



LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

13 December 2022

D22/69673

Hon Aileen MacDonald MLC  
Chair  
Standing Committee on State Development  
Via email: [state.development@parliament.nsw.gov.au](mailto:state.development@parliament.nsw.gov.au)

**Request for advice – Inquiry into allegations of impropriety against agents of the City of Canterbury Bankstown Council**

Dear Chair

I refer to your request for advice dated 12 December 2022 in relation to the power of the Standing Committee on State Development to order the production of certain documents from the City of Canterbury Bankstown Council. The documents sought are 'All disclosures under the *Public Interest Disclosures Act* by Councilors to [the] City of Canterbury Bankstown Council and Bankstown City Council'. I understand that the Council has contended that it cannot produce these documents given the prohibition on the disclosure of identifying information contained in the *Public Interest Disclosures Act 2022*.

Your letter raises a number of legal and procedural issues which I will deal with separately.

**The power of Legislative Council committees to order the production of State papers**

The first legal issue is whether Legislative Council committees, as opposed to the House itself, have the power to order the production of State papers, either at common law or possibly under the *Parliamentary Evidence Act 1901*.

As members of the committee would be well aware, it is well established that the House has the inherent power at common law to order the production of State papers. This was confirmed by the so-called *Egan* decisions of the late 1990s.

Several statutory committees also have the express statutory power to 'send for persons, papers and records'.

For all other committees, there is disagreement between the executive and the Legislative Council as to whether such committees have the power to order the production of State papers. However, in a significant opinion in 2018, the Solicitor General observed:

I should add, however, that it is more likely than not, in my view, that, if this question of the powers of a parliamentary Committee 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, subject to claims of privilege, such as public interest immunity and legal professional privilege, that may be made by a witness. There may be some argument as to whether such a power resides in the Parliamentary Evidence Act, Standing Order 208(c) of the Legislative Council or a power based on reasonable necessity, but if the power does exist, it would be likely to emerge in any court proceedings on the basis that such proceedings would be difficult to confine to the limited question of the construction of the Parliamentary Evidence Act.<sup>1</sup>

In a separate legal advice in 2018, the Crown Solicitor deferred to the advice of the Solicitor General.<sup>2</sup>

In 2019, at the commencement of the 57<sup>th</sup> Parliament, the Legislative Council adopted a sessional order regulating the process by which committees may order the production of State papers under standing order 208(c), on the assumption that the power does indeed exist. However, since then, on the two occasions that committees of the Legislative Council have sought the production of State papers under the sessional order, the executive has continued to argue that committees do not have the power to order the production of State papers, notwithstanding the advice of the Solicitor General.

Needless to say, I do not agree with the executive government's position and believe that the power of committees to order the production of State papers would be found to exist were the matter to be tested in court. There is some doubt as to whether the power rests on reasonable necessity under the common law, or potentially the *Parliamentary Evidence Act 1901*. It seems more likely that the power is founded on the common law, given both the language of the *Parliamentary Evidence Act 1901* and its legislative history and that of its predecessor, the *Parliamentary Evidence Act 1881*. Nevertheless, as the Solicitor General stated, if the power does exist, its basis would be likely to emerge in any court proceedings.

I therefore believe that committees of the Legislative Council are on solid legal grounds to order the production of State papers.

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<sup>1</sup> Solicitor General, 'Question of powers of Legislative Council Committees to call for production of documents from witnesses' (redacted), 2018, p 2.

<sup>2</sup> Crown Solicitor, 'Section 38 Public Finance and Audit Act and powers of Parliamentary Committees', Advice to the Auditor General, 10 August 2018, paras 3.28-3.30; published in Audit Office, *Report on State Finances*, 19 October 2018, Appendix 2.

## Whether documents held by local councils constitute State papers

The second legal question is whether papers held by a local council, in this case the City of Canterbury Bankstown Council (and former Bankstown City Council), are subject to compulsory production in response to an order for papers by a committee of the Legislative Council.

The *Egan* decisions of the late 1990s concerned the power of the House to order the production of 'State papers'.<sup>3</sup> The question arises whether documents held by local councils fall within the gamut of State papers. I believe it likely that they do, but this is not free of doubt.

Councils are constituted under section 219 of the *Local Government Act 1993* and section 51(2) of the *Constitution Act 1902*. In short, they are statutory bodies or corporations created by the State.

It is well understood that the power of the Legislative Council to order the production of State papers is not confined to documents in the custody or control of ministers, departments and agencies. Rather that power extends to any State papers, including papers held by statutory bodies or corporations. In 1996 in *Egan v Willis and Cahill*, Priestley JA gave the following guidance on what documents fall within the boundaries of reasonable necessity:

In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power, in my opinion, in the two parts ordinarily called parliament and the three part legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws.<sup>4</sup>

This position was cited with approval by the majority in *Egan v Willis* in 1998.<sup>5</sup>

I also note that in 2004 during the General Purpose Standing Committee No. 4 Inquiry into the Designer Outlets Centre, Liverpool, often referred to as the 'Orange Grove' inquiry, Mr Bret Walker SC gave advice as to the capacity of Legislative Council committees to inquire into the operations of local councils. Whilst the advice was specifically responding to the question of whether councils are statutory bodies or corporations, and whether such bodies were within the purview of the committee's inquiry despite not reporting directly to Parliament, nevertheless the advice is relevant in the current context too. Mr Walker observed:

<sup>3</sup> State papers were defined by Gleeson CJ in the decision of the Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 654 as 'papers which are created or acquired by ministers, office-holders, 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'. This definition was adopted by the majority (Gaudron, Gummow and Hayne JJ) in the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 at 442.

<sup>4</sup> *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 692-693 per Priestley JA.

<sup>5</sup> *Egan v Willis* (1998) 195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ.

Emphatically, one would not expect a parliamentary chamber to have restricted its committees to potential scrutiny only of those bodies or corporations which are already bound directly to report to the chamber. The operation of other instrumentalities of government, including local councils, is among the subjects generally described as the operation of statutory mechanisms intended for the public good. In turn, that subject is at the heartland of parliamentary scrutiny. It is thus not to be excluded by any implication from the notion of the effectiveness of statutory bodies or corporations within the scope of a chamber's committee's remit.<sup>6</sup>

I also acknowledge, however, that an argument could be made that documents held by local councils do not constitute State papers. Of particular note, section 220 (3) of the *Local Government Act 1993* provides that: 'A council does not have the status, privileges and immunities of the Crown (including the State and the Government of the State)'.<sup>7</sup>

On balance, I believe it more likely than not that were the matter to be tested in court, it would be found that local councils do hold 'State papers' which are amenable to production by order of the Legislative Council and its committees. However, the matter certainly cannot be said to be free of doubt.

### **The confidentiality provisions in the *Public Interest Disclosures Act 1994***

The third legal issue is that cited by Mr Stewart, Chief Executive Officer of the City of Canterbury Bankstown Council, in his letter of 8 December 2022 to the Committee concerning the prohibition on a public official or an agency disclosing information under section 64 of the *Public Interest Disclosures Act 2022*. In passing, I note that the 2022 Act is yet to come into force, but that somewhat comparable provisions are currently found in section 22 of the *Public Interest Disclosures Act 1994*.

Members of the Committee would be well aware that the Legislative Council has consistently and at times vigorously asserted the legal principle that the privileges of the Parliament at common law are not affected by a statutory provision unless the provision alters the common law of privilege by express words or by 'necessary implication', and that the presumption against alteration of the common law of privilege by necessary implication is very strong. The matter is discussed in detail in *New South Wales Legislative Council Practice*.<sup>7</sup> This principle is most commonly asserted by the House in relation to so-called statutory secrecy provisions, and indeed the executive has now seemingly conceded that statutory secrecy provisions do not trump the power of the House to order the production of State papers.

The same principle applies in this matter. It cannot be conceded that the *Public Interest Disclosures Act 1994* affects the common law powers of the House and its committees, including the asserted common law power of committees to order the production of State papers, unless there is express language to that effect, or very clear 'necessary implication'. There is neither in the *Public Interest Disclosures Act 1994*. On the contrary, section 23 of the Act specifically preserves parliamentary

<sup>6</sup> B. Walker SC, Opinion, 'Legislative Council, General Purpose Standing Committee No 4 – Orange Grove Designer Outlets Inquiry', 10 August 2004, p 4.

<sup>7</sup> S.Frappell and D.Blunt (eds), *New South Wales Legislative Council Practice*, 2nd edn, (Federation Press, 2021) pp 171-173.

privilege, although I agree with the advice of the Clerk Assistant – Committees that this provision is directed at preserving the right of the Houses to debate matters the subject of public interest disclosures rather than at asserting the powers of the House and its committees.

This is not to say that the concerns expressed by Mr Stewart in his correspondence of 8 December 2022 in relation to the disclosure of identifying information in public interest disclosures should not be taken seriously by the Committee. There is a strong public interest in protecting the identity of those making public interest disclosures. As such, the Committee should give due and proper consideration to preserving the privacy of those making public interest disclosures, for example by asking for the documents in question to be provided confidentially, or by asking for the documents to be provided with the name and identifying information of the person making a public interest disclosure redacted.

### **Next steps**

I understand that to date, the City of Canterbury Bankstown Council has cooperated with the Committee in the provision of the documents the Committee seeks. In those circumstances, I would advise the Committee to continue to engage with the Council in good faith to seek the voluntary production of the documents sought, including either privately or with redactions as may be considered appropriate.

However, should this process fail to come to a satisfactory outcome, the Committee could consider certain further steps.

The first would be to summon the relevant representatives from the Council under the *Parliamentary Evidence Act 1901* and request the tabling of the documents in question at the hearing. As stated previously, I believe that the power of committees to order the production of State papers is more likely to rest on the common law rather than the *Parliamentary Evidence Act 1901*. Nevertheless, compelling the attendance of witnesses from the City of Canterbury Bankstown Council under the *Parliamentary Evidence Act 1901* may give the witnesses certain additional comfort that they are protected by parliamentary privilege in tabling the documents sought. Should this approach be adopted, the Committee would be well advised to adopt the same procedural protections as are included in the sessional order for the production of State papers by committees under standing order 208(c). This could be done by way of resolution of the Committee. Doing so would have the advantage of establishing procedures for the City of Canterbury Bankstown Council to make a claim of privilege, and for those claims to be dealt with in a way similar to the processes of the House under standing order 52. Such arrangements may allay the concerns of Mr Stewart and the Council.

If the Council still resists providing the documents sought, the complicated legal issues discussed in this advice would come into play. I believe the Committee would be on reasonable legal grounds should it seek to compel the production of the documents sought by way of an order made under the sessional order for the production of State papers by committees. However, before taking such a step, I believe that the Committee would be well advised to obtain further legal advice on the matter from the Crown Solicitor. I would be happy to facilitate the seeking of such advice.

Separately, I note that since the establishment of this inquiry by the State Development Committee, Portfolio Committee No. 7 – Planning and Environment has adopted similar terms of reference for an inquiry into the Hills Shire Council. Should similar matters arise in that inquiry, I would offer the same advice to Portfolio Committee No. 7 in relation to the power of committees to order the production of papers from local councils.

I trust this information is of assistance to the Committee. Please do not hesitate to contact me if you require any further information.

Yours sincerely,

**David Blunt**  
Clerk of the Parliaments