992] 1 Qd R 423 at 430.

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which it makes provision, by comparison with other provisions that have been reviewed in this context over time.

32. The ICS Act vests a series of oversight functions in the Inspector. Some of the Inspector's oversight functions are routine; others may be undertaken at the request of the Minister, or on the Inspector's own motion, subject to the formation of an opinion that it is in the interest of any person or in the public interest to do so. Central to the Inspector's oversight role are the Inspector's concomitant reporting functions; each of s 6(1)(d) to (g) is framed by reference to Parliament as the recipient of the Inspector's reports.

33. The ICS Act does not place any constraints upon how the Inspector goes about preparing a draft report or the information contained therein; or how the Inspector circulates draft material for feedback. However, the ICS Act expressly contemplates that before the Inspector provides a report to Parliament, the mechanism for which is s 16 of the ICS Act, the Inspector must:

    (a) ensure that, if she proposes, in the report, to set out an opinion that is expressly or impliedly critical of a Public Service agency (other than Corrective Services NSW and Juvenile Justice) or any person, give the relevant agency head, or the person, an opportunity to make submissions, orally or in writing, about the matter (s 14(2));

    (b) give the Minister for Corrective Services (as the Minister responsible for Corrective Services NSW and Juvenile Justice) a draft of the report, along with a reasonable opportunity to make submissions, orally or in writing, about the draft report (s 14(1));

    (c) consider any submissions made pursuant to s 14(1) and s 14(2), which may lead to the Inspector making amendments to a report (although the Inspector is not bound to make amendments) (s 14(3)(a));

    (d) include, in the final report, a statement as to who has made submissions "in relation to the Inspector's draft report" (s 14(3)(b));

    (e) consider whether there is an overriding public interest against disclosure of any information contained in a report to Parliament, with the public interest against disclosure delineated by reference to whether the information could reasonably be expected to have one or more of the effects set out in s 15(3); and

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(f) if there is an overriding public interest against disclosure of information, not include that information in the report to Parliament (s 15(1)).

34. By contrast with a general non-disclosure or secrecy provision, of which s 25 of the ICS Act might be an example, the detail of the legislative steps outlined above include constraints upon what the Inspector may include in a report "to Parliament". I agree with the Acting Crown Solicitor, that, on balance, a requirement for the Inspector to provide a draft of one or more of her reports to a parliamentary committee – which may not have gone through each of the steps above – would undermine that legislative regime. Apart from the obligations of procedural fairness with which disclosure of a draft report would be inconsistent, such disclosure would also put at risk the publication of sensitive information which the Inspector may include in a draft report but which she is required, by s 15, not to disclose in a report to Parliament.

35. The matter is not without doubt, particularly having regard to the threshold required to abrogate parliamentary privileges. However, in light of the legislative scheme for which the ICS Act makes careful provision, I agree on balance with the conclusion of the Acting Crown Solicitor that the power of the Committee to require production of records does not extend to a draft report to Parliament that the Inspector has prepared in the exercise of her statutory functions. I do not consider that there is, in this regard, any relevant inconsistency between the 24 October Advice of the Acting Crown Solicitor and earlier advices of the Crown Solicitor and the Solicitor General. The opinion expressed in the 24 October Advice is the product of applying general principles of statutory construction, in particular as to the need for express words or a necessary implication, to the terms of the ICS Act.

Section 4 of the PE Act

36. The proposition that the Committee does not have the power to require provision to it of the Draft Report applies whether the Committee relies upon an implication from standing order 208(c), or from the terms of s 4 of the PE Act, as the source of its power. For completeness, however, I note that in a letter of advice to the Inspector of 29 October 2018, the Acting Crown Solicitor noted the view of the Solicitor General that the power was more likely to derive from standing order 208(c), and the principle that the Legislative Council has all of the powers that are reasonably necessary to exercise its functions, rather than s 4 of the PE Act. In agreeing with that opinion, the Acting Crown Solicitor referred to:

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(a) the terms of s 4(2) of the Act, which conveys the notion of spoken testimony as opposed to the production of documents;

(b) a number of other textual indications in the PE Act which indicated that it was concerned only with the attendance and examination of witnesses to give oral evidence;

(c) the absence of any provision in the PE Act for the consequences where a witness refuses to produce a document (cf s 11) or protection against defamatory words in any document produced or required to be produced by a witness in giving his or her evidence (cf s 12); and

(d) the absence of anything in the legislative history or extrinsic materials which supports the view that the Parliament intended that the PE Act confer power to compel the production of documents.

37. I consider that the reasoning of the Acting Solicitor for agreeing with a view apparently recently expressed by the Solicitor General has force. However, in circumstances where a general power resides in standing order 208(c), or otherwise arises as a matter of reasonable necessity, it is not necessary to express a concluded view as to the scope of s 4 of the PE Act.

I advise accordingly.

19 November 2018

A. Mitchelmore.

Anna Mitchelmore SC

Sixth Floor Selborne Wentworth Chambers

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