NEW SOUTH WALES LEGISLATIVE COUNCIL
MOTION AGAINST LEADER OF THE GOVERNMENT

OPINION

I am asked to advise the Department of Premier and Cabinet in relation to a Notice of Motion expected to be debated in the Legislative Council on 10th November 2020, of which notice was given on 22nd October 2020. The effect of the motion is to seek that the Leader of the Government in the House be found in contempt of the House and suspended from its service until the adjournment of the House on the next sitting day.

2 In particular, I am asked to advise on aspects of the proposed motion with respect to the powers of the House arising from the distinct components of the conduct of the Leader of the Government on 22nd October 2020, that constitute the alleged contempt. This subject involves consideration of differences between an order for papers and an order purporting to compel the provision of information otherwise than by the production of papers. It therefore concerns the scope of the powers (or privileges) of the House in aid of its scrutiny function.

3 The Notice of Motion reads as follows.

MATTER OF PRIVILEGE—NOTICE OF MOTION

1. **Mr Searle to move—**

(1) That this House notes that no additional documents were produced to the House according to the order of the House of 20 October 2020 for the production of documents relating to the Stronger Communities Fund.

(2) That this House acknowledges:

(a) the correspondence tabled in the House on 22 October 2020 from the Secretary of the Department of Premier and Cabinet advising that the Department of Premier and Cabinet will conduct a search to confirm that it does not hold any documents that are required to be produced in response to the order of the House of 20 October 2020 and provide certification in response to the order on or before 10 November 2020,

(b) the provision of correspondence from the Office of the Premier, Office of the Deputy Premier and Office of the Minister for Local Government, advising that no documents covered by the terms of the resolution and lawfully required to be provided are held by those offices

(3) That this House considers that the explanation given to the House on Thursday 22 October 2020 by the Leader of the Government did not satisfy the order of this House of 20 October 2020 for, in the absence of the production of the documents sought, a clear explanation about the manner in which formal approval by the Premier and her Ministers was executed and recorded.

(4) That this House considers the absence of a clear explanation as to how decisions were made by the Executive Government relating to the Stronger Communities Fund is an obstruction to the proper exercise of the function of this House of scrutinising Executive Government decisions and actions.

(5) That this House accordingly adjudges the Leader of the Government as the representative of the Government in this House guilty of a contempt of the House for his failure to provide a clear explanation according to the order of the House.

(6) That this House:

(a) regarding it as necessary to obtain information on any matter affecting the public interest and in order to protect the rightful powers and privileges of the House, and to remove any obstruction to the proper performance of the important function it is intended to execute hereby suspends the Leader of the Government from the service of the House until the adjournment of the House on the next sitting day, and

(b) orders the Leader of the Government to attend in his place at the Table of the House at the commencement of the next following sitting day to explain how the decision to allocate funds from the Stronger Community Fund was executed and recorded.

(Notice given 22 October 2020)

4 The reference in para (3) to the order of the House on 20th October 2020 for "a clear explanation about the manner in which formal approval by the Premier and her Ministers was executed and recorded" is to the effect of para (6)(b) of the order of that date. That part of the order of that date was explicitly to operate in default of compliance by the Leader of the Government with orders for the production of certain signed written briefs etc. The first of the default orders was to the effect that the Leader of the Government should attend in his place at the Table of the House on the commencement of the sitting on 22nd October 2020 to produce the signed written briefs – para (6)(a).

5 The critical second of the default orders, para (6)(b), ordered the Leader of the Government to "confirm that the documents do not exist", in the first place. That is, in form it requires the Leader of the House to articulate the fact there are no documents to be produced under the order. Obviously, that could not be understood as a requirement to state other than the truth as the Leader of the Government believes it to be.

6 Thus, the second step in para (6)(b) is explicitly a step required to be taken in the absence of papers being required to be produced – ie in the case where there are no papers to be produced as confirmed by the Leader of the Government. It follows that the "clear explanation" sought by para (6)(b) is to be understood as the provision of information which is both explanatory and also "clear" concerning the executive actions involved in the "formal approval ...". The addition of the phrase "to the satisfaction of the House" qualifying the required provision of a clear explanation therefore draws attention to the powers of the House in relation to the provision of

information on a question concerning public administration – not by an order for papers, but by what is, in my opinion, a kind of answer to the question.

7 There may be significance for the scope of the powers of the House to impose sanctions for contempt including suspension from the service of the House in the distinction between the failure or refusal to comply with orders for papers, and the provision of a statement or explanation considered to be unsatisfactory, perhaps by not being "clear", in a case where it is accepted that there are no further papers to be produced in answer to an order. It could not be supposed that a contempt of an order for papers would be committed by truthfully stating that there are no further papers to be produced in response to it.

8 So a supposed contempt of the order of 20th October 2020 in relation to para (6)(b) proceeds on the premise that the Leader of the Government could properly not only be compelled to provide information on the questions in hand, but could in some sense be compelled to do so in a way regarded as satisfactory by the House and as being "clear" – on pain of being sanctioned for contempt.

9 The terms of para (3) of the proposed motion accept that there was an explanation given to the House on 22nd October 2020, in the proposed resolution that the Leader of the Government did not thereby provide "a clear explanation …" on the matters in hand.

10 Only some elements of the privileges of the House have been adjudicated by the courts of law. It is fundamental that there is near autonomy for the House in shaping its practices and conventions in such a way as to demonstrate the understood

and accepted nature and extent of its powers and privileges. But there is a limit imposed by law, ultimately to be ruled on by the courts of law. For present purposes, I turn now to aspects of the sparse judicial authority that may inform the House's own appreciation of possible limits of present relevance.

11 It is not controversial that the powers of the House include a power to compel the production of State papers, because such a power is reasonably necessary for the proper exercise of the House's functions, which themselves include, in general terms, superintendence of the conduct of the executive government. Nor is it controversial that the long practice of the House, established, maintained and evolved by its conventions, extend to exerting this power against one of its members designated to represent in the Legislative Council the position of portfolios held by members in the Legislative Assembly. In this regard, there is no doubt that the Leader of the Government in the House is an appropriate object of an order for papers relating to matters falling within the portfolios or Ministerial responsibilities administered by members of the Legislative Assembly. These fundamental matters were settled by the High Court of Australia in *Egan v Willis* (1998) 195 CLR 424, esp at 453, 454 [46], [48] and [50] per Gaudron, Gummow and Hayne JJ.

12 Nor is there any doubt that a failure or refusal of, say, the Leader of the Government to produce papers required by an order made by the House would provide good ground for adjudging that Member to be guilty of a contempt of the House and to suspend him or her from the service of the House at least for a modest period (such as the remainder of the day's sitting). Enforcement of such a decision by the House would be justified in the sense of providing a complete answer to a cause of action such as trespass to the person by way of the Usher of the Black Rod conducting

that Member from the Chamber. Again, these propositions are uncontroversial since their pronouncement in *Egan v Willis*, esp at 195 CLR 438 [2], 455-456 [54], [55].

13 It is interesting to note that the issues determined in *Egan v Willis* by the courts did not touch upon part of the resolution of the House of 1st May 1996, viz para 3(b), pursuant to which the then Leader of the Government in the House was ordered to explain his reasons for not complying with orders to table documents: see 195 CLR 438 [2], 439 [6], 456 [56]. *Egan v Willis* is not authority for the existence of any power of the House to compel an explanation of that kind, such as to provide justification for what would otherwise be a trespass against the person upon forced removal from the Chamber. The kind of explanation required by the resolution considered in *Egan v Willis*, it should also be noted, was a relatively familiar requirement for the explanation of non-production of ordered papers. It can readily be regarded as ancillary to the order for production, and not at all premised on there being no papers to be produced. To the contrary, notoriously, the then Leader of the Government in the House firmly held a principled (but wrong) view denying the power that eventually the Court of Appeal and the High Court held to exist. Mr Egan certainly did not take the position that there were no papers to be produced.

14 In this light, it seems to me that a purported requirement for an explanation going beyond a refusal to produce papers, being as in this case an explanation of executive action concededly not to be found in existing papers required to be produced under an order, is a different kind of explanation altogether. Functionally, it seems to me that such an explanation is in substance the same as an answer to a question. Certainly, it has that identical function so far as concerns the House's undoubted power of scrutiny.

15 It is at this point that I see grave reason to doubt the availability of the contempt sanction to be visited upon the Leader of the Government by reason of his "explanation" not satisfying the House, or not being "clear". My misgivings arise from the accepted practice and convention of the House in relation to questions, formally so-called, directed to Ministers (including those representing portfolios in the Legislative Assembly).

16 This is not a matter of construing Standing Orders – these being creatures of the House, amenable to ad hoc dispensation. They therefore do not describe in a legal sense the extent of the House's power. Self-imposed limits found in Standing Orders may, without any excess of power on the part of the House, be dispensed with or altered, for particular occasions or for the indefinite future generally.

17 The issue, rather, concerns the question whether political dissatisfaction with an answer, or the provision of information amounting to an answer, either as to its content or level of detail, or clarity in the estimation of a majority in the House, can properly result in sanctions for contempt. Of course, there is a broad range of political sanctions against inadequate answers, as to form, content or even tone, upon which Members of the House scarcely need my advice. This Opinion should not be understood as expressing any views about them or their exercise. They are, in my view, not justiciable at all, and not really in the same area of discourse as the limits of power to impose sanctions for contempt with resulting suspension from service of the House and consequential use of force to remove a suspended Member from the Chamber. It is not for the judges, or lawyers, to comment on their possible deployment. It is a matter ultimately for the voters.

18 But suspension from service in the House affects the representation of those voters, if only temporarily. As well, the manner in which a Minister answers a question must be informed by an appreciation on the part of his or her audience in the Chamber that it is part and parcel of the freedom of speech existentially vital to the conduct of the House. It is unthinkable, to use an extreme hypothetical example, that political opponents could wield the sanction of contempt and consequent suspension with physical removal against Members opposite whose Ministerial answers did not suit or advance the political position held by those opponents.

19 Since self-government in New South Wales, the privileges of the House have been based on historical practice in the House of Commons. The principle or rule made explicit in *Egan v Willis* engrafted upon that Westminster stock the implication of powers, privileges and immunities as are reasonably necessary for the proper exercise of the House's functions, including scrutiny of the executive.

20 I very much doubt that it is reasonably necessary in the sense explained by the High Court for the House to be able to sanction for contempt and thereafter suspend a Member from service to the House, with physical removal from the Chamber as a consequence, because of political dissatisfaction with an answer to a question, let alone by disagreement as to the quality of clarity displayed by an answer. In my opinion, reasonable necessity extends to the asking of questions, and the subsequent parliamentary and electoral political consequences of failures to answer, or to answer satisfactorily, meritoriously or clearly. It does not extend, in my opinion, to altering the balance of voting temporarily by suspension.

21 As a general proposition, it may be accepted, following *Egan v Willis*, that the contempt sanction, in a context such as the present one, may be imposed coercively but not punitively. That does not seem to be controversial in the present case. It is not necessary to explore further the accepted difficulties created by that supposed distinction: cf *Egan v Willis* at 195 CLR 455 [55].

22 But what would it mean to coerce an answer that is satisfactory to those opposite and to a majority of the House? What would it mean to coerce a "clear explanation"? The invidious notion of appearing to require a Minister, or the Leader of the Government representing a Minister in the Legislative Assembly, to state an answer or provide information with more or less detail than he or she would choose to do in good faith, or to do so in more or less direct language than he or she would do so, let alone to express matters not regarded as fair or correct by him or her, is inescapable. The test of <u>reasonable</u> necessity is most unlikely to justify the exertion of any such so-called coercion.

23 This approach to the distinct components of the proposed motion is also supported by general considerations concerning the history, evolution and current practice and convention of the House in relation to questions to Ministers, in the formal sense. It is unnecessary to dwell on the detailed regulation devised by the House over the years, subject to its President's rulings and ultimately its own collegiate will, in relation to both questions and answers. It suffices to note that the traditional and current strictures on the form of proper questions, and especially the standard of relevance and brevity called for in relation to answers, rather tell against the reasonable necessity of a contempt sanction of the kind proposed by the motion.

24 Further, the restrictions on supplementary questions, and the like, tend against the reasonable necessity of a contempt sanction with respect to the explanation sought under the proposed motion. At the risk of oversimplification, it may be said that the practice of the House is that the way in which a question may be answered is a matter for the Member to whom it is directed. In certain circumstances, it may even be said that whether a question is answered is also (subject to matters not presently relevant) a matter for the Member to whom it is directed. Both these matters highlight the ready availability of political sanctions, rather than the sanction of contempt with its possible consequences, in order for the House to discharge its scrutiny function.

25 By way of illustration, I note a ruling by the President on 28th May 2019 by way of summary of precedent in the House concerning answers to questions. The President stated that "It is not for the Chair to direct how the Minister should answer a question. The Chair cannot compel the Minister to answer a question other than in the way in which he or she wishes. It is not for the Chair to direct what part of the question a Minister should answer. A Minister may indicate they do not wish to answer the question.". One of the parliamentary responses to what a Member may regard as an unsatisfactory answer may be debate on a motion to take note of answers. That current procedure does not indicate the reasonable necessity of the sanction of contempt for the same situation. In a parliamentary chamber, a primary recourse is to speech to and fro, evident in the very word "parliament".

26 For all these reasons, that part of the proposed motion that calls for the imposition of sanctions for contempt on failure to provide a "clear explanation" satisfactory to the House is most problematic as to its validity.

27 I recommend that these considerations be respectfully drawn to the attention of the House.

Fifth Floor St James' Hall

4th November 2020

Bret Walker