



## Appendix two – Legal opinions

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The Auditor-General is required by section 52(2) of the *Public Finance and Audit Act 1983* (PF&A Act) to publish any requests for a legal opinion submitted to the Attorney General or the Crown Solicitor under section 33 of the PF&A Act.

Three legal opinions were received since my last 'Report on State Finances', which was released on 24 October 2017.

The three opinions were related to:

- whether the Auditor-General is to be the auditor of joint organisations and county councils under s. 422(1) of the *Local Government Act 1993*
- whether the 'secrecy' provision in s. 38 of the *Public Finance and Audit Act 1983* could be relied upon in response to a question, or a demand for a document, by a non-statutory Parliamentary committee
- whether the 'secrecy' provision in s. 38 of the *Public Finance and Audit Act 1983* could be relied upon in response to questions, or a demand for documents, by the Public Accounts Committee.

**Sensitive: Legal**



**CROWN SOLICITOR**  
NEW SOUTH WALES

## Advice

### Local Government Act 1993 - County councils and joint organisations

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**Prepared for:** AUD018 Audit Office of NSW  
**Date:** 7 August 2018  
**Client ref:** Liz Basey  
**CSO ref:** 201802643 T08 Alexandra Brown

**Sensitive: Legal**

## **1. Summary of advice**

- 1.1 You seek my urgent advice as to whether the Auditor-General is to be the auditor for joint organisations and county councils under s. 422(1) of the *Local Government Act 1993* ("LG Act").
- 1.2 As to question 1, subject to certain exceptions that are not presently relevant, the *LG Act* applies "to county councils in the same way as it applies to councils" with such exceptions and modifications (if any) as the regulations may provide (s. 400(1), *LG Act*). Part 3 of Ch. 13 (ss. 408-427) of the *LG Act* contains provisions regarding financial management, including auditing, of councils. As there are no relevant exceptions or modifications in the regulations, Pt. 3 of Ch. 13 applies to county councils in the same way as it applies to councils and, by application of s. 422(1), the Auditor-General is to be the auditor for a county council.
- 1.3 As to question 2, other than the "excluded provisions" and any modification or exclusion in the regulations, the *LG Act* applies "to a joint organisation in the same way as it applies to a council" (s. 400ZH(1), *LG Act*). As Pt. 3 of Ch. 13 is not an "excluded provision", that Part applies to a joint organisation in the same way as it applies to a council (subject to the modified application of s. 413(1) by cl. 397N of the *Local Government (General) Regulation 2005*). By application of s. 422(1), the Auditor-General is to be the auditor for a joint organisation.
- 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. Background**

- 2.1 You instruct me that it is accepted throughout the sector that the Auditor-General is to be the auditor for county councils. Your office currently contracts out the audits of all ten county councils.
- 2.2 You are concerned because s. 422(1) of the *LG Act* provides that "The Auditor-General is to be the auditor for a council" but there is no specific reference in that provision to the Auditor-General being the auditor for a county council or a joint organisation.

## **3. Advice sought**

- 3.1 By letter dated 30 July 2018, you seek my urgent advice as to the following questions:
  - "1. Is it reasonable to conclude that I do not have the mandate to audit county councils on the basis the Act does not specifically appoint me as the auditor of county councils? Or could it be argued that as the provisions in Chapter 13, Part 3 of the Act on financial management apply to county councils in the same way as councils, county councils are subject to my oversight in the same way as councils? Are there other considerations I should be aware of?

2. Do the principles that apply to the audit of county councils apply in the same way to joint organisations?"
- 3.2 I understand question 2 to be asking whether Pt. 3 of Ch. 13 of the *LG Act* applies to joint organisations, and, specifically, whether the Auditor-General is to be the auditor for a joint organisation.
- 3.3 You also seek my advice on any other issues I consider relevant. Whilst I have not raised any other issues in this advice, I would of course be pleased to provide further advice, if required.

#### **4. Advice**

##### **Question 1 – county councils**

- 4.1 The provisions with respect to financial management of councils are found in Pt. 3 of Ch. 13 of the *LG Act* (ss. 408-427). Division 2 of Pt. 3 of Ch. 13 is concerned with, among other things, the obligation on a council to prepare financial reports and to refer them for audit (s. 413); the auditing of a council's financial reports (s. 415); the time for preparation and auditing of a council's financial reports (s. 416); and the reports to be prepared by a council's auditor (s. 417).
- 4.2 Division 3, "Auditors", of Pt. 3 of Ch. 13 includes s. 422, which relevantly provides:
- "(1) The Auditor-General is to be the auditor for a council.
  - (2) The Auditor-General may appoint, in writing, a person (whether or not that person is employed in the Public Service) or a firm to be an auditor for the purposes of this Act."
- 4.3 Division 3 also provides for access to and production of documents to the Auditor-General (s. 423), including access to records of deposit-taking institutions (s. 424), in addition to setting out secrecy provisions (s. 425) and imposing an obligation on the Auditor-General to communicate with the Minister (s. 426). Division 2A of Pt. 3 of Ch. 13 includes provision for the Auditor-General to conduct performance audits of all or any particular activities of one or more councils.
- 4.4 County councils are dealt with in Pt. 5 of Ch. 12. Section 400 is concerned with the application of the *LG Act* to county councils, and relevantly provides as follows:
- "(1) This Act (except Part 1 and Divisions 1 and 2 of Part 2 of Chapter 9, Chapter 10, section 365, Part 7 of this Chapter and the provisions of Chapter 15 concerning the making and levying of ordinary rates) applies:
    - (a) to county councils in the same way as it applies to councils, and
    - (b) to the members of county councils in the same way as it applies to the councillors of councils,with such exceptions and modifications (if any) as the regulations may provide."
- 4.5 The effect of s. 400(1)(a) is that the *LG Act* applies "to county councils in the same way as it applies to councils" with the exception of those provisions specified in parentheses

and with such exceptions and modifications (if any) as the regulations provide. As explained above, the provisions relevant to the auditing of councils are found in Pt. 3 of Ch. 13. None of these provisions are specified in s. 400(1) as not applying to county councils, nor do the regulations make any exceptions or modifications to the application of Ch. 13 to county councils (see *Local Government (General) Regulation 2005* ("the Regulation")).

- 4.6 Accordingly, in my view, it follows that the effect of s. 400(1)(a) is that Pt. 3 of Ch. 13 (which contains the financial management provisions) applies to county councils in the same way as it applies to councils. In particular, this means that, by application of s. 422, the Auditor-General is to be the auditor for a county council.
- 4.7 For completeness, I note that I am not aware of anything in the extrinsic materials that accompanied the introduction of the *LG Act*, including the provisions with respect to county councils, which would support a different interpretation of s. 400(1)(a).

### Question 2 – joint organisations

- 4.8 Part 7 of Ch. 12 of the *LG Act* contains provisions relating to joint organisations. This Part was inserted into the *LG Act* by the *Local Government Amendment (Regional Joint Organisations) Act 2017* ("Regional Joint Organisations Act"), and commenced on 15 December 2017<sup>1</sup>.
- 4.9 Section 400ZH addresses the application of the *LG Act* to joint organisations. Section 400ZH(1) provides:

"(1) Except as provided by subsection (3), this Act applies:

- (a) to a joint organisation in the same way as it applies to a council, and
- (b) to the representatives on the board of a joint organisation in the same way as it applies to the councillors of councils, and
- (c) to the executive officer of a joint organisation in the same way as it applies to the general manager of a council."

- 4.10 Subsection (3) lists "excluded provisions" of the *LG Act* that do not apply to or in respect of a joint organisation. Parts 2 and 4 of Ch. 13 and ss. 438T, 438ZA and 438ZB are excluded provisions (s. 400ZH(3)(i)). The excluded provisions do not include any of the provisions in Pt. 3 of Ch. 13 (which contains the financial management provisions). The regulations may modify the application of any provision of the *LG Act* that applies to or in respect of a council for the purpose of its application to a joint organisation, or exclude a provision of the *LG Act* from applying to or in respect of a joint organisation (s. 400ZH(5)). As your instructions note, cl. 397N of the *Regulation* modifies the application of s. 413(1) of the *LG Act* with respect to the time in which the first financial reports are required to be prepared for a joint organisation under Pt. 3 of Ch. 13 of the *LG Act*.

<sup>1</sup> By proclamation of the Governor dated 13 December 2017 (NSW Government Gazette, Commencement Proclamation No 730, 2017).

- 4.11 In my view, s. 400ZH(3)(i) evinces a deliberate and specific intention to exclude the application of those provisions of Ch. 13 specified therein to joint organisations and to render the remainder of that Chapter applicable to joint organisations in the same way as it applies to councils, unless modified or exempted by the regulations. Other than cl. 397N of the *Regulation*, I am not aware of any regulation that modifies the application of a provision of Pt. 3 of Ch. 13 of the *LG Act* to joint organisations.
- 4.12 For completeness, I note that the following comments made on behalf of the Minister in the Second Reading speech accompanying the introduction of the *Regional Joint Organisations Act* provide support, in general terms, for the interpretation of s. 400ZH set out above (Legislative Council Hansard, 15 November 2017, pp.52-56):
- "To protect the public interest, the bill will generally require joint organisations to meet the standards of conduct and good governance, transparent reporting, accountability and oversight expected of councils, councillors and council staff.
- In new subsections 400ZH (1) and (2), the bill provides that most provisions in the [*LG Act*] apply to joint organisations and their office holders and staff in the same way as it applies to local councils.
- ...
- Where particular provisions of the [*LG Act*] that apply to councils are not appropriate to be applied to a joint organisation, they are explicitly excluded by new section 400ZH (3). There is also a regulation-making power to prescribe further provisions of the [*LG Act*] as either applying or not applying to joint organisations. This allows for some flexibility if it becomes apparent that further or fewer provisions of the Act should apply as joint organisations' governance and operations are further developed and become more complex over time.
- Joint organisations are also intended to operate with minimal cost and red tape. For that reason there is a broad regulation-making power that will allow adjustments to be made to a range of standard governance requirements, including planning and reporting requirements that would apply to councils. This will help to make sure that joint organisations remain lean and effective."
- 4.13 In summary, the effect of s. 400ZH of the *LG Act* is that Pt. 3 of Ch. 13 applies to a joint organisation in the same way as it applies to a council (subject to the modified application of s. 413(1) by reason of cl. 397N of the *Regulation*). Accordingly, by application of s. 422(1) of the *LG Act*, the Auditor-General is to be the auditor for a joint organisation.

Signed:

  
Lea Armstrong  
**Crown Solicitor**

**Sensitive: Legal**

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**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 questions<sup>1</sup> 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*.

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<sup>1</sup> 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 that<sup>2</sup>, 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.<sup>3</sup> 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

<sup>2</sup> Subject to an exception relating to religious confessions.

<sup>3</sup> The witness may then be committed for such offence "into the custody of the usher of the black rod or sergeant-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).<sup>4</sup> 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

<sup>4</sup> "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.<sup>5</sup>

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

- 3.12 As I have recently advised,<sup>6</sup> 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

<sup>5</sup> *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.

<sup>6</sup> 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".<sup>7</sup> 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",<sup>8</sup> 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"

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

<sup>8</sup> For reasons such as those outlined at [3.4] above.

for the Council to exercise its functions.<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup>
- 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*.<sup>12</sup> 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

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

<sup>10</sup> 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.

<sup>11</sup> See generally *Egan v Willis*, discussed above.

<sup>12</sup> '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/tabledpaper/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.

- 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**



## **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 advice<sup>1</sup> 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*.

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<sup>1</sup> 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",<sup>2</sup> 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

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<sup>2</sup> 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).<sup>3</sup>
- 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.<sup>4</sup> 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

<sup>3</sup> 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).

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>
- 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

<sup>5</sup> Standing Order 208(c) of the Legislative Council; Standing Order 288 of the Legislative Assembly.

<sup>6</sup> 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.

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".<sup>7</sup> 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.

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

- 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**