



LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

1 November 2018

D18/38777

C18/62

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

Dear Mr Walker,

Production of documents to Committees

I refer to my letter to you dated 25 October 2018 and our telephone conversation that afternoon concerning the production of a document to Portfolio Committee No. 4. Many thanks for the verbal advice that you were able to provide on that occasion.

Subsequently, on Monday 29 October 2018 Ms Fiona Rafter, Inspector of Custodial Services, and Mr Andrew Cappie-Wood, Secretary, Department of Justice, were each served with a summons in the terms that you reviewed last week. Ms Rafter wrote to the Committee Secretariat on 30 October to advise that she would not produce the draft report in question on the basis of two advices received from the Acting Crown Solicitor, dated 24 and 29 October 2018 (copies of those advices together with two earlier advices from the former Crown Solicitor dated 10 August and 12 September 2018 are attached).

The committee met yesterday to deliberate in relation to these matters and to take evidence at a public hearing. The minutes of proceedings of yesterday's meeting are attached together with relevant extracts of the transcript. I draw your attention to the following resolutions of the committee.

Resolved, on the motion of Ms Voltz: That, notwithstanding the power of the committee to order the production of documents:

- a) the committee notes the correspondence from Mr Andrew Cappie-Wood, Secretary, Department of Justice, and Ms Fiona Rafter, Inspector of Custodial Services, dated 30 October 2018, and the attached Acting Crown Solicitor's advice, and further notes that public servants are bound to accept the advice of the Acting Crown Solicitor;

- b) the committee therefore will delay any action to enforce the provisions of the summons concerning the production of the draft report on juvenile justice prepared by the Inspector of Custodial Services, 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 transcript until further legal advice is obtained;
- c) the committee request that the Clerk seek further legal advice on this matter, noting the inconsistencies between the Crown Solicitor's advice published in the Auditor General's Report on State Finances, dated 19 October 2018, and the Acting Crown Solicitor's advice of 24 October 2018 and 29 October 2018;
- d) the committee request that Mr Cappie-Wood provide the committee with the Solicitor General's advice referred to in the Acting Crown Solicitor's advice of 24 October 2018 in paragraph 4.4, within seven days;
- e) the Chair make a statement asserting the committee's power to require the production of documents and noting in this instance it will not press the matter immediately and seek further legal advice; and
- f) the committee not conclude its inquiry into Budget Estimates at this stage and if necessary consider calling Ms Rafter and Mr Cappie-Wood to attend a further hearing, and therefore seek an extension of its reporting date until 28 February 2019.

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of:

- a) the responses to the order for certain documents from the Minister for Corrections, Counter Terrorism, Veterans Affairs, the Secretary of the Department of Justice and the Inspector of Custodial Services, dated 24 October 2018; correspondence from Ms Rafter and Mr Cappie-Wood, dated 30 October 2018, and the attached Acting Crown Solicitor's advices dated 24 October 2018 and 29 October 2018;
- b) the Clerk's advice to the committee on the responses to the order for certain documents from the Minister for Corrections, Counter Terrorism, Veterans Affairs, the Secretary of the Department of Justice and the Inspector of Custodial Services, dated 25 October 2018.

At this stage, neither I nor the committee have access to the advice of the Solicitor General which is referred to in a number of the attached advices from the Crown Solicitor. If and when this is received it will be forwarded to you immediately.

In accordance with the resolution of the committee, I now seek your advice as follows:

1. Any advice you may wish to provide in response to the four advices from the Crown Solicitor and the Acting Crown Solicitor that are attached.
2. In light of the Acting Crown Solicitor's advice of 29 October 2018 in relation to the *Parliamentary Evidence Act*, any matters that should be drawn to the attention of the committee or the President if action is to be taken to enforce the provisions in sections 7 to 9 or 11 of the *Parliamentary Evidence Act* in light of the refusal of Ms Rafter and Mr Cappie-Wood to produce the document yesterday and Ms Rafter declining to answer certain questions.
3. Any thoughts you might have in relation to paragraph 3.29 in the advice of the former Crown Solicitor dated 10 August 2018 and paragraph 3.22 in her advice dated 12 September 2018:

3.29 The Solicitor General considered that there may be some argument as to whether such a power resides in the *PE Act*, Standing Order 208(c), or a power based on reasonable necessity. If the power does exist, however, it would be likely to emerge in any court proceedings (even if the only basis initially relied upon by the committee was a summons issued under the *PE Act*).

3.22 I have shown a draft of this advice to the Solicitor General, who has indicated that he agrees with it. The Solicitor General also observed 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. That power is, instead, more likely to be found to derive from Standing Order 288 and the principle that the Legislative Assembly has all the powers that are "reasonably necessary" to exercise its functions.

4. During its deliberative meeting yesterday, the committee discussed a number of possible ways forward in relation to these matters. No doubt informed by the comments attributed to the Solicitor General as highlighted in question 3 above, and also in the context of the enforcement issues now being explored regarding the *Parliamentary Evidence Act*, there was a collective view across parties that it might be most appropriate to proceed by way of the formulation of a new standing order (probably initially a sessional order) to set out procedures to be followed in relation to the production of documents in response to orders by committees. This could conceivably include equivalent provisions to standing order 52 allowing for the making of claims of privilege and a role for an independent legal arbiter. I would appreciate any thoughts you might have on this idea and whether you would be available to comment on a draft such order early in the New Year.

5. Any other advice you may have in relation to any of these matters.

I understand that there are a great many demands upon your time at the moment. I would be only too happy to discuss these matters with you over the phone or during a brief conference if that is more practicable than the provision of written advice on these matters.

Yours sincerely,



David Blunt
Clerk of the Parliaments