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Report 39

February 2019

4



Portfolio Committee No. 4 – Legal Affairs

Budget Estimates 2018-2019

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Terms of reference

1. That upon tabling, the Budget Estimates and related papers for the financial year 2018-2019 presenting the amounts to be appropriated from the Consolidated Fund be referred to the Portfolio Committees for inquiry and report.

2. That the initial hearings be scheduled as follows:

Day One: Thursday 30 August 2018

PC 4	Police, Emergency Services	2.00 pm – 6.00 pm
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Day Two: Friday 31 August 2018

PC 5	Primary Industries, Regional Water, Trade and Industry	9.00 am – 1.00 pm
PC 6	Planning, Housing, Special Minister of State	9.00 am – 1.00 pm
PC 5	Transport and Infrastructure	2.00 pm – 6.00 pm
PC 6	Resources, Energy and Utilities, Arts	2.00 pm – 5.00 pm

Day Three: Monday 3 September 2018

PC 1	Finance, Services and Property	9.00 am – 12.00 pm
PC 5	Lands and Forestry, Racing	2.00 pm – 4.00 pm
PC 1	Treasury, Industrial Relations	2.00 pm – 6.00 pm

Day Four: Tuesday 4 September 2018

PC 3	Early Childhood Education, Aboriginal Affairs, Assistant Minister for Education	9.00 am – 11.00 am
PC 4	Counter Terrorism, Corrections, Veterans Affairs	9.00 am – 12.00 pm
PC 3	Regional New South Wales, Skills, Small Business	2.00 pm – 4.00 pm
PC 4	Attorney General	2.00 pm – 4.00 pm

Day Five: Wednesday 5 September 2018

PC 2	Multiculturalism, Disability Services	9.00 am – 12.00 pm
PC 2	Family and Community Services, Social Housing, Prevention of Domestic Violence and Sexual Assault	2.00 pm – 5.00 pm
PC 3	Tourism and Major Events, Assistant Minister for Skills	2.00 pm – 4.00 pm

Day Six: Thursday 6 September 2018

PC 2	Mental Health, Women, Ageing	9.00 am – 12.00 pm
PC 1	Innovation and Better Regulation	9.00 am – 11.00 am
PC 1	The Legislature	12.00 pm – 1.00 pm
PC 2	Health, Medical Research	2.00 pm – 6.00 pm
PC 1	Premier	2.00 pm – 6.00 pm

Day Seven: Friday 7 September 2018

PC 3	Education	9.00 am – 1.00 pm
PC 5	Roads, Maritime and Freight	9.00 am – 1.00 pm

PC 6	Environment, Local Government, Heritage	2.00 pm – 6.00 pm
PC 5	Western Sydney, WestConnex, Sport	2.00 pm – 4.00 pm

3. That supplementary hearings be scheduled during the week of 8 to 12 October 2018.
4. That each scheduled day for the initial round of hearings will begin not earlier than 9.00 am and conclude by 6.00 pm.
5. That the committees must hear evidence in public.
6. That the committees may ask for explanations from ministers, or officers of departments, statutory bodies or corporations, relating to the items of proposed expenditure.
7. That ministers may not make an opening statement before the committee commences questions.
8. That the committees are to present a final report to the House by 14 December 2018.
9. That members may lodge supplementary questions with the committee clerk by 5.00 pm, within two days, excluding Saturday and Sunday, following the hearing.
10. That answers to questions on notice and supplementary questions be published, except those answers for which confidentiality is requested, after these answers have been circulated to committee members.

These terms of reference were referred to the committee by the House: *Minutes*, NSW Legislative Council, 20 June 2018, pp 2758-2759.

Committee details

Committee members

The Hon Robert Borsak MLC	Shooters, Fishers and Farmers Party	<i>Chair</i>
Mr David Shoebridge MLC	The Greens	<i>Deputy Chair</i>
The Hon David Clarke MLC	Liberal Party	
The Hon Catherine Cusack MLC	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Shaoquett Moselmane MLC	Australian Labor Party	
The Hon Lynda Voltz MLC	Australian Labor Party	

Non-substantive members who attended the hearings

The Hon Adam Searle MLC	Australian Labor Party
The Hon Wes Fang MLC	The Nationals
The Hon Ben Franklin MLC	The Nationals
The Hon Scott Farlow MLC	The Nationals

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Chair's foreword

I am pleased to present this report on the Inquiry into Budget Estimates 2018-2019. This annual inquiry into the Budget Estimates ensures parliamentary oversight of the Budget, and provides an important mechanism for the accountability of the executive government to the Legislative Council.

The inquiry consisted of three hearings to examine the following portfolios:

- Police, Emergency Services
- Corrections, Counter Terrorism, Veterans Affairs
- Attorney General.

Supplementary hearings were also held, one for the Police portfolio and two for the Corrections portfolio.

On behalf of the committee, I would like to thank the Ministers and their officers who assisted the committee during this important inquiry. I am grateful to my fellow committee members and the secretariat staff for their contributions to the inquiry process.



The Hon Robert Borsak MLC
Chair

Chapter 1 Introduction

Referral of the 2018-2019 Budget Estimates

- 1.1 On 20 June 2018, the Legislative Council resolved that ‘the Budget Estimates and related papers for the financial year 2018-2019 presenting the amounts to be appropriated from the Consolidated Fund be referred to the Portfolio Committees for inquiry and report’.¹ The resolution (hereafter referred to as the Budget Estimates resolution) requires each committee to examine the Budget Estimates for the relevant portfolios and report to the House by 14 December 2018.²
- 1.2 The Budget Estimates resolution further stipulated that the initial hearings be held from 30 August to 7 September 2018 and the initial round of supplementary hearings be scheduled during the week of 8 to 12 October 2018.³

Hearings

- 1.3 The committee held three public hearings as follows:
- Thursday 30 August 2018 – Police, Emergency Services
 - Tuesday 4 September 2018 – Corrections, Counter Terrorism, Veterans Affairs
 - Tuesday 4 September 2018 – Attorney General.
- 1.4 The committee also held supplementary hearings on Wednesday 31 October 2018 for the Police and Corrections portfolios, and a further supplementary hearing for the Corrections portfolio on 19 December 2018.

Transcripts, questions on notice and supplementary questions

- 1.5 Transcripts of the hearings, questions taken on notice, supplementary questions and answers to these questions are available on the Budget Estimates web page at: www.parliament.nsw.gov.au/budgetestimates.

¹ *Minutes*, NSW Legislative Council, 20 June 2018, pp 2758-2759.

² *Minutes*, NSW Legislative Council, 20 June 2018, pp 2758-2759.

³ *Minutes*, NSW Legislative Council, 20 June 2018, pp 2758-2759.

Chapter 2 Issues raised during hearings

This chapter provides a brief summary by portfolio of the key issues raised during the hearings.

Police, Emergency Services

2.1 A hearing examining the portfolios of Police, Emergency Services was held on Thursday 30 August 2018. The following issues were raised during the committee's examination of these portfolios:

- The cost of re-engineering of the NSW Police Force and associated redundancies
- Commissioner's permits and the Firearms Registry
- Recruitment at the Law Enforcement Commission
- Drug dog operations and drug testing
- The Suspect Target Management Program
- Automatic Vehicle Location (AVL)
- The Erskine Park Training Centre
- The implications of climate change for NSW Rural Fire Service.

2.2 A supplementary hearing examining the portfolio of Police was held on Wednesday 31 October 2018. The following issues were raised during the committee's examination of this portfolio:

- Use of police officers in the transfer of inmates
- Firearms registry
- Police officers using force against people with a mental illness
- Counter terrorism asset management support for city train stations
- Police pursuits for traffic offences
- The use of tasers
- Aboriginal juvenile's on the Suspect Target Management Program
- Slowing to 40 km/h when an emergency vehicle is flashing on the side of the road.

Corrections, Counter Terrorism, Veterans Affairs

2.3 A hearing examining the portfolios of Corrections, Counter Terrorism, Veterans Affairs was held on Tuesday 4 September 2018. The following issues were raised during the committee's examination of these portfolios:

- Progress of Inspector of Custodial Services' report on use of confinement in juvenile justice
- Numbers of juveniles held in confinement, assaults on staff and incidents of self-harm

- Measures to reduce periods of confinement
- Allegations of sexual activity between Corrective Services staff and inmates
- Proportions of juveniles on remand who are Aboriginal
- Proportions of women on remand who are Aboriginal and have children
- Efficiency dividend measures
- Training in techniques to avoid positional asphyxia.

2.4 Supplementary hearings examining the portfolio of Corrections were held on Wednesday 31 October 2018 and 19 December 2018. The following issues were raised during the committee's examination of this portfolio:

- Call for papers for the draft report on the use of forced separation, segregation and confinement of detainees in the NSW juvenile justice system by the Inspector of Custodial Services
- Delays to the finalisation of the Inspector's report and the contents of the report
- Sexual inappropriate relationships between prison inmates and prison staff
- Allegations of assault of a Corrective Services Officer at the Parklea Correctional Centre
- Strip searches on juvenile detainees
- Accumulation of confinement of detainees and breaches to the 24 hour confinement policy.

Attorney General

2.5 A hearing examining the portfolio of Attorney General was held on Tuesday 4 September 2018. The following issues were raised during the committee's examination of this portfolio:

- The disappearance of Lynette Dawson
- The Women's Domestic Violence Court Advocacy Services [WDVCAS] tender
- Appointment of Children's Magistrates
- Results of the NSW People Matter Employee Survey in the Department of Justice
- Seal of the Confessional in the Catholic Church
- Resourcing of the Coronial, District and Local court systems
- The prison population held on remand
- The critical communications enhancement program.

Chapter 3 Corrections portfolio – procedural issues

As noted in the previous chapter, the committee pursued the substantial delay in the Inspector of Custodial Services' finalisation of a report on juvenile justice centres via three separate hearings as well as an order for the production of the draft report and a summons to produce the report. In this chapter the committee documents the procedural issues that arose during the committee's endeavours to understand the reasons for this delay, and to expedite the publication of the Inspector's report. Please note that the legal advice referred to in this chapter is available on the committee's website and at appendix 3 of this report.

Background

- 3.1** In June 2016 the Inspector of Custodial Services, Ms Fiona Rafter, commenced an inspection focusing on the use of force in juvenile justice centres. The inspection occurred under the *Inspector of Custodial Services Act 2012* (hereafter ICS Act) requiring that all juvenile justice centres be inspected every three years. In October that year the Minister for Corrections, the Hon David Elliott MP, asked the Inspector to expand the terms of reference for the inspection to include the use of separation, segregation and confinement of young people in juvenile justice centres. On 4 November 2016 the terms of reference were amended accordingly.⁴ Almost two years later, when the initial 2018-19 Budget Estimates hearings took place into the Corrections portfolio, the report had not been finalised.
- 3.2** In order to understand the reasons for the delay in finalising the report, the committee pursued the matter in oral evidence and sought to obtain relevant documents.

The committee's actions in respect of the draft report to the Minister

- 3.3** At its first hearing for the Corrections portfolio on 4 September 2018, the committee asked the Minister and the Inspector a number of questions concerning the delay in the completion of the report. Questions were also put to the Minister and the Inspector about a draft report provided to the Minister's office in late 2017.⁵
- 3.4** On 17 October 2018 the committee resolved to take further evidence from the Inspector and Justice representatives at a supplementary hearing to be held on 31 October 2018. It further resolved that under Standing Order 208(c) the NSW Government provide to the committee the draft report by 24 October 2018.⁶
- 3.5** In response to this order for the production of the document, on 24 October 2018 the Minister wrote to the committee declining to provide the document, attaching Acting Crown Solicitor's

⁴ Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (2018), p 5.

⁵ Evidence, Hon David Elliott MP, Minister for Corrections, 4 September 2018, pp 9-11; Evidence, Ms Fiona Rafter, 4 September 2018, pp 9-11.

⁶ Minutes no. 85, Portfolio Committee No. 4, NSW Legislative Council, 17 October 2018. Standing order 208(c) sets out that the a committee has the power to 'send for and examine persons, papers, records and things'.

advice disputing the committee's power to compel the production of the document.⁷ The Secretary of the Department of Justice, Mr Andrew Cappie-Wood, in a separate letter also declined to provide the document, attaching the same advice.⁸ On the same date, Ms Rafter advised the committee that she would not be providing the document but confirmed she would attend the supplementary hearing on 31 October 2018.⁹

3.6 The Acting Crown Solicitor's advice, dated 24 October 2018, acknowledged an opinion of the Solicitor General which affirmed in general terms the power of Legislative Council Committees to order the production of documents, but went on to dispute that power in relation to the draft report on the basis that the committee's use of the power in this instance was not reasonably necessary:

I defer to the opinion of the Solicitor General that it is more likely than not that a court would find that a committee of the NSW Parliament has the power to call for the production of documents. The Solicitor General also considered that this would be subject to claims of privilege, such as public interest immunity and legal professional privilege that might be made.

I do not think, on balance, that the Committee has the power to require the production of this draft report. Requiring production of the draft report which had been provided to the Minister would involve a significant degree of inconsistency, if not interference, with the operation of the statutory scheme established by the *Inspector of Custodial Services Act 2012* ("the Act") under which the Inspector reports to each House. I do not think, in such circumstances, that production of the draft report to the committee is reasonably necessary for the House to exercise its scrutiny functions.

I also prefer the view that the Council would not have power to compel production of the draft report, if an order for papers were made under Standing Order 52. This view, however, is subject to significant doubt, and must also be understood having regard to the very limited time available.¹⁰

3.7 The following day, 25 October 2018, the committee resolved, under the authority of section 4(2) of the *Parliamentary Evidence Act 1901* (hereafter the PE Act), to summon the Inspector and the Secretary to attend the hearing on 31 October 2018 to answer questions and to produce the draft report. The committee further resolved to seek the advice of the Clerk of the Parliaments on the responses from the Minister, Secretary and Inspector to the committee's order for the

⁷ Advice, Acting Crown Solicitor, 'Draft report of Inspector of Custodial Services', 24 October 2018, p 1, appended to correspondence from Minister Elliott MP, 24 October 2018.

⁸ Correspondence from Mr Andrew Cappie-Wood, Secretary, NSW Department of Justice, to secretariat, 24 October 2018, p 1.

⁹ Correspondence from Ms Fiona Rafter, Inspector of Custodial Services, to secretariat, 24 October 2018, p 1.

¹⁰ Advice, Acting Crown Solicitor, 'Draft report of Inspector of Custodial Services', 24 October 2018, p 1, appended to correspondence from Minister Elliott MP, 24 October 2018, Mr Cappie-Wood, 24 October 2018, and Ms Rafter, 24 October 2018.

¹⁰ Advice, Acting Crown Solicitor, 'Draft report of Inspector of Custodial Services', 24 October 2018, p 1, appended to correspondence from Minister Elliott MP, 24 October 2018, Mr Cappie-Wood, 24 October 2018, and Ms Rafter, 24 October 2018.

production of the draft report under Standing Order 208 (c), and to request that he seek legal advice on the matter.¹¹

3.8 The Clerk sought the opinion of Mr Bret Walker SC regarding the terms of two draft summonses prepared for the witnesses, and concerning the advice of the Acting Crown Solicitor. In doing so, the Clerk noted advice that Mr Walker had provided in 2015 regarding the powers of Legislative Council committees in the context of statutory secrecy provisions and the power under the PE Act that a summons to appear and give evidence included the production of documents.¹²

3.9 Later that day the Clerk provided advice to the committee, having obtained initial advice from Mr Bret Walker SC, as follows:

- The summonses are appropriately worded – the key issue being to ensure that they clearly crystallise the matters at hand, including that the two witnesses are being summonsed to give evidence, including to answer questions and to produce the document in question. This provides sufficient clarity to the witnesses and also, should it come to this, enables the issue as to the power of the committee to require the production of the document to be dealt with in litigation.
- The author of the advice (the A/Crown Solicitor) is greatly respected and his views should be accorded due deference. In this regard, the proposition that seems to be put forward, namely that for all the reasons set out in the advice the Inspector of Custodial Services Act 2012 does impliedly displace parliamentary privilege (in terms of the power of the committee), is arguable.
- However, whilst arguable it is not a view with which Mr Walker is sympathetic: the threshold to be crossed for a statute to abrogate or displace parliamentary privilege (including the powers of a committee) is a high one. It is very rarely that a statute will meet this threshold and there are few that come to mind. The reasons set out in the advice as to why this statute should be so construed are not persuasive. There may be legitimate reasons for a committee wishing to inquire into the content of a draft report of the Inspector. Whether it is wise or appropriate in any set of circumstances for a committee to seek to inquire into a draft report is a matter of judgement. The suggestion that a committee is precluded from doing so (ie does not have power to do so by requiring the production of the document) is, however, not supported.¹³

3.10 On 28 October 2018 the Secretary and Inspector were each summoned to attend and give evidence at a hearing on 31 October 2018, 'with such evidence include the answering of questions and the production of the draft report on juvenile justice.'¹⁴

¹¹ Portfolio Committee No. 4 – Legal Affairs, Minutes no. 86, 25 October 2018.

¹² Letter from Clerk of the Parliaments to Mr Bret Walker SC, 25 October 2018. Mr Walker's 2015 advice, 'Parliament of New South Wales – Legislative Council Select Committee on Ombudsman's "Operation Prospect": Opinion' is published in Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" (2015), *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, pp 127-133.

¹³ Mr Bret Walker SC, initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees, 25 October 2018.

¹⁴ Summons by the Chair of Portfolio Committee No. 4 – Legal Affairs under section 2 of the Parliamentary Evidence Act of Ms Fiona Rafter, Inspector of Custodial Services, 28 October 2018; Summons by the Chair of Portfolio Committee No. 4 – Legal Affairs under section 2 of the

3.11 On 30 October 2018, the Secretary and the Inspector each provided further legal advice again disputing the committee's power to order the documents by summons under the PE Act.¹⁵ The Secretary reiterated the Acting Crown Solicitor's advice of 24 October and attached further advice from the Acting Crown Solicitor dated 29 October 2019 that 'the PE Act does not confer power on the committee to compel the production of documents.'¹⁶ The advice acknowledged Mr Walker's 2015 opinion that the PE Act enables a committee to issue a summons requiring the production of documents by a witness. However, the Acting Crown Solicitor's preference is the view of the former Crown Solicitor, Ms Lea Armstrong, in advice in another matter to the Solicitor General which observed that there is good argument that the PE Act itself does not confer power on a non-statutory committee to compel the production of documents. The Acting Crown Solicitor noted that there were numerous textual indications in the PE Act, including one acknowledged by Mr Walker in his 2015 advice, that the Act is concerned only with the attendance and examination of witnesses to give oral evidence.¹⁷

3.12 At the hearing on 31 October 2018, attended under summons by the Inspector and Secretary (along with the Executive Director, Juvenile Justice, and Commissioner, Corrective Services NSW, who both appeared by invitation), Ms Rafter made an opening statement about her role, and by way of an explanation for the length of time taken in finalising her report, the broader context of her work and the procedural fairness process required under the ICS Act.¹⁸ Ms Rafter then declined to provide the draft report, citing the Acting Crown Solicitor's advice, particularly that producing the document was not consistent with, and perhaps even interfered with, her obligations under the ICS Act:

Whilst I wish to assist the Committee in any way possible, I must draw the Committee's attention to the inconsistency or conflict that exists between my ability to perform my functions and obligations under the Act and the powers of the Committee and the important work it is undertaking. Therefore, based on the two advices from the Crown Solicitor's Office and my obligations under the Act, I cannot produce the draft report requested. However, I am happy to otherwise assist the Committee in any way that I can, and I am able.¹⁹

3.13 Immediately after Ms Rafter's statement, the committee met in private, and sought advice of the Clerk. On resumption of the public hearing, the Chair outlined the committees agreed plan of action:

Parliamentary Evidence Act of Mr Andrew Cappie-Wood, Secretary, Department of Justice, 28 October 2018.

¹⁵ Correspondence from Ms Fiona Rafter, Inspector of Custodial Services, to Committee Clerk, 30 October 2018, p 1; Correspondence from Mr Andrew Cappie-Wood, Secretary, Department of Justice, 30 October 2018.

¹⁶ Letter from Mr Andrew Cappie-Wood, Secretary, Department of Justice, 30 October 2018 attaching Advice, Acting Crown Solicitor 'Request by Committee for draft report of Inspector of Custodial Services', 29 October 2018.

¹⁷ Advice, Acting Crown Solicitor 'Request by Committee for draft report of Inspector of Custodial Services', 29 October 2018, p 36.

¹⁸ Evidence, Ms Rafter, 31 October 2018, pp 3-4. It is not a usual practice for a witness to make an opening statement during a Budget Estimates hearing, but in the circumstances the committee resolved to allow it: PC4, Minutes no. 88, 31 October 2018.

¹⁹ Evidence, Ms Rafter, 31 October 2018, p 4.

Notwithstanding the power of the Committee to order the production of the document, the Committee has resolved to delay taking immediate action to enforce provisions of the summons concerning the production of the draft report until further legal advice has been obtained. We note the correspondence from Mr Cappie-Wood and Ms Rafter and that public servants are bound to accept the advice of the Acting Crown Solicitor. The Committee will seek further legal advice on this matter, noting the inconsistencies between the various advices provided by the Crown Solicitor's and the Acting Crown Solicitor. The Committee has resolved not to conclude its inquiry into budget estimates at this stage and may consider recalling Ms Rafter and Mr Cappie-Wood to attend a further hearing. We will seek an extension of our reporting date until 28 February 2019.²⁰

3.14 The committee then proceeded to ask the witnesses questions, including a number of questions of the Inspector regarding the content of the draft report, which she declined to answer.²¹ At the end of the hearing the committee respectfully asked Ms Rafter to carefully reconsider her approach in light of two further legal advices:

- The first, provided by the Crown Solicitor in advice to the Auditor-General, dated 10 August 2018, that addressed statutory secrecy provisions and lawful questions under the PE Act. Noting the Solicitor General's opinion that 'it is more likely than not that a court would find a committee has power to require a witness to produce a document to it', the Crown Solicitor concluded that it 'probably follows that [the secrecy provision in section 38 of the *Public Finance and Audit Act 1983*] could not be relied upon to resist a summons, or other demand, from a committee to produce a document.'²²
- The second, prepared in 2014 by the Solicitor General for the Crown Solicitor, acting for the Secretary of the Department of Premier and Cabinet, provided detailed advice in respect of the powers of the Council to compel the production of documents from the Executive under Standing Order 52.²³

3.15 At the request of the committee, on 7 November 2018 Mr Cappie-Wood provided a copy of the Solicitor General's advice referred to in the Acting Crown Solicitor's advice of 24 October 2018 from which he had quoted in his letter to the committee of 29 October 2018, albeit in redacted form.²⁴ The stated purpose of the Solicitor General's advice was to comment on an advice of the Crown Solicitor on an unrelated matter which did not consider the substantive question of the power of a committee to call for a document, but which indicated an acceptance of that power:

²⁰ Hon Robert Borsak MLC, Committee Chair, 31 October 2018, p 6.

²¹ Evidence, Ms Rafter, 31 October 2018, pp 8 and 17.

²² Crown Solicitor's advice to Audit Office, 'Section 38, Public Finance and Audit Act and powers of parliamentary committees', 10 August 2018, p 1. The advice was published as an appendix to the Audit Office, Report on State Finances, 19 October 2018, pp 31-39, at www.audit.nsw.gov.au/publications/latest-reports/state-finances-2018.

²³ Mr Borsak, 31 October 2018, p 21. Solicitor-General's advice to Crown Solicitor, 'Questions of powers of Legislative Council to compel production of documents from Executive', 9 April 2014. The advice was tabled in the Legislative Council on 6 May 2014 and is available at <https://www.parliament.nsw.gov.au/lc/tailedpapers/Pages/tailed-paper-details.aspx?pk=65436>.

²⁴ Letter from Mr Andrew Cappie-Wood, Secretary Department of Justice, to secretariat, 7 November 2018, attaching advice, NSW Solicitor General, 'Question of powers of Legislative Council committees to call for production of documents from witnesses', 2018 [date redacted].

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.²⁵

- 3.16** On 19 November 2018 the Inspector wrote to the committee providing answers to questions on notice and further legal advice prepared by Ms Anna Mitchelmore SC, which stated her agreement with the Acting Crown Solicitor's opinion of 24 October 2018 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 the House'.²⁶ Ms Mitchelmore further stated her agreement with the view of both the Solicitor General and the Acting Crown Solicitor that the power to issue a summons under section 4 of the PE Act does not extend to requiring the production of documents. She proposed that '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'.²⁷ She then acknowledged that a general power on the part of committees to order documents 'resides in standing order 208(c), or otherwise arises as a matter of reasonable necessity'.²⁸
- 3.17** At the committee's request the Clerk referred the Solicitor General's advice and Ms Mitchelmore's advice to Mr Bret Walker SC for his consideration and advice.²⁹ The committee is awaiting Mr Walker's advice on the matter.
- 3.18** On 23 November 2018 the Inspector tabled and published her report titled *Use of force, separation, segregation and confinement in NSW juvenile justice centres*.³⁰
- 3.19** On 26 November 2018 the committee resolved to recall the Secretary and the Inspector to attend a two hour hearing on 19 December 2018, along with the Executive Director, Juvenile Justice.³¹ Each appeared by invitation, and during the hearing Ms Rafter again declined to provide the draft report.³²

²⁵ Advice, Solicitor General, 'Question of powers of Legislative Council Committees to call for production of documents from witnesses', 2018, p 2.

²⁶ Advice, Ms Anna Mitchelmore SC, 'Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019', 19 November 2018, p 2, appended to correspondence from Ms Fiona Rafter, Inspector of Custodial Services to secretariat, 19 November 2018.

²⁷ Advice, Ms Mitchelmore SC, 19 November 2018, p 2.

²⁸ Advice, Ms Mitchelmore SC, 19 November 2018, p 12.

²⁹ Portfolio Committee No. 4, Minutes, 21 November 2018.

³⁰ Tabled paper, NSW Legislative Council, Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres*, 23 November 2018.

³¹ Portfolio Committee No. 4, Minutes, 26 November 2018.

³² Evidence, Ms Rafter, 19 December 2018, p 15.

- 3.20** On 18 January 2019, answers to questions on notice were provided by the witnesses. The Inspector clarified issues raised by members at the hearing related to the tabling and publishing timeframes of the final report.³³

Committee comment

- 3.21** The committee pursued the production of the Inspector of Custodial Services' report on the use of force, separation and confinement in NSW juvenile justice centres out of concern for the human rights and welfare of young people detained in New South Wales. This cohort is by its nature highly vulnerable. In addition, while all people in detention require protection from cruel, inhuman or degrading treatment, it is widely accepted that a heightened obligation of protection exists towards young people in custody because of their youth. The potential for systemic problems of this nature was highlighted by the events at the Northern Territory's Don Dale Youth Detention Centre which were the catalyst for the Minister's request that the Inspector examine the use of separation, segregation and confinement of young people in this state.
- 3.22** Within this context, the committee was very concerned by the extraordinarily long delay in the finalisation of this report, having been initiated in June 2016, then expanded at the Minister's request in November 2016.
- 3.23** The report was eventually tabled in late November 2018. Once published, we were able to ask important questions about the Inspector's findings and recommendations, and reforms underway to improve the New South Wales juvenile justice system. The committee is in no doubt that the pressure we exerted through our persistent questions about the delay, and the exercise of our powers to order the production of the draft report, helped to expedite the report's finalisation.
- 3.24** The committee notes that neither the Inspector nor the Secretary of the Department of Justice complied with the committee's order for the production of documents. While the committee accepts that their actions were based on legal advice it is nevertheless displeased by their non-compliance.
- 3.25** The committee takes this opportunity to address the opinions of the Acting Crown Solicitor and Solicitor General, as captured in the various advices referred to in this chapter.
- 3.26** First, the committee does not accept the view that the committee lacks the power to require the production of this draft report in the circumstances of the statutory scheme established by the ICS Act. We consider that the order in these circumstances was indeed reasonably necessary to fulfil the scrutiny function of the committee in respect of the work of the Inspector of Custodial Services. In keeping with this, we challenge the Acting Crown Solicitor's proposition that the ICS Act impliedly displaces parliamentary privilege. The committee notes the advice of Mr Walker SC, obtained for the specific purpose of this inquiry, that the threshold to be crossed for a statute to nullify parliamentary privilege is a very high one and must be expressly stated,³⁴ a view which the committee prefers.

³³ Answers to questions on notice, Ms Fiona Rafter, Inspector of Custodial Services, 18 January 2019.

³⁴ Mr Bret Walker SC, initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees, 25 October 2018.

3.27 We note the content of the advice from the former Crown Solicitor, the Acting Crown Solicitor and Ms Mitchelmore SC that the PE Act itself does not confer power on a committee to compel the production of documents, in part based on numerous textual indications in the PE Act, and that the Act is concerned only with the attendance and examination of witnesses to give oral evidence.³⁵ However, in light of advice from Mr Walker SC in 2015, that "There is no sensible justification for confining the nature of "evidence" which may become available to the Council under the [PE] Act to spoken material only",³⁶ we have sought and await Mr Walker's further advice on this matter.³⁷

3.28 Having strongly asserted the powers of Legislative Council committees, we turn to the parts of the advices provided by inquiry participants that actually support the committee's position in important respects. The various advice concede that committees have the power under Standing Order 208 (c) to order documents and that the House and committees have the power to order documents as is reasonably necessary to fulfil their function.

3.29 The Solicitor General stated:

... 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 might be made by the 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.³⁸

3.30 In advice to the Auditor General dated 10 August 2018, the (then) Crown Solicitor deferred to this opinion:

The Solicitor General recently indicated that, in his view, it is "*more likely than not*" that if the question 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. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness.

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*).

³⁵ Advice, Acting Crown Solicitor 'Request by Committee for draft report of Inspector of Custodial Services', 29 October 2018, p 36.

³⁶ Advice, Mr Bret Walker SC, 'Parliament of New South Wales, Legislative Council: Orders for papers from bodies not subject to direction or control by the Government', 2015, p 14.

³⁷ Portfolio Committee No. 4, Minutes, 21 November 2018.

³⁸ Advice, Solicitor General, 'Question of powers of Legislative Council Committees to call for production of documents from witnesses', 2018, p 2.

I defer to the opinion of the Solicitor General.³⁹

3.31 The Acting Crown Solicitor stated that he also deferred to the Solicitor General's opinion in advice dated 24 October 2018:

... the Solicitor General has recently indicated that, in his view, it is "more likely than not" that, if the question 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. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness. This power would most likely be found to derive from the Standing Orders and the principle that each House has all the powers that are "reasonably necessary" to exercise its functions.

I defer to the opinion of the Solicitor General.⁴⁰

3.32 Further to this, the Acting Crown Solicitor acknowledged that in ordering the production of documents a committee is doing what is reasonably necessary to exercise the Legislative Council's parliamentary function of reviewing executive conduct:

I therefore proceed on the basis that the power of a committee to "send for" papers and records, as reflected in Standing Order 208(c), derives from the fact that such a power is reasonably necessary for the Council to exercise its functions. Each House exercises the constitutional functions of making laws (pursuant to s. 5 of the *Constitution Act*), and the parliamentary function of reviewing executive conduct, in accordance with the principle of responsible government. In *Egan v Willis*, the power to require production of State papers from Ministers was found to be reasonably necessary for the performance of both of these functions.

The resolution of the Committee has been made in the course of the Committee conducting its current "Estimates inquiry", in accordance with the Budget Estimates Resolution of the Legislative Council of 20 June 2018. The Council resolved that, "upon tabling, the Budget Estimates and related papers for the financial year 2018-2019 presenting the amounts to be appropriated from the Consolidated Fund be referred to the Portfolio Committees for inquiry and report".

The Committee is therefore, in accordance with the Council's resolution, exercising the Council's parliamentary function of reviewing executive conduct.⁴¹

3.33 As previously noted, Ms Mitchelmore SC, who provided advice on committee powers to the Inspector of Custodial Services, appears to acknowledge that a general power on the part of

³⁹ Advice, Crown Solicitor, 'Section 38 Public Finance and Audit Act and powers of parliamentary committees', 10 August 2018, p 7.

⁴⁰ Advice, Acting Crown Solicitor, 'Draft report of Inspector of Custodial Services', 24 October 2018, pp 3-4, appended to correspondence from Minister Elliott MP, 24 October 2018, Mr Cappie-Wood, 24 October 2018, and Ms Rafter, 24 October 2018.

⁴¹ Advice, Acting Crown Solicitor, 'Draft report of Inspector of Custodial Services', 24 October 2018, pp 4-5, appended to correspondence from Minister Elliott MP, 24 October 2018, Mr Cappie-Wood, 24 October 2018, and Ms Rafter, 24 October 2018.

committees to order documents 'resides in standing order 208(c), or otherwise arises as a matter of reasonable necessity.⁴²

- 3.34** Thus, due to this committee's persistence in pursuing the draft report, and other committees undertaking similar orders for documents, in particular Portfolio Committee No. 5 during its inquiry into Windsor Bridge, these advices concede that there is common understanding that Legislative Council committees have the power to order documents.
- 3.35** Having reached some form of consensus that committees do indeed have the power to order the production of documents and that this power most likely arises from reasonable necessity and Standing Order 208, there would be benefit in discussions with the Executive Government on the development and adoption of clear procedures in the application of this power, including procedures for communicating orders, co-ordinating responses and dealing with claims of privilege, for example through a sessional order in the next Parliament.

Conclusion

- 3.36** Despite the committee's power to enforce the production of the draft report it has elected not to pursue this matter on this occasion. This decision has been made within the context of the end of the Parliamentary session prior to the 2019 state election, as well as this committee's consideration of the role and resourcing of the Inspector of Custodial Services in our recent inquiry into Parklea Correctional Centre.
- 3.37** Again we reiterate that it is the Council's view that the committee has the power to order the production of documents. The committee awaits further advice in response to the specific reasons that were the basis of the Inspector of Custodial Services non-production of her draft report.
- 3.38** Turning to the policy matter of the welfare of young people detained in New South Wales that was the subject matter of the report, during the Parklea inquiry the committee considered the work of the Inspector of Custodial Services within the context of the need for optimally effective oversight of private prisons as well as of the broader correctional system. In our report, published December 2018, we recommended:

That the NSW Government:

- review the performance, functions, powers and resourcing of the Inspector of Custodial Services, in order to enhance the effectiveness of that office
- conduct the review in the first half of 2019
- ensure that any resultant legislative changes are introduced to Parliament by the end of 2019.⁴³

⁴² Advice, Ms Mitchelmore SC, 19 November 2018, p 12.

⁴³ Portfolio Committee No. 4 – Legal Affairs, *Nsw Parklea Correctional Centre and other operational issues*, 2018, p 107.

- 3.39** The committee considers that NSW Government action to accept and implement this recommendation is the best way forward for now. We note that, in response the NSW Government has advised that a statutory review of the ICS Act will be undertaken in 2019.⁴⁴
- 3.40** In conclusion, the committee looks forward to the opportunity to raise further questions about reforms to the juvenile justice system, based on the Inspector of Custodial Services report, at the next Budget Estimates inquiry.

⁴⁴ Government response to Portfolio Committee No. 4 – Legal Affairs, *Parakea Correctional Centre and other operational issues*, 25 January 2019.

Appendix 1 Witnesses at hearings

Police, Emergency Services – Thursday 30 August 2018

Name	Position and Organisation
The Hon Troy Grant MP	Minister for Police and Minister for Emergency Services
Mr Andrew Cappie-Wood	Secretary, Department of Justice
Mr Andrew Simpson	Acting Chief Financial Officer, Department of Justice
Mr Feargus O'Connor	Executive Director, Office of Emergency Management, Department of Justice
Mr Adrian McKenna	Executive Director, Office for Police, Department of Justice
Mr Michael Fuller APM	Commissioner, NSW Police Force
Mr Paul Baxter	Commissioner, Fire & Rescue NSW
Mr Shane Fitzsimmons AFSM	Commissioner, NSW Rural Fire Service
Mr Mark Smethurst DSC, AM	Commissioner, NSW State Emergency Service
Ms Rosemary Milkins	Deputy Commissioner, NSW Police Force
Hon Justice Michael Adams QC	Chief Commissioner, Law Enforcement Conduct Commission

Corrections, Counter Terrorism, Veterans Affairs – Tuesday 4 September 2018

Name	Position and Organisation
The Hon David Elliott MP	Minister for Counter Terrorism, Minister for Corrections and Minister for Veterans Affairs
Mr Andrew Cappie-Wood	Secretary, Department of Justice
Ms Elizabeth Stratford	Chief Financial Officer, Department of Justice
Mr Peter Severin	Commissioner, Corrective Services NSW
Ms Melanie Hawyes	Executive Director, Juvenile Justice
Ms Mary-Ann O'Loughlin AM	Deputy Secretary, Social Policy Group, Department of Premier and Cabinet

Ms Caroline Mackaness	Director, Office for Veterans Affairs, Department of Justice
Ms Fiona Rafter	Inspector of Custodial Services

Attorney General – Tuesday 4 September 2018

Name	Position and Organisation
The Hon Mark Speakman MP	Attorney General
Mr Andrew Cappie-Wood	Secretary, Department of Justice
Ms Elizabeth Stratford	Chief Financial Officer, Department of Justice
Ms Kathrina Lo	Deputy Secretary, Justice Services, Department of Justice
Mr Paul McKnight	Executive Director, Policy and Reform, Department of Justice

Police – Wednesday 31 October 2018 (supplementary hearing)

Name	Position and Organisation
Mr Michael Fuller APM	Commissioner, NSW Police Force

Corrections – Wednesday 31 October 2018 (supplementary hearing)

Name	Position and Organisation
Mr Andrew Cappie-Wood	Secretary, Department of Justice
Ms Melanie Hawyes	Executive Director, Juvenile Justice
Mr Peter Severin	Commissioner, Corrective Services NSW
Ms Fiona Rafter	Inspector of Custodial Services

Corrections – Wednesday 19 December 2018 (supplementary hearing)

Name	Position and Organisation
Mr Andrew Cappie-Wood	Secretary, Department of Justice
Mr Steven Southgate	Acting Executive Director, Juvenile Justice
Ms Fiona Rafter	Inspector of Custodial Services

Appendix 2 Minutes

Minutes no. 77

Wednesday 15 August 2018
 Portfolio Committee No. 4 – Legal Affairs
 Members' Lounge, Parliament House, Sydney at 10.31 am

1. Members present

Mr Borsak, *Chair*
 Mr Shoebridge, *Deputy Chair*
 Mr Clarke (from 10.33 am)
 Ms Cusack (from 10.34am)
 Mrs Houssos (substituting for Ms Voltz)
 Mr Khan
 Mr Moselmane (from 10.37 am)

2. Correspondence

The committee noted the following items of correspondence:

Received:

- 25 July 2018 – Email from Ms Simone Lieser, Office of the Hon Mark Speakman MP, Attorney General, providing the list of witnesses for Budget Estimates
- 26 July 2018 – Email from Mr Edward Strong, Office of the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veteran Affairs, providing the list of witnesses for Budget Estimates
- 30 July 2018 – Letter from Ms Rachael Hayes, Deputy Chief of Staff, Office of the Hon Troy Grant MP, Minister for Police, Emergency Services, providing the list of witnesses for Budget Estimates and requesting time allocations for the different portfolios.
- 10 August 2018 – Email from Nishita Dayal, Office of the Hon Troy Grant MP, Minister for Police, Emergency Services, providing an update to the witness list.

Sent:

- 10 July 2018 – Letter from Ms Teresa McMichael, A/Clerk Assistant – Committees to the Hon David Elliot MP, Minister for Counter Terrorism, Corrections, Veteran Affairs, inviting the Minister to Budget Estimates
- 10 July 2018 – Letter from Ms Teresa McMichael, A/Clerk Assistant – Committees to the Hon Mark Speakman MP, Attorney General, inviting the Attorney General to Budget Estimates
- 10 July 2018 – Letter from Ms Teresa McMichael, A/Clerk Assistant – Committees to the Hon Troy Grant MP, Minister for Police, Emergency Services, inviting the Minister to Budget Estimates.

3. Inquiry into Budget Estimates 2018-2019 – procedural resolutions

The committee noted that the Budget Estimates timetable for 2018-2019 was agreed to by the House, with the following Portfolio Committee No. 4 hearings:

Date	Time	Portfolio	Room
Thursday 30 August	2.00 pm – 6.00 pm	Police, Emergency Services (Grant)	Macquarie
Tuesday 4 September	9.00 am – 12.00 pm	Counter Terrorism, Corrections, Veterans Affairs (Elliott)	Jubilee
	2.00 pm – 4.00 pm	Attorney General (Speakman)	Jubilee

3.1 Government questions

Resolved, on the motion of Mr Shoebridge: That with government members not asking questions:

- The portfolios of Police, Emergency Services be examined from 2.00 pm – 5.00 pm, with a 20 minute break in the middle.
- The portfolios of Counter Terrorism, Corrections, Veterans Affairs be examined from 9.00 am – 11.00 am.

Resolved, on the motion of Mr Shoebridge: That with government members asking questions:

- The portfolio of Attorney General be examined from 2.00 pm – 4.00 pm.

3.2 Sequence of questions

The committee noted that, under the resolution establishing the Portfolio Committees, the sequence of questions alternates between opposition, crossbench and government members, with equal time allocated to each, unless the committee decides otherwise.

3.3 Procedure for examining more than one portfolio

The committee noted that the portfolios would be examined concurrently.

3.4 Additional witness requests

The committee noted each minister's list of witnesses, as per the table below, and that members have until 10.30 am Thursday 16 August 2018 to provide any additional witness requests.

Resolved on the motion of Mr Shoebridge: That the following witnesses be invited:

- Ms Fiona Rafter, Inspector of Custodial Services – for the Corrections hearing
- Deputy Commissioner Rosemary Milkins – for the Police, Emergency Services hearing.

Minister	Portfolio	Witness	Position and Department
Grant	Police, Emergency Services	Mr Andrew Cappie-Wood	Secretary, NSW Department of Justice
		Mr Andrew Simpson	A/Chief Financial Officer, NSW Department of Justice
	Emergency Services	Mr Feargus O'Connor	Executive Director, Office of Emergency Management, NSW Department of Justice
		Mr Paul Baxter	Commissioner, Fire & Rescue NSW

		Mr Shane Fitzsimmons	Commissioner, NSW Rural Fire Service
		Mr Mark Smethurst	Commissioner, NSW State Emergency Services
	Police	Mr Adrian McKenna	Executive Director, Office for Police, NSW Department of Justice
		Mr Michael Fuller	Commissioner, NSW Police Force
Elliott	Corrections	Mr Andrew Cappie-Wood	Secretary, Department of Justice
		Ms Elizabeth Stratford	Chief Financial Officer, Department of Justice
		Mr Peter Severin	Commissioner, Corrective Services NSW
		Ms Melanie Hawyes	Executive Director, Juvenile Justice, Department of Justice
	Office for Veterans Affairs	Ms Caroline Mackaness	Director, Office for Veterans Affairs, Department of Justice
	Counter Terrorism	Ms Mary-Ann O'Loughlin	Deputy Secretary, Social Policy Group, Department of Premier & Cabinet
Speakman	Attorney General	Mr Andrew Cappie-Wood	Secretary, Department of Justice
		Ms Catherine D'Elia	Deputy Secretary, Courts and Tribunal Services, Department of Justice
		Ms Kathrina Lo	Deputy Secretary, Justice Services, Department of Justice
		Ms Elizabeth Straford	Chief Financial Officer, Department of Justice
		Ms Kate Connors	Acting Deputy Secretary, Justice Strategy and Policy, Department of Justice

4. Adjournment

The committee adjourned at 10.40 am, *sine die*.

Sarah Dunn
Clerk to the Committee

Minutes no. 79

Thursday 30 August 2018

Portfolio Committee No. 4 - Legal Affairs

Macquarie Room, Parliament House, Sydney, at 1.46 pm

1. Members presentMr Shoebridge, *Deputy Chair*

Ms Cusack (from 2.01 pm)

Mr Fang (substituting for Mr Clarke)

Mr Franklin (substituting for Mr Khan)

Mr Moselmane

Mr Searle (participating) (from 2.31 pm until 3.49 pm) (from 4.53 pm to 5.00 pm)

Ms Voltz

2. ApologiesMr Borsak, *Chair***3. Previous minutes**

Resolved, on the motion of Mr Moselmane: That draft minutes no. 77 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- ***
- 22 August 2018 – Email from Ms Katherine Danks, Office of the Hon David Elliott MP, Minister for Counter Terrorism, Minister for Corrections and Minister for Veterans Affairs, to secretariat, confirming additional witness for Budget Estimates
- 23 August 2018 – Email from Ms Nishita Dayal, Office of the Hon Troy Grant MP, Minister for Police, Emergency Services, to secretariat, confirming additional witnesses for Budget Estimates
- 27 August 2018 – Email from author of submission no. 105, to secretariat, providing additional information to the committee in relation to the inquiry into emergency services agencies.

Sent

- 17 August 2018 – Email from secretariat, to Mr Bryce O'Connor, Office of the Attorney General, advising that the committee has not requested any additional witnesses for Budget Estimates
- 17 August 2018 – Email from secretariat, to Ms Tanya Raffoul and Mr Edward Strong, Office of the Hon David Elliott MP, Minister for Counter Terrorism, Minister for Corrections and Minister for Veterans Affairs, advising of the committee's request for a further additional witness for Budget Estimates
- 17 August 2018 – Email from secretariat, to Ms Alexandra Byrne, Office of the Hon Troy Grant MP, Minister for Police, Emergency Services, advising of the committee's request for additional witnesses for Budget Estimates
- ***

5. Inquiry into Budget Estimates 2018-2019**5.1 Public hearing: Budget Estimates 2018-2019 – Police, Emergency Services**

Witnesses, the public and the media were admitted.

The chair made an opening statement regarding the broadcasting of proceedings and other matters. The chair noted that members of Parliament swear an oath to their office, and therefore do not need to be sworn prior to giving evidence before a committee.

Minister Grant MP was admitted.

The following witnesses were sworn:

- Mr Andrew Cappie-Wood, Secretary, NSW Department of Justice
- Mr Andrew Simpson, Acting Chief Financial Officer, NSW Department of Justice
- Mr Feargus O'Connor, Executive Director, Office of Emergency Management, NSW Department of Justice
- Mr Paul Baxter, Commissioner, Fire & Rescue NSW
- Mr Shane Fitzsimmons, Commissioner, NSW Rural Fire Service
- Mr Mark Smethurst, Commissioner, NSW State Emergency Service
- Mr Adrian McKenna, Executive Director, Office for Police, NSW Department of Justice
- Mr Michael Fuller, Commissioner, NSW Police Force
- Ms Rosemary Milkins, Deputy Commissioner, NSW Police Force
- Hon Justice Michael Adams QC, Chief Commissioner, Law Enforcement Conduct Commission.

The chair declared the proposed expenditure for the portfolios of Police, Emergency Services open for examination.

The Minister and departmental witnesses were examined by the committee.

Minister Grant tendered the following document:

- Letter from, Chief Commissioner, Law Enforcement Conduct Commission to Minister Troy Grant MP, dated 4 May 2017.

Ms Voltz tendered the following document:

- Letter, from Minister Stuart Ayres MP and Minister David Elliott MP to Minister Gabrielle Upton MP, regarding permanent closure of a section of Driver Avenue at Moore Park Sydney, dated 14 September 2017.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.03 pm.

The public and media withdrew.

5.2 Tendered documents

Resolved, on the motion of Ms Voltz: That the committee postpone consideration of the publication of the following document tendered during the **Police, Emergency Services** hearing held on **Thursday 30 August 2018** until Tuesday 4 September 2018:

- Letter, Chief Commissioner, Law Enforcement Conduct Commission to Minister Troy Grant MP, dated 4 May 2017, tendered by Minister Grant.

Resolved, on the motion of Mr Moselmann: That the committee publish the following document tendered during the **Police, Emergency Services** hearing held on **Thursday 30 August 2018**:

- Letter, from Minister Stuart Ayres MP and Minister David Elliott MP to Minister Gabrielle Upton MP, permanent closure of a section of Driver Avenue at Moore Park Sydney, dated 14 September 2017, tendered by Ms Voltz.

5.3 Supplementary hearings

Resolved, on the motion of Mr Franklin: That the committee hold a further meeting to deliberate on whether to hold supplementary hearings for the portfolios of **Police, Emergency Services** on a date to be determined following receipt of answers to questions on notice.

6. Adjournment

The committee adjourned at 5.08 pm, until 9.00 am, Tuesday, 4 September 2018, Jubilee Room (*Counter Terrorism, Corrections, Veterans Affairs*).

Susan Want

Committee Clerk

Minutes no. 80

Tuesday 4 September 2018

Portfolio Committee No. 4 - Legal Affairs

Jubilee Room, Parliament House, Sydney, at 8.50 am

1. Members present

Mr Shoebridge, *Deputy Chair*

Mr Clarke

Mr Farlow (substituting for Ms Cusack)

Mr Khan

Mr Moselmane

Ms Voltz

2. Apologies

Mr Borsak, *Chair*

3. Inquiry into Budget Estimates 2018-2019

3.1 Police, Emergency Services hearing – tendered document

Resolved, on the motion of Ms Voltz: That the committee publish the document tendered by Minister Grant during the Police, Emergency Services hearing on 30 August 2018.

3.2 Public hearing: Budget Estimates 2018-2019 – Counter Terrorism, Corrections, Veterans Affairs

Witnesses, the public and the media were admitted.

The chair made an opening statement regarding the broadcasting of proceedings and other matters. The chair noted that members of Parliament swear an oath to their office, and therefore do not need to be sworn prior to giving evidence before a committee.

The chair also reminded Mr Andrew Cappie-Wood from the Department of Justice, that he did not need to be sworn, as he had been sworn at another Budget Estimates hearing.

Minister Elliott MP was admitted.

The following witnesses were sworn:

- Ms Elizabeth Stratford, Chief Financial Officer, Department of Justice
- Mr Peter Severin, Commissioner, Corrective Services NSW

- Ms Melanie Hawyes, Executive Director, Juvenile Justice, Department of Justice
- Ms Fiona Rafter, Inspector Custodial Services,
- Ms Caroline Mackaness, Director, Office of Veterans Affairs, Department of Justice
- Ms Mary-Ann O'Loughlin AM, Deputy Secretary, Social Policy Group, Department of Premier and Cabinet.

The chair declared the proposed expenditure for the portfolios of Counter Terrorism, Corrections, Veterans Affairs open for examination.

The Minister and departmental witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 11.01 am.

The public and media withdrew.

4. **Supplementary hearings**

Resolved, on the motion of Mr Moselmane: That the committee hold a further meeting to deliberate on whether to hold supplementary hearings for the portfolios of Counter Terrorism, Corrections, Veterans Affairs on a date to be determined following receipt of answers to questions on notice.

5. **Adjournment**

The committee adjourned at 11.02 am, until 2.00 pm, Tuesday, 4 September 2018, Jubilee Room (*Attorney General*).

Merrin Thompson
Committee Clerk

Minutes no. 81

Tuesday 4 September 2018
Portfolio Committee No. 4 - Legal Affairs
Jubilee Room, Parliament House, Sydney, at 1.46 pm

1. **Members present**

Mr Shoebridge, *Deputy Chair*
Mr Clarke (from 2.01 pm)
Ms Cusack
Mr Khan
Mr Moselmane
Ms Voltz
Mr Searle (participating) (from 1.48 pm)

2. **Apologies**

Mr Borsak, *Chair*

3. **Inquiry into Budget Estimates 2018-2019**

3.1 Hearing – Police, Emergency Services – Supplementary questions

Mr Moselmane moved: That, with reference to the Police, Emergency Services Budget Estimate hearing:

- (a) questions taken on notice by the LECC Chief Commissioner, the transcript and supplementary questions directed to the LECC Chief Commissioner be sent directly to the Chief Commissioner for response; and
- (b) the Minister be advised of this approach.

Ms Cusack moved: That the motion of Mr Moselmane be amended by omitting paragraph (a) and inserting instead:

- “(a) questions taken on notice by the LECC Chief Commissioner, the transcript and supplementary questions directed to the LECC Chief Commissioner be forwarded to the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission for consideration.”

Amendment put and negatived.

Original question put and passed.

3.2 Government questions

Resolved, on the motion of Ms Voltz: That with government members not asking questions, the portfolio of Attorney General be examined from 2.00 pm to 4.00 pm.

3.3 Public hearing: Budget Estimates 2018-2019 – Attorney General

Witnesses, the public and the media were admitted.

The chair made an opening statement regarding the broadcasting of proceedings and other matters. The chair noted that members of Parliament swear an oath to their office, and therefore do not need to be sworn prior to giving evidence before a committee.

The chair also reminded Mr Andrew Cappie-Wood and Ms Elizabeth Stratford from the Department of Justice that they did not need to be sworn, as they had been sworn at another Budget Estimates hearing.

Attorney General Speakman MP was admitted.

The following witnesses were sworn:

- Ms Kathrina Lo, Deputy Secretary, Justice Services, Department of Justice
- Mr Paul McKnight, Executive Director, Policy and Reform, Department of Justice.

The chair declared the proposed expenditure for the portfolio of Attorney General open for examination.

The Attorney General and departmental witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.02 pm.

The public and media withdrew.

3.4 Supplementary hearings

Resolved, on the motion of Mr Khan: That the committee hold a further meeting to deliberate on whether to hold supplementary hearings for the portfolio of Attorney General on a date to be determined following receipt of answers to questions on notice.

4. Adjournment

The committee adjourned at 4.03 pm, *sine die*

Susan Want

Committee Clerk

Minutes no. 84

Friday, 28 September 2018

Portfolio Committee No. 4 – Legal Affairs

Macquarie Room, Parliament House, Sydney, 9.15 am

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Clarke

Mr Farlow

Mr Graham (*until 9.27 am*)

Mr Khan

Ms Voltz

2. Apologies

Mr Moselmane

3. Draft minutes

Resolved, on the motion of Ms Voltz: That draft minutes nos 73, 74, 75, 77, 79, 80 and 81 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- ***
- ***
- ***
- ***
- ***
- 25 September 2018 – Answers to questions on notice from the Hon Troy Grant MP, Minister for Police, Emergency Services, to committee, from the Police, Emergency Services hearing 30 August 2018, including two pieces of legal advice with a request to keep these confidential
- 25 September 2018 – Answers to supplementary questions from the Hon Justice Michael Adams QC, Chief Commissioner, Law Enforcement Conduct Commission, to committee, from the Police, Emergency Services hearing 30 August 2018
- 25 September 2018 – Letter from the Hon Justice Michael Adams QC, Chief Commissioner, Law Enforcement Conduct Commission, to committee, requesting the committee redact the body which conducted the 2017 Washington Conference from the transcript for the budget estimates hearing dated 30 August 2018
- ***
- 27 September 2018 – Email from Ms Nishita Dayal, Office of Minister Grant, to secretariat, in relation to publication of the two pieces of legal advice provided as part of answers to questions on notice.

Sent:

- ***
- ***

- ***

4.1 Consideration of the status of answers to questions on notice: Police, Emergency Services

Resolved, on the motion of Mr Graham: That the committee:

- publish the two pieces of legal advice provided as part of the answers to questions on notice from the Hon Troy Grant MP, Minister for Police, Emergency Services, received 25 September 2018
- publish the answers to supplementary questions from the Hon Justice Michael Adams QC, Chief Commissioner, Law Enforcement Conduct Commission, received 25 September 2018
- redact from page 14 of the transcript from the Police, Emergency Services hearing on 30 August 2018 the name of the body which conducted the 2017 Washington Conference
- keep confidential the correspondence received on 25 September 2018 from the Hon Justice Michael Adams QC, Chief Commissioner, Law Enforcement Conduct Commission, requesting the committee redact the body which conducted the 2017 Washington Conference from the transcript.

5. ***

6. ***

7. Next meeting

The committee adjourned at 4.08 pm, until Tuesday 30 October 2018.

Merrin Thompson
Committee Clerk

Minutes no. 85

Wednesday 17 October 2018

Portfolio Committee No. 4 – Legal Affairs

Members' Lounge, Parliament House at 1.31 pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Clarke (from 1.34 pm)

Ms Cusack (from 1.32 pm)

Mr Khan (from 1.32 pm)

Mr Moselmane

Ms Voltz (from 1.32 pm)

2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 84 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 3 September 2018 – Email from Ms Simone Lieser, Office of the Hon Mark Speakman, Attorney General, advising the committee that due to a family emergency and conflict in leave arrangements the Minister amended the list of witnesses accompanying him to the Budget Estimates hearing

- 25 September 2018 – Letter from Hon Troy Grant MP, Minister for Police, Emergency Services to the Chair, attaching answers to questions on notice, answers to supplementary questions, transcript corrections and legal advice
- 25 September 2018 – Letter from Hon Justice Michael Adams QC, Commissioner, Law Enforcement Conduct Commission to the secretariat, attaching answers to questions on notice and transcript corrections
- 27 September 2018 – Email from Ms Nishita Dayal, Office of the Hon Troy Grant, Minister for Police and Minister for Emergency Services, advising the committee that the Minister provided the legal advice at the request of the Acting Chair and not for release to the public at large, however, if the committee resolved to release the documents, the Minister would not press the matter. .
- 28 September 2018 – Letter from Hon David Elliott MP, Minister for Corrections, Counter Terrorism, Veterans Affairs to the secretariat, attaching answers to questions on notice, answers to supplementary questions and transcript corrections
- 28 September 2018 – Letter from Hon David Elliott MP, Minister for Corrections, Counter Terrorism, Veterans Affairs to the secretariat, clarifying evidence provided to the committee during Budget Estimates
- 28 September 2018 – Letter from Ms Fiona Rafter, Inspector of Custodial Services to the secretariat, attaching answers to questions on notice
- 28 September 2018 – Letter from Hon Mark Speakman MP, Attorney General to the secretariat, attaching answers to questions on notice, answers to supplementary questions and transcript corrections.

Sent:

- 3 September 2018 – Email from secretariat to Ms Simone Lieser and Mr Bryce O'Connor, Attorney General Speakman's office, confirming that the committee has no objections to the changes made to the list of witnesses for the hearing
- 4 September 2018 – Email from secretariat to Ms Nishita Dayal, Office of the Hon Troy Grant, Minister for Police and Minister for Emergency Services, attaching transcript of evidence with questions on notice highlighted, supplementary questions and instructions on how to correct the transcript and return answers to questions
- 4 September 2018 – Email from secretariat to the Hon Justice Michael Adams QC, Commissioner, Law Enforcement Conduct Commission, attaching transcript of evidence with questions on notice highlighted, supplementary questions and instructions on how to correct the transcript and return answers to questions
- 4 September 2018 – Email from secretariat to Ms Tanya Raffoul and Mr Edward Strong, Minister Elliott's office, attaching transcript of evidence with questions on notice highlighted, supplementary questions and instructions on how to correct the transcript and return answers to questions
- 7 September 2018 – Email from secretariat to Mr Bryce O'Connor, Attorney General Speakman's office, attaching transcript of evidence with questions on notice highlighted, supplementary questions and instructions on how to correct the transcript and return answers to questions.

3.1 Inquiry into Budget Estimates 2018-2019

3.2 Supplementary hearings

Mr Shoebridge moved: That

- the committee hold two further hearings to consider matters relating to the portfolios of Police and Corrections, on a date to be determined by the Chair in consultation with the members; and
- the Commissioner of Corrective Services NSW, Inspector of Custodial Services and Executive Director of Juvenile Justice be invited to appear at the Corrections supplementary hearing.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Moselmane, Mr Shoebridge, Ms Voltz

Noes: Mr Clarke, Ms Cusack, Mr Khan,

Question resolved in the affirmative.

Mr Shoebridge moved: That the portfolios of Police and Corrections be examined for 1.5 hours each, with no government questions.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Moselmane, Mr Shoebridge, Ms Voltz

Noes: Mr Clarke, Ms Cusack, Mr Khan.

Question resolved in the affirmative.

Resolved, on the motion of Ms Voltz: That the committee hold no further hearings to consider matters relating to the following portfolios:

- Emergency Services
- Counter Terrorism, Veterans Affairs
- Attorney General.

3.3 Order for papers

Ms Voltz moved:

1. That, under Standing Order 208(c), Portfolio Committee No. 4 – Legal Affairs be provided with the following documents in the possession, custody or control of the Inspector of Custodial Services, the Minister for Corrective Services, and the Department of Justice:
 - the draft report on Juvenile Justice following the Royal Commission into the Protection and Detention of Children in the Northern Territory, prepared by Ms Fiona Rafter, Inspector of Custodial Services and provided to the Minister for Corrective Services; and
 - any legal or other advice regarding the scope or validity of this order of the committee created as a result of this order of this committee.
2. That the documents be provided to the committee clerk by 4.00 pm, Wednesday 24 October 2018.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Moselmane, Mr Shoebridge, Ms Voltz

Noes: Mr Clarke, Ms Cusack, Mr Khan.

Question resolved in the affirmative.

4. Adjournment

The committee adjourned at 1.40 pm.

Rebecca Main
Committee Clerk

Minutes no. 86

Thursday 25 October 2018

Portfolio Committee No. 4 – Legal Affairs

Members' Lounge, Parliament House at 1.30 pm

1. Members presentMr Borsak, *Chair*

Mr Clarke (from 1.31 pm)

Ms Cusack

Mr Moselmane

Ms Voltz

2. Apologies

Mr Khan

Mr Shoebridge

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- 17 October 2018 – Letter from Director, Budget Estimates, on behalf of the committee, to the Minister for Corrections, Counter Terrorism, Veterans Affairs ordering the production of certain documents by 4.00pm Wednesday, 24 October 2018
- 17 October 2018 – Letter from Director, Budget Estimates, on behalf of the committee, to the Inspector of Custodial Services ordering the production of certain documents by 4.00pm Wednesday, 24 October 2018
- 17 October 2018 – Letter from Director, Budget Estimates, on behalf of the committee, to the Secretary of the Department of Justice ordering the production of certain documents by 4.00pm Wednesday, 24 October 2018
- 17 October 2018 – Email from the secretariat to the Office of the Minister for Corrections advising of the supplementary hearing on 31 October 2018 and requesting certain witnesses.
- 17 October 2018 – Email from the secretariat to the Office of the Minister for Police, Emergency Services advising of the supplementary hearing on 31 October 2018 and requesting a list of witnesses.

Received:

- 22 October 2018 – Email from the Office of the Minister for Corrections, Counter Terrorism, Veterans Affairs providing list of witnesses for the supplementary hearing on 31 October 2018
- 24 October 2018 – Letter from Minister for Corrections, Counter Terrorism, Veterans Affairs, declining to provide the ordered documents and attaching Crown Solicitors Advice
- 24 October 2018 – Letter from the Secretary of the Department of Justice, declining to provide the ordered documents and attaching Crown Solicitors Advice
- 24 October 2018 – Letter from Inspector of Custodial Services, declining to provide the ordered documents and advising she will attend the supplementary hearing on 31 October 2018
- 25 October 2018 – Email from the Office of the Minister for Police, Emergency Services providing a list of witnesses for the supplementary hearing on 31 October 2018.

4. Inquiry into Budget Estimates 2018-2019**4.1 Order for papers**

The committee considered 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.

Ms Voltz moved, that:

1. The committee write to the Clerk to seek his advice on the responses from the Minister for Corrections, Counter Terrorism, Veterans Affairs, the Secretary of the Department of Justice, the attached Acting Crown Solicitor's advice, and the response from the Inspector of Custodial Services; and that the Clerk seek legal advice on this matter; and
2. Under the authority of s 4(2) of the *Parliamentary Evidence Act 1901*, the Inspector of Custodial Services and the Secretary of the Department of Justice, be served with a summons to attend to give evidence on Wednesday 31 October 2018 at 11.15am, and such evidence include the answering of questions and the production of the draft report on juvenile justice prepared by Ms Fiona Rafter, 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 hearing transcript.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Moselmane, Ms Voltz

Noes: Ms Cusack

Question resolved in the affirmative.

Mr Clarke joined the meeting at 1.31pm.

5. Previous minutes

Resolved, on the motion of Mr Moselmane: That draft minutes no. 85 be confirmed.

6. Adjournment

The committee adjourned at 1.32 pm.

Rebecca Main

Committee Clerk

Minutes no. 88

Wednesday 31 October 2018

Portfolio Committee No. 4 – Legal Affairs

Macquarie Room, Parliament House, Sydney at 9.10 am

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair* (from 9.16 am)

Mr Clarke (from 9.27 am)

Ms Cusack (from 9.17 am until 12.49 pm)

Mr Khan

Mr Moselmane

Ms Voltz

2. Previous minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 86 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- 28 October 2018 – Summons from the Chair to Ms Fiona Rafter, Inspector of Custodial Services, ordering the Inspector to attend before the committee on Wednesday 31 October 2018 to give

evidence as to, and concerning the matters to be inquired into by the committee, and such evidence include the answering of questions and the production of the draft report on juvenile justice prepared by the Inspector

- 28 October 2018 – Summons from the Chair to Mr Andrew Cappie-Wood, Secretary, Department of Justice, ordering the Secretary to attend before the committee on Wednesday 31 October 2018 to give evidence as to, and concerning the matters to be inquired into by the committee, and such evidence include the answering of questions and the production of the draft report on juvenile justice prepared by the Inspector of Custodial Services
- 29 October 2018 – Email from secretariat to Ms Fiona Rafter, Inspector of Custodial Services, advising that her letter requesting the committee to reconsider summoning her to the hearing on 31 October 2018 has been circulated to the committee for their attention and the committee has indicated it will proceed as previously resolved, to issue the summons.

Received:

- ***
- 25 October 2018 – Email from the Clerk to the secretariat providing 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
- 26 October 2018 – Letter from Ms Fiona Rafter, Inspector of Custodial Services, to secretariat requesting the committee to reconsider summons
- 30 October 2018 – Letter from Mr Andrew Cappie-Wood, Secretary, Department of Justice, advising that he is unable to provide a copy of the draft report based on the advice from the Acting Crown Solicitor
- 30 October 2018 – Letter from Ms Fiona Rafter, Inspector of Custodial Services, to secretariat, advising that the will not be producing the draft report on two advices from the Crown Solicitor's Office.

4. Inquiry into Budget Estimates 2018-2019

4.1 Return of answers to questions on notice

Resolved on the motion of Mr Shoebridge: That witnesses be requested to return answers to questions on notice and supplementary questions by the 19 November 2018.

4.2 Public hearing - Police

The witness, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The Chair reminded Mr Michael Fuller APM that he did not need to be sworn, as he had been sworn at an earlier Budget Estimates hearing of this committee.

The Chair declared the proposed expenditure for the portfolio of Police open for examination.

Mr Fuller was examined by the committee.

The evidence concluded at 10.58 am and the witness withdrew.

4.3 Public hearing – Corrections

Witnesses, the public and the media were admitted.

Resolved, on the motion of Mr Shoebridge: That Ms Fiona Rafter, Inspector of Custodial Services, be permitted to provide an opening statement.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The Chair reminded Mr Andrew Cappie-Wood, Mr Peter Severin, Ms Melanie Hawyes and Ms Fiona Rafter that they did not need to be sworn, as they had been sworn at an earlier Budget Estimates hearing of this committee.

The Chair declared the proposed expenditure for the portfolio of Corrections open for examination.

Ms Rafter made an opening statement.

The committee proceeded to deliberate in private.

The witnesses, the media and the public withdrew.

4.4 Deliberative meeting

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.

4.5 Public hearing continued – Corrections

The witnesses, the public and the media were readmitted.

The Chair made an opening statement regarding the resolution of the committee in relation to ordering the production of documents.

The witnesses were examined by the committee.

Mr Borsak left the meeting at 11.47 am, and Mr Shoebridge was Acting Chair.

Mr Borsak re-joined the meeting at 12.23pm.

Ms Cusack left the meeting at 12.49 pm.

The evidence concluded at 12.55 pm and the witnesses withdrew.

4.6 Tendered documents

Ms Voltz tabled certain documents relating to incident reports for employees of Corrections Centres.

4.7 Supplementary hearings

Resolved, on the motion of Ms Voltz: That the committee hold no further hearings to consider matters relating to the portfolio of Police.

5. Adjournment

The committee adjourned at 1.00 pm, *sine die*.

Rebecca Main
Committee Clerk

Minutes no. 90

Wednesday 21 November 2018
Portfolio Committee No. 4 – Legal Affairs
Members' Lounge, Parliament House, Sydney at 10.45 am

1. Members present

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair* (from 10.47 am)
Mr Clarke
Ms Cusack (from 10.48 am)
Mr Khan (from 10.46 am)
Mr Moselmane
Ms Voltz

2. Previous minutes

Resolved, on the motion of Mr Moselmane: That draft minutes no. 88 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 7 November 2018 – Letter from Mr Andrew Cappie-Wood, Secretary, Department of Justice, to secretariat, requesting that the committee provide a copy of the legal advice it receives so that Mr Cappie-Wood can be given sufficient opportunity to respond
- 7 November 2018 – Letter from Mr Andrew Cappie-Wood, Secretary, Department of Justice, to secretariat, providing the Solicitor General's advice referred to in the Acting Crown Solicitor's advice of 24 October 2018
- 14 November 2018 – Letter from the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, to secretariat, providing a clarification to the transcript of 4 September 2018
- 15 November 2018 – Letter from the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, to secretariat, providing a clarification to a transcript of 31 October 2018 relating to Ms Melanie Hawyes evidence.
- 19 November 2018 – Email from Ms Tanya Raffoul, Office of the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, to secretariat, attaching answers to questions on notice and transcript corrections from the hearing of 31 October 2018
- 19 November 2018 – Email from Ms Nishita Dayal, Office of the Hon Troy Grant MP, Minister for Police, Emergency Services, to secretariat, attaching answers to questions on notice from the hearing of 31 October 2018

- 19 November 2018 – Email from Ms Fiona Rafter, Inspector of Custodial Services, to secretariat, attaching answers to questions on notice, transcript corrections and legal advice from the hearing on 31 October 2018
- 20 November 2018 – Letter from the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, to secretariat, providing a clarification to a response to supplementary question 138.

Sent:

- 31 October 2018 – Letter from secretariat, to Mr Andrew Cappie-Wood, Secretary, Department of Justice, requesting a copy of the Solicitor General's advice referred to in the Acting Crown Solicitor's advice of 24 October 2018
- 5 November 2018 – Email from secretariat, to Ms Nishita Dayal, Office of the Hon Troy Grant MP, Minister for Police, Emergency Services, attaching transcript of evidence with questions on notice highlighted, and instructions on how to correct the transcript and return answers to questions
- 5 November 2018 – Email from secretariat, to Ms Tanya Raffoul, Office of the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, and MS Fiona Rafter, Inspector of Custodial Services, attaching transcript of evidence with questions on notice highlighted, and instructions on how to correct the transcript and return answers to questions.

4. Inquiry into Budget Estimates 2018-2019

4.1 Legal advice from Ms Fiona Rafter

Resolved, on the motion of Mr Khan:

- That the committee authorise the publication of correspondence dated 19 November 2018 from Ms Fiona Rafter, Inspector for Custodial Services, to secretariat, and the attached 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'.
- That the committee authorise the publication of correspondence dated 31 October 2018 from Mr Andrew Cappie-Wood, Secretary, Department of Justice, to secretariat, and the attached Solicitor General's advice.
- That the committee request that the Clerk refer the Solicitor General's advice provided by Mr Cappie-Wood and the memorandum of advice provided by Ms Rafter to Mr Bret Walker SC for his overall consideration in relation to the five questions the Clerk has requested advice on, and in particular to seek Mr Walker's observations of paragraph 28 as to who makes the determination as to what is 'reasonably necessary'.
- That the committee authorise the publication of correspondence from Mr David Blunt, Clerk of the Parliaments, to Mr Bret Walker SC, dated 1 November 2018, seeking his advice on this matter.

Mr Shoebridge joined the meeting.

Ms Cusack joined the meeting.

4.2 Transcript clarifications – Minister Elliott

Resolved, on the motion of Ms Voltz: That:

- Ms Melanie Hawyes, Executive Director of Juvenile Justice NSW, be sent a copy of the letter from the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, dated 19 November 2018, to clarify if Ms Hawyes is aware of the clarification and would like it included as a footnote in the transcript of 31 October 2018
- the committee authorise the publication of correspondence received on 19 and 20 November 2018 from Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, regarding clarification to the transcript and supplementary questions.

4.3 Further committee activity

The committee noted that it will await the advice from Mr Brett Walker SC before considering any further action and that the Clerk will provide an update on the timing of the advice.

5. ***

6. **Adjournment**

The committee adjourned at 10.52 am, *sine die*.

Rebecca Main
Committee Clerk

Minutes no. 91

Monday 26 November 2018
Portfolio Committee No. 4 – Legal Affairs
Room 1136, Parliament House, Sydney at 2.04 pm

1. **Members present**

Mr Borsak, *Chair*
Mr Shoebridge, *Deputy Chair*
Mr Clarke
Ms Cusack (from 2.15 pm)
Mr Khan
Mr Moselmane
Ms Voltz

2. **Previous minutes**

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 78 be confirmed.

3. **Correspondence**

The committee noted the following items of correspondence:

Received:

- 1 February 2018 – Email from Ms Maureen Tangney, Department of Justice to secretariat, regarding the high rate of litigation fees for unpaid council rates.

4. ***

5. ***

6. **Inquiry into Budget Estimates 2018-2019 – Police and Corrective Services**

6.1 Rafter report

Resolved on the motion of Ms Voltz: That the committee recall Mr Andrew Cappie-Wood, Secretary Department of Justice, Ms Melanie Hawyes, Executive Director, Juvenile Justice and Ms Fiona Rafter, Inspector of Custodial Services, to attend a two hour hearing on the morning of Wednesday 19 December 2018.

7. **Adjournment**

The committee adjourned at 2.59 pm, *sine die*.

Rebecca Main

Committee Clerk

Minutes no. 92

Wednesday 19 December 2018

Portfolio Committee No. 4 – Legal Affairs

Jubilee Room, Parliament House, Sydney at 9.50 am

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Clarke

Ms Cusack

Mr Khan

Mr Moselmane

Ms Voltz

2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes nos. 85, 88, 89, 90 and 91 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- 21 November 2018 – Email from secretariat, to Ms Melanie Hawyes, Executive Director, Juvenile Justice NSW, requesting confirmation that she is aware of the transcript clarification received from Minister Elliott's office and is supportive of a footnote being inserted in the transcript to provide the clarification
- 27 November 2018 – Email from secretariat, to Ms Tanya Raffoul, Office of the Hon David Elliott MP, Minister for Corrections, Counter Terrorism, Veterans Affairs, requesting the Secretary of Justice and Executive Director of Juvenile Justice attend a supplementary hearing on 19 December 2018
- 27 November 2018 – Email from secretariat, to Ms Fiona Rafter, Inspector of Custodial Services, requesting Ms Rafter attend a supplementary hearing on 19 December 2018.

Received:

- 21 November 2018 – Email from Ms Melanie Hawyes, Executive Director, Juvenile Justice NSW, to secretariat, confirming that she is aware of the transcript clarification received from Minister Elliott's office and is supportive of a footnote being inserted in the transcript to provide the clarification
- 3 December 2018 – Email from Ms Nerida Meaney, Executive Assistant to the Secretary, Department of Justice, advising that the Secretary and Mr Stephen Southgate, Acting Executive Director, Juvenile Justice, will attend the supplementary hearing on 19 December 2018
- ***
- 12 December 2018 – Email from Ms Fiona Rafter, Inspector of Custodial Services, advising of her attendance at the supplementary hearing on 19 December 2018.

4. Inquiry into Budget Estimates 2018-2019

4.1 Public hearing – Corrections

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters..

The Chair reminded Mr Andrew Cappie-Wood and Ms Fiona Rafter that they did not need to be sworn, as they had been sworn at an earlier Budget Estimates hearing of this committee.

The following witness was sworn and examined:

- Mr Steven Southgate, Acting Executive Director, Juvenile Justice, Department of Justice.

The Chair made a statement concerning some important matters arising from earlier hearings with the Inspector of Custodial Services.

The Chair declared the proposed expenditure for the portfolio of Corrections open for examination.

The evidence concluded at 12.05 pm and the witnesses withdrew.

4.2 Answers to questions taken on notice

Resolved, on the motion of Mr Shoebridge: That, in consideration of the Christmas and New Year closedown, answers to questions taken on notice be provided to the committee by 18 January 2019.

4.3 Further activity – Corrections portfolio

The committee deferred consideration of any further activity for the Corrections portfolio until after answers to questions taken on notice are received.

5. Adjournment

The committee adjourned at 12.07 pm, *sine die*.

Susan Want

Committee Clerk

Minutes no. 95

Monday 11 February 2019

Portfolio Committee No. 4 – Legal Affairs

Macquarie room, Parliament House, 8.15 am

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Farlow

Mr Khan

Mr Moselmane

Mr Secord

Mrs Ward (substituting for Mr Mallard)

2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 93 be confirmed.

3. Inquiry into Budget Estimates 2018-2019

3.1 Content of draft report

The committee discussed the Chair's proposed content of the draft report including procedural issues in respect of the Corrections portfolio.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 January 2019 – Letter from the Hon David Elliott MP, Minister for Counter Terrorism, Corrections, Veterans Affairs, to secretariat, attaching answers to questions on notice and transcript corrections from the hearing of 19 December
- 18 January 2019 – Letter from Ms Fiona Rafter, Inspector of Custodial Services, to secretariat, attaching answers to questions on notice and transcript corrections from the hearing of 19 December 2018

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- 8 February 2019 – Letter from Government Whip to secretariat, advising that Mrs Natalie Ward MLC will be substituting for Mr Shayne Mallard MLC for the hearing on 11 February 2019
- ***

Sent:

5. ***

6. **Adjournment**

The committee adjourned at 1.23 pm, until Friday 22 February 2019, Room 1043, Parliament House (museums and galleries report deliberative).

Emma Rogerson
Committee Clerk

Draft minutes no. 96

Friday 22 February 2019

Portfolio Committee No. 4 – Legal Affairs

Room 1043, Parliament House, 10.01 am

1. **Members present**

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair* (from 10.03 am)

Mr Farlow (from 10.04 am)

Mr Khan

Mr Mallard (Museums and galleries)

Mr Moselmane

Mr Secord

Mr Clarke (Budget Estimates until 10.06 am)

2. **Previous minutes**

Resolved, on the motion of Mr Khan: That draft minutes nos. 94 and 95 be confirmed.

3. **Correspondence**

4. **Inquiry into Budget Estimates 2018-2019**

4.1 **Consideration of Chair's draft report**

The Chair submitted his draft report entitled *Budget Estimates 2018-2019*, which having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Shoebridge: That:

- a) The draft report be the report of the committee and that the committee present the report to the House;
- b) The transcripts of evidence, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;
- c) Upon tabling, all unpublished transcripts of evidence, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- d) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- e) That the report be tabled on Thursday 28 February 2019.

5. ***

6. **Adjournment**

The committee adjourned at 10.45 am, *sine die*.

Rebecca Main
Committee Clerk

Appendix 3 Legal advice

1. Crown Solicitor, 'Section 38 Public Finance and Audit Act and powers of parliamentary committees', 10 August 2018
2. Crown Solicitor, 'Section 38 Public Finance and Audit Act and powers of parliamentary committees – Advice 2', 12 September 2018
3. Acting Crown Solicitor, 'Draft report of Inspector of Custodial Services', 24 October 2018
4. Mr Bret Walker SC, initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees, 25 October 2018
5. Acting Crown Solicitor 'Request by Committee for draft report of Inspector of Custodial Services', 29 October 2018
6. Solicitor General, 'Question of powers of Legislative Council Committees to call for production of documents from witnesses', 2018 (redacted)
7. Ms Anna Mitchelmore SC, 'Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019', 19 November 2018

1. Crown Solicitor, 'Section 38 Public Finance and Audit Act and powers of parliamentary committees', 10 August 2018

Sensitive: Legal



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Section 38 *Public Finance and Audit Act* and powers of Parliamentary Committees

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Prepared for: AUD018 Audit Office
Date: 10 August 2019
Client ref: D1811513 Liz Basey
CSO ref: 201802302 T08 Tom Chisholm

Sensitive: Legal

1. Summary of advice

- 1.1 You seek my advice on whether the "secrecy" provision in s. 38 of the *Public Finance and Audit Act 1983* ("PFA Act") could be relied upon in response to a question, or a demand for a document, by a non-statutory Parliamentary committee.
- 1.2. Applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question.
- 1.3 The Solicitor General's opinion is that it is more likely than not that a court would find a committee has power to require a witness to produce a document to it. I think it probably follows that s. 38 of the *PFA Act* could not be relied upon to resist a summons, or other demand, from a committee to produce a document.
- 1.4 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Advice sought

- 2.1 By letter of 6 July 2018, the Auditor-General seeks my advice in relation to the powers of Parliamentary committees to ask questions, or require the production of documents, which might breach the "secrecy" provision in s. 38 of the *PFA Act*.
- 2.2 I confirm that, as discussed with your Ms Liz Basey on 3 August 2018, this advice only addresses the powers of two non-statutory committees: the Public Accountability Committee, and the Public Works Committee ("the Committees"). I will prepare a further advice relating to the powers of the statutory Public Accounts Committee.
- 2.3 Your questions¹ are:
 1. Am I (or any member of my staff) under an obligation to answer questions in these Parliamentary Committees when doing so would otherwise breach s. 38 of the *PFA Act*?
 2. Am I (or any member of my staff) under an obligation to produce documents to these Parliamentary Committees when doing so would otherwise breach s. 38 of the *PFA Act*?
- 2.4 I am not asked to advise in relation to the *Government Sector Finance Bill 2018* or the *Government Sector Finance Legislation (Repeal and Amendment) Bill 2018*.

¹ I have re-formulated these questions slightly for convenience, as discussed with your Ms Basey on 3 August 2018.

3. Advice

Question 1 – questions asked by a Committee

Section 38 of the PFA Act

3.1 Section 38 of the *PFA Act* provides that: (emphasis added)

"38 Secrecy

- (1) The Auditor-General, an auditor and an authorised person shall **preserve and aid in preserving secrecy** with respect to all matters and things that come to the knowledge of the Auditor-General, auditor or authorised person in the exercise of the functions of the Auditor-General, auditor or authorised person under this Act and the prescribed requirements and shall **not communicate to any person** any such matter or thing.
- (2) Nothing in subsection (1) applies to or in respect of:
 - (a) the conduct of any matter necessary for the proper administration of this Act or the prescribed requirements, or
 - (b) proceedings for an offence relating to public money, other money, public property or other property or for the recovery of public money, other money, public property or other property, or
 - (c) disciplinary proceedings brought against an officer of an authority, or
 - (d) a report or communication authorised or required to be made by or under this Act or the prescribed requirements, or
 - (e) a report or communication that the Treasurer authorises the Auditor-General to make to a person for the purposes of a due diligence or similar process relating to the sale of any government undertaking."

Parliamentary Evidence Act – giving evidence before a committee

3.2 The *Parliamentary Evidence Act 1901* ("*PE Act*") applies to the giving of evidence by witnesses before a Parliamentary committee. A committee may (by an order signed by the Chair) summon a person "to attend and give evidence" before the committee: s. 4(2).

3.3 Section 11(1) of the *PE Act* provides that², if any witness "refuses to answer any lawful question during the witness's examination", the witness shall be deemed guilty of a contempt of Parliament.³ A Committee may therefore compel a witness to answer any "lawful question".

3.4 My predecessor and the Solicitor General have consistently advised that a "lawful question" is one which a person is compellable to answer according to the established

² Subject to an exception relating to religious confessions.

³ The witness may then be committed for such offence "into the custody of the usher of the black rod or serjeant-at-arms"; and, if the House so orders, to gaol for a period not exceeding one month, by a warrant under the hand of the President or Speaker: s. 11.

usages of law: *Crafter v Kelly* [1941] SASR 237 at 241-2. A question is *not* a "lawful question" if the answer to the question would (without necessarily being exhaustive):

1. be outside the committee's terms of reference;
 2. require a (non-expert) witness to express an opinion;
 3. be subject to legal professional privilege;
 4. be subject to public interest immunity; or
 5. contravene the privilege against self-incrimination.
- 3.5 I note, however, that Bret Walker SC has recently expressed a different view in an advice provided to the Clerk of a Select Committee of the Legislative Council (14 January 2015).⁴ It is possible that the Committees may proceed on the basis of that alternative view, but it is not a view that I or the Solicitor General favour.

The Committees

- 3.6 The Public Accountability Committee was established as a standing committee by the Legislative Council on 15 March 2018. Its principal function is to inquire into and examine the public accountability, financial management, regulatory impact and service delivery of New South Wales government departments, statutory bodies or corporations. The Public Accountability Committee is also to inquire into and report on any matter referred to it by resolution of the House, and may also adopt a "self-reference".
- 3.7 The Public Works Committee was also established as a standing committee by the Legislative Council on 15 March 2018. Its principal function is to inquire into and report on public works to be executed where the estimated cost of completing such works exceeds \$10 million. The Public Works Committee is also to inquire into and report on any matter referred to it by resolution of the House, and may also adopt a "self-reference".
- 3.8 Since these committees are non-statutory, it is necessary to consider the interaction between s. 38 of the *PFA Act* and the relevant provisions of the *PE Act*.

"Secrecy" provisions and "lawful questions" under the PE Act

- 3.9 The Solicitor General has provided several advices on whether statutory "secrecy" or non-disclosure provisions can be relied on by a witness to resist answering an otherwise "lawful question". The Solicitor General has noted that this issue has generated considerable division of legal opinion. The question is whether the relevant statutory provision is intended to prohibit the disclosure of information to a Parliamentary

⁴ "Parliament of New South Wales – Legislative Council Select Committee on Ombudsman's 'Operation Prospect'" of 14 January 2015.

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. The context in which this question is asked includes the existence of Parliamentary privileges, namely the immunities of the Houses of Parliament and the powers of the Houses to protect their processes. The Solicitor General also noted that it is uncontroversial that these privileges extend to Parliamentary committees.

- 3.10 The Solicitor General expressed the general view that a statutory prohibition on disclosure of information will only be held to apply to disclosure to a Parliamentary committee if that is done *expressly* or by *necessary implication*.
- 3.11 I defer to the views of the Solicitor General. It is therefore not necessary for me to consider this issue in further detail, or to refer to any of the differing legal opinions (including of my predecessor) that the Solicitor General referred to. I would only add that the principle applied by the Solicitor General - that legislation will be presumed not to diminish the "privileges" of Parliament or its committees, unless it does so expressly or by necessary implication - has been accepted in several Australian cases.⁵

Whether s. 38 PFA Act applies to evidence before the Committees

- 3.12 As I have recently advised,⁶ the prohibition in s. 38 of the *PFA Act* is expressed in wide terms. Those to whom s. 38 applies must:
1. "preserve and aid in preserving secrecy" (with respect to matters and things that come to their knowledge in the exercise of their functions under the *PFA Act* and the prescribed requirements); and
 2. "shall not communicate to any person" any such matter or thing.
- 3.13 These requirements do not apply in any of the circumstances specified in s. 38(2). None of these circumstances expressly apply to disclosures to Parliament or its committees. It is not necessary to consider whether there may be any specific circumstances in which any of these exceptions may apply to disclosures to Parliament or its committees.
- 3.14 There are no other provisions in the *PFA Act* that relate to disclosures to Parliament or to any *non-statutory* committees.
- 3.15 Section 58 of the *PFA Act* relates to giving evidence before the Public Accounts Committee, which is constituted by s. 54 of the *PFA Act* as a committee of the

⁵ *Criminal Justice Commission v Parliamentary Criminal Justice Commission* (2002) 2 Qd R 8 at 23; [2001] QCA 218; *Aboriginal Legal Service of Western Australia Inc. v State of Western Australia*; (1993) 9 WAR 297 at 304; (1993) 113 ALR 87 at 108; and see also *R v. Smith, ex parte Cooper* [1992] 1 Qd R 423 at 430.

⁶ CSO ref: 201802375 Advice 1, especially at [4.3].

Legislative Assembly. The Act does not, however, expressly deal with giving evidence by the Auditor-General or her staff to the Public Accounts Committee, or with evidence of matters and things that have come to the attention of the Auditor-General or her staff in exercising functions under the *PFA Act*.

- 3.16 The provisions relating to giving evidence to the Public Accounts Committee, therefore, do not deal with the matters and things to which the "secrecy" provision in s. 38 of the *PFA Act* relates. Section 38 is also in a different part of the Act and (as noted above) makes no reference to disclosures to the Public Accounts Committee.
- 3.17 In *Sydney Water Corporation v The Persons Listed in the Schedules t/as PricewaterhouseCoopers* [2008] NSWSC 361, the Court rejected the submission of the then Auditor-General that he could rely upon s. 38 of the *PFA Act* to resist producing documents to a Court under a subpoena. The Court applied authorities which have held, in relation to non-disclosure or "secrecy" provisions, that a court is not a "person".⁷ The Court distinguished *Re NSW Grains Board* [2002] NSWSC 913; (2002) 171 FLR 68, on the basis that there is no "reasonable excuse" for non-compliance with a subpoena.
- 3.18 Section 38 of the *PFA Act* does not expressly apply to Parliament or its committees. I also cannot identify any reason why s. 38 would be said to apply, by necessary implication, to the giving of evidence before a non-statutory Parliamentary committee. I do not think a committee, or its members, would be a "person" for the purposes of s. 38. This conclusion is consistent with the similar approach adopted in the *Sydney Water Corporation* case.
- 3.19 In my view, applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question before either Committee.
- 3.20 I would be pleased to provide further advice, if required, on the options available to a witness who is concerned either that a question may not be a "lawful question",⁸ or that it would harm the public interest for certain evidence to be given in public.

Question 2 – request by a Committee to produce documents

Whether a committee can require production of documents

- 3.21 In *Egan v Willis*, the High Court found that the Council has power to compel the Executive Government to produce State papers, as this power is "reasonably necessary"

⁷ At [24], referring to authorities (including in particular *Hilton v Wells* (1985) 157 CLR 57) summarised at [14]-[19].

⁸ For reasons such as those outlined at [3.4] above.

- for the Council to exercise its functions.⁹ There is no Australian judicial authority on whether a House may authorise one of its non-statutory *committees* to require production of documents to it.
- 3.22 Legislative Council Standing Order 208(c) provides that a committee has power to "send for and examine persons, papers, records and things".
- 3.23 My predecessor had taken the view that it should not be conceded that Parliamentary committees have the power to require the production of documents. He considered that the terms of Standing Order 208(c) are ambiguous; and that if Standing Order 208(c) does purport to empower a Parliamentary committee to require the production of documents, there is doubt as to whether it is authorised by s. 15(1)(a) of the *Constitution Act 1902*. My predecessor took a similar approach in the advice you refer to in your instructions,¹⁰ concluding that the Public Accounts Committee has no power to require the production of documents from the Auditor-General or any other person.
- 3.24 Section 15 of the *Constitution Act* permits, relevantly, the making of Standing Orders regulating the orderly conduct of the Council. In addition to powers conferred by statute, the Council has powers which are reasonably necessary for the exercise of its functions.¹¹
- 3.25 The Solicitor General has previously indicated that he was inclined to prefer the opinion of Lovelock and Evans (former Clerks of the Council), that Standing Order 208(c) does allow a committee of the Council to require the production of documents from a witness before the Committee.
- 3.26 Mr Bret Walker SC has recently advised that a committee may compel a person required to attend to give evidence to produce documents, under the *PE Act*.¹² Mr Walker relied on the power conferred by s. 4(2) of the *PE Act*, that a person "may be summoned to attend and *give evidence* before a committee". Mr Walker preferred the view that the giving of "evidence" by a witness could include the production of documents to the committee.
- 3.27 Consistently with Mr Walker's view, a committee of the Council recently issued a summons under the *PE Act* requiring a witness not only to attend to give evidence, but

⁹ (1998) 195 CLR 424 at 453-454, [45]-[51] (Gaudron, Gummow and Hayne JJ); and at 495, [137]-[138] (Kirby J).

¹⁰ CSO ref: AUD018.83.1a. I note that this advice was published by the former Auditor-General in Volume 1 of his 2001 Report to Parliament.

¹¹ See generally *Egan v Willits*, discussed above.

¹² 'Parliament of New South Wales, Legislative Council: Orders for papers from bodies not subject to direction or control by the Government', 18 November 2015, available at <https://www.Parliament.nsw.gov.au/lc/papers/DBAssets/taledpaper/WebAttachments/56633/Opinion%20from%20Bret%20Walker%20SC.pdf>.

also to produce a document (which related to a current tender process). I note that, by contrast, committees have not generally sought to test or enforce the view they had power under Standing Order 208(c) to require production of documents.

- 3.28 The Solicitor General recently indicated that, in his view, it is "*more likely than not*" that if the question 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. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness.
- 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*).
- 3.30 I defer to the opinion of the Solicitor General.

Whether s. 38, PFA Act applies to production of documents

- 3.31 The Solicitor General has not, as far as I am aware, been asked to consider whether a statutory "secrecy" provision such as s. 38 of the *PFA Act* could be relied upon in response to a demand, or the issue of a summons, by a committee requiring production of a document.
- 3.32 The Solicitor General (advising jointly with Ms Anna Mitchelmore) has, however, considered the equivalent question in relation to the power of the Council to require production of State papers, under Standing Order 52. The Solicitor General has acknowledged that this may involve a "difficult question", before inclining to 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".
- 3.33 I therefore also approach the present question on the basis that express words, or necessary implication, are required in order to displace a Parliamentary "privilege". I think this principle would apply to the "privilege" (or power), to require the production of documents from a witness, irrespective of whether that power ultimately derives from the *PE Act*, Standing Order 208(c), or reasonable necessity.
- 3.34 *If* the power were derived from the *PE Act*, a question would arise about the interaction between the *PE Act* and s. 38 of the *PFA Act*. The *PE Act* is silent on any limits on the "giving of evidence" by way of production of a document.

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- 3.35 I doubt, essentially for the reasons given in my answer to Question 1, that s. 38 of the *PFA Act* would apply so as to displace, or diminish, any power of a committee to require a witness to produce a document to it.
- 3.36 I therefore think it probably follows from the opinions of the Solicitor General that:
1. a Committee would have power to require the Auditor-General or her staff, when called as a witness, to produce a document to it; and
 2. s. 38 of the *PFA Act* could not be relied upon to resist a summons, or other demand, from a Committee to produce a document.
- 3.37 I note the Solicitor General's view that a witness could, in these circumstances, make a claim of privilege such as public interest immunity and legal professional privilege.

Final comment

- 3.38 The legal questions addressed here are complex and significant. If a Committee were to issue a summons, or other demand, to the Auditor-General or her staff for the production of documents of a kind to which s. 38 applies, I would recommend the Auditor-General consider seeking my advice. That advice could consider, if required, the prospects of any court proceedings to challenge the issue of such a summons or other demand. I would likely seek a further opinion from the Solicitor General.
- 3.39 I also confirm that I am not asked to advise whether s. 38 of the *PFA Act* would apply if the Auditor-General were, at the invitation of the Committee, to produce a document *voluntarily*.

Signed:


Lea Armstrong
Crown Solicitor

Sensitive: Legal

2. Crown Solicitor, 'Section 38 Public Finance and Audit Act and powers of parliamentary committees – Advice 2', 12 September 2018

Sensitive: Legal



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Section 38 *Public Finance and Audit Act* and powers of
Parliamentary Committees – Advice 2

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Prepared for: AUD018 Audit Office
Date: 12 September 2018
Client ref: Liz Basey
CSO ref: 201802302 T08 Tom Chisholm

Sensitive: Legal

1. Summary of advice

- 1.1 You seek my advice on whether the "secrecy" provision in s. 38 of the *Public Finance and Audit Act 1983* ("*PFA Act*") could be relied upon in response to questions, or a demand for documents, by the Public Accounts Committee.
- 1.2 In my view, applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question before the Committee.
- 1.3 I do not think there can be any certainty about whether the Committee currently has power to compel the production of documents from a witness. I prefer the view, however, particularly in light of the Solicitor General's recent opinions, that the Committee does have such a power.
- 1.4 On that basis, I do not think that s. 38 of the *PFA Act* could be relied upon to resist a demand for production of documents.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Advice sought

- 2.1 In my first advice¹ I considered whether the "secrecy" provision in s. 38 of the *PFA Act* could be relied upon in response to questions, or a demand for documents, by two non-statutory committees of the Legislative Council. In this advice I consider the same issues in relation to the Public Accounts Committee, a committee of the Legislative Assembly constituted by the *PFA Act*.
- 2.2 Your questions are:
 1. Am I (or any member of my staff) under an obligation to answer questions in the Public Accounts Committee when doing so would otherwise breach s. 38 of the *PFA Act*?
 2. Am I (or any member of my staff) under an obligation to produce documents to the Public Accounts Committee when doing so would otherwise breach s. 38 of the *PFA Act*?
- 2.3 I am not asked to advise in relation to the *Government Sector Finance Bill 2018* or the *Government Sector Finance Legislation (Repeal and Amendment) Bill 2018*.

¹ CSO ref: 201802302 Advice 1.

3. Advice

Question 1 – questions asked by the Committee

- 3.1 The Public Accounts Committee is constituted by s. 54 of the *PFA Act*, as a committee of the Legislative Assembly.
- 3.2 The functions of the Committee are specified in s. 57(1) of the *PFA Act*. The first specified function is to examine the consolidated financial statements and general government sector financial statements transmitted to the Legislative Assembly by the Treasurer. The second specified function is to examine the financial reports of "authorities of the State",² being financial reports that have been audited by the Auditor-General or an auditor appointed under s. 47(1), or laid before the Legislative Assembly by a Minister of the Crown. Other functions are to examine opinions and reports of the Auditor-General transmitted with the consolidated financial statements and general government sector financial statements, or laid before the Legislative Assembly with the financial report of an authority of the State; and to examine any report of the Auditor-General laid before the Legislative Assembly.
- 3.3 Section 58 of the *PFA Act* relates both to the giving of evidence before the Committee and to the production of documents to the Committee. Section 58(1) provides that, subject to that section, the Committee "shall take all evidence in public". Section 58(2) provides that, where in the opinion of the Committee, any evidence proposed to be given "relates to a secret or confidential matter", the Committee may, and at the request of the witness shall, take the evidence in private. Where evidence is taken in private, the consent of the witness is required before the Committee may disclose or publish that evidence: ss. 58(4), (7).
- 3.4 The *PFA Act* does not, as I noted in my first advice (at [3.15]-[3.16]), expressly deal with giving evidence by the Auditor-General or her staff to the Committee, or with evidence of matters and things that have come to the attention of the Auditor-General or her staff in exercising functions under the *PFA Act*. The provisions relating to giving evidence to the Committee do not deal with the matters and things to which the "secrecy" provision in s. 38 of the *PFA Act* relates. Section 38 is also in a different part of the Act, and makes no reference to disclosures to the Committee.
- 3.5 I adopt the approach of the Solicitor General that a statutory prohibition on disclosure of information will only be held to apply to disclosure to a Parliamentary committee if that is done expressly or by necessary implication (see [3.9]-[3.11] of my first advice).
- 3.6 I do not think, for similar reasons discussed in my first advice (particularly at [3.17]-3.18]), that the Committee or its members would be regarded as a "person" for the

² As defined in s. 53.

purposes of s. 38(1) of the *PFA Act*. I also cannot identify any reason why s. 38 would be said to apply, by necessary implication, so as to restrict the giving of evidence before the Committee. The fact that s. 58 provides certain protections in dealing with evidence relating to "secret or confidential matters" may provide further support for this conclusion.

- 3.7 In my view, applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question before the Committee.

Question 2 – request by the Committee to produce documents
Whether the Committee can require production of documents

- 3.8 Section 58(11) of the *PFA Act* provides that the production of documents to the Committee "shall be in accordance with the practice of the Legislative Assembly with respect to the production of documents to select committees of the Legislative Assembly".
- 3.9 Standing Order 288 of the Legislative Assembly provides that a committee "*shall have power* to send for persons, papers, records, exhibits and things" (emphasis added).
- 3.10 Section 58 of the *PFA Act* includes various protections where, in the opinion of the Committee, the whole or a part of a document which is produced (or proposed to be produced) in evidence by a witness "relates to a secret or confidential matter". These protections are the same as those applying to oral evidence relating to secret or confidential matters (see [3.3] above).³
- 3.11 As you are aware, my predecessor had advised that the Committee has no power to require the production of documents from any person, including the Auditor General.⁴ My predecessor had considered that s. 58(11) of the *PFA Act* is not a source of power to require production, but goes only to the *procedure* in relation to the production of documents. He pointed out that there are several provisions in other Acts which *expressly* confer committees with a power to compel the production of documents, but that this was not done in the *PFA Act*.
- 3.12 My predecessor had also considered that it should not be conceded that Parliamentary committees have the power to require the production of documents. He considered

³ Where a direction is given under s. 58(2) that a document be treated as confidential, the contents of that document shall be *deemed* to be *evidence* given by the person producing the document and taken by the Committee in private: s. 58(3). The effect of that deeming provision is that the provisions relating to disclosure and publication of *evidence* that relates to a secret or confidential matter (ss. 58(4)-(10)) also apply to confidential documents for which a direction has been made under s. 58(2).

⁴ CSO ref AUD018.83, 1 February 2001. There were no relevant differences in the legislative provisions.

that the terms of Standing Order 288 were ambiguous; and that if Standing Order 288 does purport to empower a Parliamentary committee to require the production of documents, there is doubt whether it is authorised by s. 15(1)(a) of the *Constitution Act 1902*.

- 3.13 My predecessor's advice must now, however, be considered in light of the subsequent opinions of the Solicitor General on whether non-statutory committees have power to compel the production of documents. I refer to my previous advice at [3.21]-[3.30].
- 3.14 The Solicitor General's opinions related to the powers of non-statutory committees of the Legislative Council. The relevant Standing Orders of the Legislative Assembly are, in substance, identical to those of the Legislative Council.⁵ Section 15(1)(a) of the *Constitution Act*, which authorise the making of Standing Orders, applies to both the Legislative Assembly and the Legislative Council. I am also inclined to doubt, adopting the Solicitor General's approach, that any "inherent" (or "implied") powers of non-statutory committees of the Legislative Assembly to require production of documents from a witness would be less than the powers of committees of the Legislative Council.⁶
- 3.15 It is not entirely clear how "the practice of the Legislative Assembly with respect to the production of documents to select committees" of the Legislative Assembly is to be determined for the purposes of s. 58(11). It could be argued that "the practice" should be determined by examining the actions taken, or not taken, by particular committees of the Legislative Assembly in relation to the production of documents. This was the view my predecessor took in an advice for another client. (My understanding of the current practice, in this sense, is that committees of the Legislative Assembly do not generally seek to compel witnesses or other persons to produce documents.)
- 3.16 I doubt, however, that this is the correct way to ascertain the practice of select committees of the Legislative Assembly. I prefer the view that the practice is to be determined, at least primarily, by reference to the Standing Orders of the Legislative Assembly (or by any applicable legislative provisions, as discussed further below at [3.22]). The Standing Orders, made under s. 15(1)(a) of the *Constitution Act*, are the primary rules governing the practices and procedures of each House, including their committees. In my view, Standing Order 288 of the Legislative Assembly - in providing that a committee "*shall have power*" to send for persons, papers, records, exhibits and things - is a clear assertion of the power of a committee to compel the production of documents. In view of the Solicitor General's opinion that it is more likely than not that a court would find a committee (of the Legislative Council) has power to require the

⁵ Standing Order 208(c) of the Legislative Council; Standing Order 288 of the Legislative Assembly.

⁶ In *Egan v Willis* (1998) 195 CLR 424 the High Court found that the Legislative Council has power to compel the Executive Government to produce State papers, as this power is "reasonably necessary" for that House to exercise its functions. See [3.21] of my first advice.

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production of documents from a witness, I do not see any particular basis to read down the terms of Standing Order 288.

- 3.17 In addition, it is clear from the provisions in s. 58 of the *PFA Act* that the legislative scheme envisages that documents relating to "secret or confidential matters" would be produced to the Committee. There are significant protections relating to such documents, including protecting persons who produce such documents by requiring their consent to any further publication. It is of course possible that some people may wish to produce such sensitive material voluntarily to the Committee. On the other hand, I am inclined to think (as with oral evidence about such matters) that it is more likely that these provisions can be seen to complement a power to *compel* a person to produce documents.
- 3.18 I note that the relevant Standing Order at the time the *PFA Act* was enacted (SO 360) provided that all select committees "shall have power to send for persons, papers, and records".⁷ This is, for present purposes, effectively the same as the current Standing Order 288. It is therefore not necessary to decide whether s. 58(11) should be interpreted in light of the Standing Orders as they were at the time s. 58 was enacted, or in light of the Standing Orders as amended from time to time.
- 3.19 In conclusion, I do not think there can be any certainty about whether the Committee has power to compel the production of documents from a witness. I prefer the view, however, particularly in light of the Solicitor General's recent opinions, that the Committee *does* have such a power.
- 3.20 The better view is that this power derives from s. 58(11) of the *PFA Act*, which gives statutory force to the "practice" of the Legislative Assembly. That "practice", as reflected in the Legislative Assembly's Standing Orders, is an assertion by the House that its committees have this power.
- 3.21 I also note, as discussed in my first advice (at [3.26]), that Mr Walker SC has recently 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. If that view were correct, the *PE Act* could be said to constitute a statement of the "practice" of committees of the Legislative Assembly. Alternatively, it could be said that s. 58(11) of the *PFA Act* does not exclude, or detract from, the power conferred on the Committee by the *PE Act* to issue a summons requiring the production of documents from a witness. The outcome, on either approach, would be that the Committee could issue a summons under the *PE Act* requiring production of documents from a witness.

⁷ Historical Standing Orders are available on the Legislative Assembly' website:
<https://www.parliament.nsw.gov.au/la/houseprocedures/Pages/Historical-Standing-Orders.aspx>.

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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.

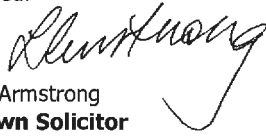
Whether s. 38 PFA can be relied upon

3.23 I therefore proceed on the basis that the Committee does have statutory power (deriving from either s. 58(11) of the *PFA Act* or s. 4(2) of the *PE Act*) to compel witnesses to produce documents.

3.24 I do not think that s. 38 of the *PFA Act* could be relied upon to resist a demand for production of documents. The reasons for this conclusion are very similar to those outlined above in my answer to Question 1.

3.25 It may well be, however, that other claims of "privilege" could be made in response to a request, or demand, for the production of documents. If further advice is required on that question, I would recommend that it be sought, if possible, from the Solicitor General.

Signed:



Lea Armstrong
Crown Solicitor

Sensitive: Legal



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Draft Report of Inspector of Custodial Services

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Prepared for: PRE128 Department of Premier and Cabinet

Date: 24 October 2018

Client ref: Karen Smith

CSO ref: 201803809 T08 Tom Chisholm

1. Summary of advice

- 1.1 You seek my very urgent advice in relation to a resolution of the Legislative Council's Portfolio Committee No. 4 – Legal Affairs ("the Committee"), requiring production of a draft report of the Inspector of Custodial Services ("the Inspector") provided to the Minister for Corrections.
- 1.2 I defer to the opinion of the Solicitor General that it is more likely than not that a court would find that a committee of the NSW Parliament has the power to call for the production of documents. The Solicitor General also considered that this would be subject to claims of privilege, such as public interest immunity and legal professional privilege that might be made.
- 1.3 I do not think, on balance, that the Committee has power to require production of this draft report. Requiring production of the draft report which had been provided to the Minister would involve a significant degree of inconsistency, if not interference, with the operation of the statutory scheme established by the *Inspector of Custodial Services Act 2012* ("the Act") under which the Inspector reports to each House. I do not think, in such circumstances, that production of the draft report to the Committee is reasonably necessary for the House to exercise its scrutiny functions.
- 1.4 I also prefer the view that the Council would not have power to compel production of the draft report, if an order for papers were made under Standing Order 52. This view, however, is subject to significant doubt, and must also be understood having regard to the very limited time available.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You seek my very urgent advice, in your email of 23 October 2018, relating to the following resolution of the Committee of 17 October 2018:
 - "1. That, under Standing Order 208(c), Portfolio Committee No. 4 – Legal Affairs be provided with the following documents in the possession, custody or control of the Inspector of Custodial Services, the Minister for Corrective Services, and the Department of Justice:
 - a) the draft report on Juvenile Justice following the Royal Commission into the Protection and Detention of Children in the Northern Territory, prepared by Ms Fiona Rafter, Inspector of Custodial Services and provided to the Minister for Corrective Services; and
 - b) any legal or other advice regarding the scope or validity of this order of the committee created as a result of this order of this committee.

2. That the documents be provided to the committee clerk by **4.00 pm, Wednesday 24 October 2018.**
- 2.2 I am instructed that in late December 2017 the Inspector wrote to the Executive Director of Juvenile Justice, providing a copy of her draft report. On the same date, that letter was copied to the Secretary of the Department of Justice, who was also provided with a copy of the draft report. The Inspector provided a copy of the draft report for the purposes of ensuring, in accordance with her obligations of procedural fairness, that the relevant agencies had an opportunity to respond to matters identified in the draft report.
- 2.3 On the same date, the Inspector also provided a copy of the draft report to the Minister for Corrections, through his office. I am instructed that this draft report was provided to the Minister "as a courtesy". The report was *not*, in particular, provided in accordance with s. 14(1) of the Act, which requires the Inspector to provide a copy of the draft of a report to the Minister, and to give the Minister a reasonable opportunity to make submissions, either orally or in writing, in relation to the draft report. No draft has yet been provided to the Minister in accordance with s. 14(1), although that is expected to occur shortly.
- 2.4 These instructions are consistent with evidence given by the Inspector before the Committee on 4 September 2018.¹ I note in particular that the Inspector said: (p. 9)

"I would describe it as an officer level report. As part of our usual process, I provided that to the executive director of Juvenile Justice to provide some extra information and also to provide feedback. At the same time that I did that I provided a copy to the Minister's office. But it is not the final report. It is part of the process of feeding back to me additional clarification on matters, additional information and some feedback around potential recommendations."

I also note that, when asked by the Chair to describe her purpose in providing a copy of the report to the Minister, the Inspector said "[a]s a courtesy" (p. 10). The Inspector also confirmed that she was "not seeking any feedback at that stage from the Minister"; but that she sent it "to Juvenile Justice for agency feedback".²
- 2.5 I understand that the draft report is inaccurately described in the Committee's resolution, but I proceed on the basis that the draft report provided to the Minister is within the scope of the Committee's resolution.

3 Advice sought

- 3.1 You seek my very urgent advice, in your email of 23 October 2018, on the following questions:

¹ See pages 4, 9-11 of the transcript, which is available on the Parliament's website.

² See also p. 11 of the transcript.

1. Whether the draft report of the Inspector is required to be produced in response to the resolution of the Committee on 17 October 2018.
 2. Whether the draft report would be required to be produced to the Legislative Council if a resolution was passed under Standing Order 52.
- 3.2 I note that, whilst I have had an earlier opportunity to consider Question 1, I have had extremely limited time to consider Question 2.

4. Advice

Question 1 – whether the Committee can require production of the report

Whether a committee can require production of documents

- 4.1 Legislative Council Standing Order 208(c) provides that a committee has power to “send for and examine persons, papers, records and things”. Section 15(1) of the *Constitution Act 1902* permits, relevantly, the making of Standing Orders regulating the orderly conduct of the Council.
- 4.2 In *Egan v Willis*, the High Court found that the Legislative Council has power to compel the Executive Government to produce State papers, as this power is “reasonably necessary” for the Council to exercise its functions.³ There is no Australian judicial authority on whether a House may authorise one of its non-statutory *committees* to require production of documents to it.
- 4.3 A former Crown Solicitor, Mr Ian Knight, had taken the view that it should not be conceded that Parliamentary committees have the power to require the production of documents. He considered that the terms of Standing Order 208(c) are ambiguous; and that, if Standing Order 208(c) does purport to empower a Parliamentary committee to require the production of documents, there is doubt as to whether it is authorised by s. 15(1)(a) of the *Constitution Act*.
- 4.4 However, the Solicitor General has recently indicated that, in his view, it is “*more likely than not*” that, if the question 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. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness. This power would most

³ (1998) 195 CLR 424 at 453-454, [45]-[51] (Gaudron, Gummow and Hayne JJ); and at 495, [137]-[138] (Kirby J).

likely⁴ be found to derive from the Standing Orders and the principle that each House has all the powers that are "reasonably necessary" to exercise its functions.

4.5 I defer to the opinion of the Solicitor General.

4.6 In the Court of Appeal proceedings in *Egan v Willis* (1996) 40 NSWLR 650, Gleeson CJ said: (at 664: emphasis added)

"There is no statute which declares or defines the powers, privileges and immunities of the two Houses of Parliament in New South Wales. Section 15 of the *Constitution Act 1902*, which authorises the making of Standing Orders, is not a source of power of the kind presently in question. Standing Order 18 and Standing Order 19 *assume the existence of a power, but do not operate as a source of power*; rather they regulate in certain respects the exercise of a power which, if it exists, must have some other source."⁵

4.7 In the High Court, the validity of these Standing Orders was not directly questioned. It appears that the Court proceeded on the same basis as outlined by Gleeson CJ in the Court of Appeal, which was not questioned in the High Court.⁶

4.8 I therefore proceed on the basis that the power of a committee to "send for" papers and records, as reflected in Standing Order 208(c), derives from the fact that such a power is reasonably necessary for the Council to exercise its functions. Each House exercises the constitutional functions of making laws (pursuant to s. 5 of the *Constitution Act*), and the parliamentary function of reviewing executive conduct, in accordance with the principle of responsible government.⁷ In *Egan v Willis*, the power to require production of State papers from Ministers was found to be reasonably necessary for the performance of both of these functions.⁸

The Committee's terms of reference

4.9 The resolution of the Committee has been made in the course of the Committee conducting its current "Estimates inquiry", in accordance with the Budget Estimates Resolution of the Legislative Council of 20 June 2018. The Council resolved that, "upon tabling, the Budget Estimates and related papers for the financial year

⁴ It is not necessary to consider here the recent opinion of Mr Bret Walker SC that a committee may compel a person required to attend to give evidence to produce documents under the *Parliamentary Evidence Act 1901*.

⁵ Standing Order 18 at that time provided that:

"Any Papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order."

⁶ See eg the judgment of Callinan J at 508 [174]. See also the opinion of the Solicitor General and Ms Mitchelmore, SG 20 14/05 (which was tabled in the Legislative Council on 6 May 2014), at p. 2.

⁷ See the summary of *Egan v Willis* by Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563; at [2] 565.

⁸ *Egan v Chadwick* at [2] 565.

2018-2019 presenting the amounts to be appropriated from the Consolidated Fund be referred to the Portfolio Committees for inquiry and report".⁹

- 4.10 The Committee is therefore, in accordance with the Council's resolution, exercising the Council's parliamentary function of reviewing executive conduct.

The Inspector and her reporting functions

- 4.11 The office of Inspector has also been established for the purpose of scrutinising executive conduct. The executive conduct to which the Inspector's functions relate is, in general, conduct of detaining persons in custodial centres, juvenile justice centres and juvenile correctional centres: s. 6.

- 4.12 The Inspector is an independent statutory officer, appointed by the Governor (see ss. 4; Sch. 1 cl. 8), who is not subject to Ministerial direction or control. The Inspector is, however, subject to oversight by the Joint Committee.¹⁰ The functions of the Joint Committee include, in particular, to "examine each annual and other report to Parliament of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report": s. 17(1)(c).

- 4.13 The principal functions of the Inspector, specified in s. 6(1), include: (emphasis added)

- (a) to inspect each custodial centre (other than juvenile justice centres and juvenile correctional centres) at least once every 5 years,
- (b) to inspect each juvenile justice centre and juvenile correctional centre at least once every 3 years,
- (c) to examine and review any custodial service at any time,
- (d) to **report to Parliament** on each such inspection, examination or review,
- (e) to **report to Parliament** on any particular issue or general matter relating to the functions of the Inspector if, in the Inspector's opinion, it is in the interest of any person or in the public interest to do so,
- (f) to **report to Parliament** on any particular issue or general matter relating to the functions of the Inspector if requested to do so by the Minister,
- (g) to include **in any report** such advice or recommendations as the Inspector thinks appropriate (including advice or recommendations relating to the efficiency, economy and proper administration of custodial centres and custodial services), ...

- 4.14 Section 14 provides that: (emphasis added)

⁹ See Chapter 1 of the *Budget Estimates Guide 2018-2019*:

<https://www.parliament.nsw.gov.au/committees/Pages/budget-estimates.aspx>; paragraph 1 of the resolution.

¹⁰ The Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission constituted under the *Ombudsman Act 1974*.

"14 Furnishing of draft reports to Minister and others

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

- 4.15 The reference to the "Minister" is to the Minister for Corrections, as the Minister who administers the Act. It is not entirely clear why s. 14(2) applies to 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*)". Part of the explanation may be that the provision of a draft report to the Minister, under s. 14(1), would give both Corrective Services NSW ("Corrective Services") and Juvenile Justice the opportunity to respond, through any submissions made in response by the Minister.
- 4.16 The Inspector is, plainly, required to provide procedural fairness to Corrective Services and Juvenile Justice when examining the conduct of those agencies for the purposes of preparing a report. I do not think that s. 14 could be said to *preclude* the Inspector from taking other measures, in addition to providing a draft report to the Minister under s. 14(1), for the purposes of providing procedural fairness to Corrective Services and Juvenile Justice.
- 4.17 The Inspector was not under any express statutory obligation to provide a copy of her draft report to the Executive Director of Juvenile Justice or to the Secretary for the purposes of inviting comment and feedback; and I am not asked to advise on whether it was open for her to do so. I am, however, comfortable in proceeding on the basis that it was open for the Inspector to provide a copy of the draft report to the Executive Director of Juvenile Justice and to the Secretary, for the purposes of ensuring procedural fairness (having regard to my view expressed at [4.16] above).

- 4.18 The Inspector must not disclose information in a report to Parliament if there is an overriding public interest against disclosure: s. 15(1). Subsections (2) – (4) of s. 15 make detailed provision in relation to what information may be subject to an overriding public interest against disclosure.
- 4.19 Section 16 relates to the provision of the Inspector's reports to Parliament, and relevantly provides that:

"16 Provisions relating to reports to Parliament

- (1A) Any report to Parliament made by the Inspector under this Act is to be made by furnishing the report to the Presiding Officer of each House of Parliament.
- (1) A copy of a report furnished to the Presiding Officer of a House of Parliament under this Part is to be laid before that House within 15 sitting days of that House after it is received by the Presiding Officer.
- (2) The Inspector may include in a report a recommendation that the report be made public immediately.
- (3) If a report includes a recommendation by the Inspector that the report be made public immediately, a Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.
- (4) If such a report is made public by a Presiding Officer of a House of Parliament before it is laid before that House, it attracts the same privileges and immunities as if it had been laid before that House."

Whether the Committee's powers are restricted by the Act

- 4.20 A resolution of a House, or one of its committees, may not make or alter the law. The Standing Orders of each House, for example, require approval from the Governor before they become "binding and of force": *Constitution Act*, s. 15(2). Legislation must, of course, be passed by each House and assented to by the Governor before it has the force of law.
- 4.21 The Solicitor General has previously provided an opinion that dealt with the effect of an inquiry by a non-statutory committee on an investigation being conducted by an independent statutory officer. The Solicitor General considered that the ambit of the committee's inquiry could not be confined by any impact it might have on the ongoing investigation by the statutory officer "unless perhaps its inquiry was to prejudice or hinder the ongoing investigation to such an extent" that the statutory officer was prevented from carrying out the officer's statutory functions (SG 2014/25).
- 4.22 The Solicitor General stated that, whilst it is uncontroversial that the scope of executive power is susceptible to control by statute, it is unlikely that impairment or curtailment of the statutory officer's investigation powers is susceptible of control by the non-statutory Committee. It was doubtful, however, that merely causing "delay" to the investigation would fall within this category.

4.23 It is not necessary in this advice to consider the ways in which courts have determined whether non-statutory executive (or prerogative) powers have been displaced by statute. I simply note that Kiefel J (as her Honour then was) has stated that:¹¹

"In *Attorney-General v De Keyser's Royal Hotel Ltd*, it was argued that the prerogative power was maintained despite a statute dealing with the same subject matter. Lord Dunedin described as 'unanswerable' the response of Swinfen Eady MR in the Court of Appeal: 'what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?' An intention to this effect, on the part of the legislature, is not readily inferred."

4.24 There are numerous instances where legislation *indirectly*¹² restricts the capacity of Ministers, other government agencies, and statutory bodies, to take actions they would otherwise have been lawfully able to take. It has also been said, more broadly, that "ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation".¹³

4.25 I am not aware of judicial consideration of any of these issues in relation to the powers of a House of Parliament or one of its committees.

4.26 I also note that the Solicitor General has expressed the general view that 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*. As noted above, I defer to the views of the Solicitor General, adding only that this principle has been accepted in several Australian cases.¹⁴

4.27 It is not entirely clear whether, or if so how, this principle applies in the context of a power or "privilege" of a House which must derive from the principle of "reasonable necessity", and in relation to which there is at least some doubt. I will proceed, however, on the basis that the power of a committee to require the production of papers or records, as recognised in Standing Order 208(c), may not be displaced by statute unless that is done expressly or by necessary implication.

¹¹ *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at [284]; (2015) 255 CLR 514; references omitted.

¹² I use the term "indirectly" here in contrast to legislation which expressly prohibits a person or statutory body to take a particular action. Such legislation can be said to directly restrict the capacity of the person or body to take the prohibited action.

¹³ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5; [2017] 1 All ER 593; ("the *Brexit decision*"); at [51].

¹⁴ *Criminal Justice Commission v Parliamentary Criminal Justice Commission* (2002) 2 Qd R 8 at 23; [2001] QCA 218; *Aboriginal Legal Service of Western Australia Inc. v State of Western Australia*; (1993) 9 WAR 297 at 304; (1993) 113 ALR 87 at 108; and see also *R v. Smith, ex parte Cooper* [1992] 1 Qd R 423 at 430.

Analysis and conclusions

- 4.28 Reporting to Parliament is the central mechanism under the Act by which the Inspector is to exercise her statutory functions of scrutinising and overseeing the detention of adults and juveniles. Reports are to be provided to the Presiding Officer of each House: s. 16(1A). The Act establishes a reasonably detailed and prescriptive scheme for that process of reporting.
- 4.29 The Inspector may not present her report to Parliament without having taken the measures required by s. 14, including providing a draft report to the Minister in accordance with s. 14(1). I think it is foreseeable, or even likely, that the Inspector may not – after considering submissions in response by the Minister – include in the final report allegations or proposed findings against Corrective Services or Juvenile Justice, in particular, which had been set out in the draft report.
- 4.30 It is also foreseeable, or likely, that the Inspector may not – after considering the responses from other persons or agencies to whom procedural fairness was provided – include in the final report allegations or proposed findings against individuals or agencies which had been set out in the draft report.
- 4.31 The Inspector must also ensure that certain matters are *not* included in the report provided to Parliament, in accordance with s. 15.
- 4.32 It appears, as outlined above, that the draft report was provided to the Executive Director of Juvenile Justice, and to the Secretary, in accordance with the Inspector's general obligation to provide procedural fairness, and not specifically in accordance with s. 14(1) or (2).
- 4.33 Nonetheless, in my view, the resolution of the Committee requiring production of the Inspector's draft report has the obvious 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 to be 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.
- 4.34 It is also relevant that the Act provides for the Inspector to be subject to oversight by the Joint Committee. I do not suggest, consistent with a previous opinion of the Solicitor General, that the mere fact the Joint Committee has statutory oversight functions prevents a non-statutory committee from also inquiring into matters relating to the Inspector's statutory functions. Nonetheless, the fact that the Joint Committee has carefully defined statutory functions, including to monitor and review the exercise of the Inspector's functions, and to examine finalised reports to Parliament, also

highlights the inconsistency with the statutory scheme of a non-statutory committee purporting to order production of a draft report.

- 4.35 Accordingly, I do not think that it is 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 this involves a significant degree of inconsistency, if not interference, with the operation of the statutory scheme pursuant to which the Inspector is required to report to each House. I prefer the view that the statutory scheme demonstrates a "necessary implication"¹⁵ that a power the Committee may otherwise have had to require production of records does not extend to such circumstances. This conclusion is, however, not beyond doubt.
- 4.36 It is arguable that the Committee would not be undermining the statutory scheme because it need not make the draft report public. It could be argued that the Committee could deal with any problems of unfairness to those mentioned in the draft report, or with any other possible prejudice to the Inspector's ongoing inquiries, by ensuring the confidentiality of these aspects of the draft report.
- 4.37 I doubt, however, whether the significant inconsistencies with the Act I have identified could be "remedied" simply by assuming that the Committee would treat information contained in the draft report in this way. It would be difficult for the Committee to determine whether unfairness, or other prejudice to the Inspector's ongoing inquiries, would be caused by disclosure of information in a draft report. It would seem that the only way the Committee could ensure that such unfairness or prejudice would not arise, would be to ask the Inspector to provide detailed information to the Committee about the current status of the investigation to which the draft report relates. That such an approach would be necessary only highlights the inconsistency with the statutory scheme, particularly given that it is the Joint Committee which has the statutory functions of monitoring and reviewing the Inspector's functions.

Question 2 – whether the Legislative Council could require production of the draft report

- 4.38 Since the draft report is held by the Minister, and within the Department of Justice, it is unnecessary to consider whether, in response to such an order for papers under Standing Order 52, the Minister could require the Inspector to provide him with a copy of the draft report, or whether the Inspector could be required to respond directly to an order.
- 4.39 The power of the House to compel Ministers to produce "State papers" has been confirmed by the decision of the High Court in *Egan v Willis*. It appears quite possible, deferring to the opinion of the Solicitor General, that the scope of the power of the

¹⁵ See above at [4.23]-[4.24].

Council to order production of documents may be greater than the power of a non-statutory committee of the Council. This conclusion may arise from the Solicitor General's view (as outlined above) that a person called to attend to give evidence and to produce a document to a committee may make a claim of privilege, such as public interest immunity and legal professional privilege. Such claims of privilege, except for public interest immunity claims relating to Cabinet documents, are not generally available to resist production of documents under an order for papers.¹⁶ (Whilst Standing Order 52 recognises that a claim of "privilege" may be made, if such a claim is accepted, the documents are still required to be produced and may be inspected by members of the Council, but are not to be published or copied by anyone other than a member.)

- 4.40 As the Solicitor General (advising jointly with Ms Mitchelmore) has noted, in the *Egan v Willis* proceedings in the Court of Appeal, Gleeson CJ noted that that the then equivalent of Standing Order 52 referred to "what are sometimes called State papers, that is to say, papers which are created or acquired by ministers, officeholders, 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". The High Court, on appeal, appeared to adopt this definition,¹⁷ and it may therefore be accepted that the reference to "documents" in Standing Order 52 is to State papers: SG 2014/05 at p. 2.
- 4.41 Chief Justice Gleeson's description of "State papers" includes documents "acquired" by ministers and public servants by virtue of the offices they hold. The draft report of the Inspector would therefore appear to be a State paper in this sense, on the basis that it was "acquired" by the Minister and the public servants when the Inspector provided them with a copy.
- 4.42 Nonetheless, I would note that in the *Egan v Willis* and *Egan v Chadwick* proceedings the courts were not required to determine any issues relating to documents created by independent statutory officers such as the Inspector. I do not think that the Inspector holds office under, or in the service of, the Crown in right of the State of New South Wales. Instead, the Inspector, as an independent statutory officer conferred with functions of scrutinising the Executive, could be considered to be part of the "integrity branch" of government, which Chief Justice Spigelman has suggested could be considered to be a fourth arm of government (in addition to the Executive, Legislative, and Judicial branches).¹⁸

¹⁶ See *Egan v Chadwick*, discussed elsewhere in this advice.

¹⁷ *Egan v Willis* (1998) 195 CLR 424 at 442 per Gaudron, Gummow and Hayne JJ citing *Egan v Willis* (1996) 40 NSWLR 650 at 654 per Gleeson CJ

¹⁸ J.J. Spigelman *The integrity branch of government* (2004) 78 ALJ 724; and Bathurst CJ speech.

- 4.43 In *Egan v Chadwick*, the Court of Appeal considered whether the Executive could rely upon certain *common law* claims of privilege in response to an order for papers. The Chief Justice considered that it is not reasonably necessary, for the proper exercise of its functions, for the Legislative Council to call for documents the production of which would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension. The existence of an inconsistency or conflict constitutes a qualification on the power itself, because the power ultimately derives from the doctrine of ministerial responsibility.¹⁹
- 4.44 It was not necessary for the Court to consider whether any statutory provisions could be relied upon to resist production under an order for papers.
- 4.45 It is, therefore, not entirely clear that the House has power to compel production of documents created by an officer such as the Inspector or - if the House does have that power - that it could only be displaced in a statute by express provision or "necessary implication". Assuming that both those propositions are correct, however, I would prefer the view, although the matter is finely balanced, that the statutory scheme relating to the preparation of reports by the Inspector would establish such a necessary implication. I would prefer that view for essentially the same reasons outlined in my answer to Question 1, particularly at [4.28]-[4.37].
- 4.46 In conclusion, I prefer the view that the Council would not have power to compel production of the draft report. This view, however, is subject to significant doubt, and must also be understood having regard to the very limited time available.

Signed:



John McDonnell
A/Crown Solicitor

¹⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 574 [55]. No reliance was placed on *individual* ministerial responsibility in that case: 571 [40], 576 [71]. Meagher JA agreed with Spigelman CJ, with some short additional comments. Priestley JA dissented.

4.Mr Bret Walker SC, initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees, 25 October 2018

From: [David Blunt](#)
To: [Madeleine Foley](#); [Rebecca Main](#)
Subject: Portfolio Committee No 4 - production of documents
Date: Thursday, 25 October 2018 4:57:30 PM
Attachments: [image001.png](#)

Dear Madeleine and Rebecca

I refer to our discussions this afternoon concerning the resolution of Portfolio Committee No 4 earlier this afternoon to issue summonses to the Inspector of Custodial Services and the Secretary of the Department of Justice to attend and give evidence next Wednesday 31 October, “such evidence include(ing) the answering of questions and the production of the draft report...”

As you are aware, I have written to Bret Walker SC to seek his advice on this matter. You both have access to the letter I sent to Mr Walker containing the request for advice, and attachments (thank you both for your assistance in putting them together in such a short time-frame in view of Mr Walker’s availability this afternoon). I have no objection to you circulating the request for advice to the members of Portfolio Committee No 4, together with this email message.

Mr Walker called a short time ago and provided some brief initial advice. His advice can be summarised as follows:

- The summonses are appropriately worded – the key issue being to ensure that they clearly crystallise the matters at hand, including that the two witnesses are being summonsed to give evidence, including to answer questions and to produce the document in question. This provides sufficient clarity to the witnesses and also, should it come to this, enables the issue as to the power of the committee to require the production of the document to be dealt with in litigation
- The author of the advice (the A/Crown Solicitor) is greatly respected and his views should be accorded due deference. In this regard, the proposition that seems to be put forward, namely that for all the reasons set out in the advice the Inspector of Custodial Services Act 2012 does impliedly displace parliamentary privilege (in terms of the power of the committee), is arguable
- However, whilst arguable it is not a view with which Mr Walker is sympathetic: the threshold to be crossed for a statute to abrogate or displace parliamentary privilege (including the powers of a committee) is a high one. It is very rarely that a statute will meet this threshold and there are few that come to mind. The reasons set out in the advice as to why this statute should be so construed are not persuasive. There may be legitimate reasons for a committee wishing to inquire into the content of a draft report of the Inspector. Whether it is wise or appropriate in any set of circumstances for a committee to seek to inquire into a draft report is a matter of judgement. The suggestion that a committee is precluded from doing so (ie does not have power to do so by requiring the production of the document) is, however, not supported.

Mr Walker is happy to provide further advice on this matter if required. Please feel free to pass this advice on to the Chair and members of the Committee, or otherwise I am happy to do so in person on Wednesday.

Kind regards

David

David Blunt

Clerk of the Parliaments | Legislative Council
Parliament of New South Wales

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25 October 2018

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

Dear Mr Walker,

Production of documents

Earlier this afternoon Portfolio Committee No. 4 resolved to issue summonses to two witnesses to attend and give evidence, such evidence to include the answering of questions and the production of a document, next Wednesday 31 October 2018.

The committee's actions in issuing such a summons, as with the actions of Portfolio Committee No. 5 in May this year to issue a summons in similar terms to the Secretary of Transport for NSW, followed on from advice you had provided concerning section 4 of the *Parliamentary Evidence Act 1901* in 2015. In response to the summons issued by Portfolio Committee No. 5 the Secretary of Transport for NSW did attend and produce the documents, however, he asserted that he did so voluntarily and without "any concession to the committee's power". On that occasion, the committee Chair however stated that as the document had been produced following the service of the summons, as far as the committee was concerned, it had been produced in response to the summons.

Last Friday the Auditor-General tabled her *Report on State Finances*. In accordance with Section 52(2) of the *Public Finance and Audit Act 1983*, the report included a number of legal opinions received by the Auditor-General during the last 12 months. Two of these dealt with the powers of parliamentary committees, copies are attached. The report has now been published on the Audit Office website and is available at the following link:

<https://www.audit.nsw.gov.au/publications/latest-reports/state-finances-2018>

It would appear from those advices that the Solicitor-General has recently provided advice that has preferred the views long held by the Legislative Council and supported by your advice over many years in relation to the powers of committees, both in respect of the production of documents and statutory secrecy. The Solicitor-General's advice has not been made public. The Crown Solicitor defers to the Solicitor-General's advice on these matters.

[I note that your 2015 advice is referred to and there is some discussion as to the most likely source of the power of a non-statutory committee to compel the production of documents with the Crown Solicitor concluding that the power is more likely to be found in the principle of reasonable necessity and the standing orders, rather than in the *Parliamentary Evidence Act*. Nevertheless, that view is expressed only tentatively.]

Portfolio Committee No. 4 is currently inquiring into the Budget Estimates. Following an earlier hearing the committee resolved to order the production of a draft report of the Inspector of Custodial Services. A copy of the order of the committee is attached. The due date for the return of the document was Wednesday 24 October 2018. No documents were returned, instead the committee secretariat received correspondence from those to whom the order had been directed attaching advice from the Crown Solicitor which expressed doubt as to the power of the committee to order the production of this particular document. This advice is largely on the basis that:

“Requiring production of the draft report which has been provided to the Minister would involve a significant degree of inconsistency, if not interference, with the operation of the statutory scheme established by the Inspector of Custodial Services Act 201 (the ‘Act’) under which the Inspector reports to each House.”

In response the committee has this afternoon resolved to order that the Inspector of Custodial Services and the Secretary of the Department of Justice be summonsed to give evidence, including the answering of questions and the production of the document next Wednesday 31 October 2018. I attach for your information relevant extracts from the Minutes of Proceedings of the committee and the two draft summonses. Also included is the Crown Solicitor's advice attached.

On behalf of the committee, I would appreciate your urgent advice as to the terms of the draft summonses to ensure they are appropriately worded to achieve the end of requiring the production of the document. In due course I would also appreciate any further advice you may wish to give in response to the three opinions of the Crown Solicitor to which reference has been made above.

Yours sincerely,


David Blunt
Clerk of the Parliaments



**Crown
Solicitor's
Office**

Your Ref: 201803751/ 201803752

My Ref: T08 201803751

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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 / 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.¹

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

¹ "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.²

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.

² 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*³ 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

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



NEW SOUTH WALES

SOLICITOR GENERAL

**QUESTION OF POWERS OF LEGISLATIVE COUNCIL COMMITTEES TO CALL
FOR PRODUCTION OF DOCUMENTS FROM WITNESSES**

I have been asked by the Crown Solicitor, who acts for [REDACTED]
[REDACTED] to comment on an advice, dated [REDACTED] 2018, by the
Crown Solicitor [REDACTED]

I have annexed the advice of the Crown Solicitor to this advice for ease of reference.

Background

[REDACTED]

Advice of the Crown Solicitor

In her advice of [REDACTED] 2018 the Crown Solicitor was not considering the substantive question of the power of a parliamentary Committee to call for a document in the way

described but rather the question [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Comments on the advice of the Crown Solicitor

I broadly agree with the view of the Crown Solicitor set out above as to [REDACTED]
[REDACTED] although, there
may be a question as to [REDACTED]

[REDACTED]

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 might be made by the 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.

Please do not hesitate to contact me in relation to any of the matters raised in this advice.



MG Sexton SC

 2018



Crown Solicitor (Ms Lea Armstrong)

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

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

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.

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:

- (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

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.

- (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”.

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.

- (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

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 must not make a report to Parliament under this Act 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 unless 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, consider any such submissions before the report is furnished to the Presiding Officers, and

(b) include in the report 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

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.

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.

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

- (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:

- (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

