Submission No 1

IMPLICATIONS FOR EXCLUSIVE COGNISANCE RAISED BY THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON THE RELATIONSHIP BETWEEN THE DURAL CARAVAN INCIDENT AND THE PASSAGE OF RELEVANT BILLS THROUGH THE LEGISLATIVE COUNCIL

Organisation: The Hon. Ron Hoenig MP

Date Received: 14 July 2025

Minister for Local Government

Submission

Standing Committee on Parliamentary Privilege and Ethics Inquiry into the implications for exclusive cognisance raised by Legislative Council Select Committee on the Relationship Between the Dural Caravan Incident and the Passage of Relevant Bills Through the Legislative Council

Executive summary

- The key principles of responsible government, exclusive cognisance and comity underpin Westminster systems of government, and inform the relationships between the executive government and the Parliament, and between the Houses of Parliament. Under these principles, Ministers are responsible to Parliament. Responsibility is individually discharged through the House of which the Minister is a member.
- The *Parliamentary Evidence Act 1901* (**Parliamentary Evidence Act**) gives the Houses of Parliament and their committees significant power to summon persons, other than Members of Parliament, as witnesses and compel answers to any lawful question. The exercise of these powers is to be understood in light of the principles and conventions which support the Westminster system of government as it applies in NSW.
- The scope and operation of the Legislative Council's Select Committee on the Relationship Between the Dural Caravan Incident and the Passage of Relevant Bills Through the Legislative Council inquiry has not been consistent with the principles and conventions which support and underpin the Westminster system of government.
- In particular, the compelled attendance of ministerial staff was inconsistent with the practice and convention observed in relation to such staff in other Westminster jurisdictions, including the McMullan Principle — a convention that ministerial staff should not be required to appear and give evidence before parliamentary committees on the basis that ministerial staff should not be held accountable for the actions or policy decisions of Ministers or their departments.
- The McMullan Principle should be adopted and respected within NSW's system of government. Compelled attendance of ministerial advisers would remain an available option, but would only be exercised consistently with the McMullan Principle – for example, where the personal conduct of a ministerial adviser is an issue properly before the inquiry.

The operation of the Parliamentary Evidence Act

The Parliament does not have inherent powers to compel witnesses to give evidence, or to punish them for contempt. However, the Parliamentary Evidence Act gives the Houses of Parliament and their committees significant power to summon persons, other than Members of Parliament, as witnesses and compel answers to any 'lawful question'.

Members of Parliament

In relation to Members of Parliament, section 5 of the Parliamentary Evidence Act provides that their attendance before a House of Parliament or a parliamentary committee must be procured in

conformity, so far as practicable, with the mode of procedure observed in the British House of Commons — that is, voluntary attendance.

Consequently, and consistently with UK procedures, parliamentary committees routinely invite Ministers from either House to appear as witnesses, and there are many examples of Ministers from both Houses voluntarily accepting such invitations. In particular, it is usual practice for Ministers to appear voluntarily before the Legislative Council's Portfolio Committees during the annual budget estimates inquiry.

People other than Members of Parliament

Most witnesses appear before parliamentary committees on a voluntary basis. However, in certain circumstances, a committee may summon a witness (other than a Member of Parliament) to attend and give evidence before it under section 4 of the Parliamentary Evidence Act. Failure to comply with a summons may result in a warrant for the apprehension of the person being issued by a judge.

There are certain limitations on this power, including that an order to attend must be signed by the Clerk of the relevant House or the Chair of the relevant committee and be personally served, that individuals summoned are entitled to advance payment of their reasonable expenses of attending, and that individuals summoned to attend and give evidence must have a territorial connection to NSW. But such limitations aside, the Parliamentary Evidence Act does not impose any particular restrictions in relation to summoning the following classes of persons to give evidence before a parliamentary committee: former Members (including former ministers), ministerial staff, Members' staff, or public officials.

Witnesses may be summoned in a range of scenarios, including where a witness declines an invitation to give evidence voluntarily, or refuses to provide certain information to committees voluntarily. Additionally, some witnesses have themselves requested that they be summoned, having expressed the view that being summoned would ensure the evidence that they give is protected by parliamentary privilege.

Summons issued by the Select Committee to ministerial staff

In April 2025, the Select Committee on the relationship between the Dural Caravan incident and the passage of relevant bills through the Legislative Council (**Select Committee**) sought the attendance of Ministers, including the Premier at its hearings. The Premier respectfully declined.

On 5 May 2025, the Select Committee invited five ministerial staff members to give evidence voluntarily before the Committee. The invitations were declined.

On 18 June 2025 the staff members were summoned under section 4 of the Parliamentary Evidence Act to give evidence at the hearing of the Select Committee on 20 June 2025.

Key principles and conventions which apply to the Parliamentary Evidence Act

Responsible government

The Westminster system of parliamentary democracy adopted in NSW establishes a framework for the relationship between the Parliament and the executive government according to the principles of responsible government. Under these principles, the executive government is collectively responsible to Parliament, and through Parliament to the people of NSW.

A key convention under the system of responsible government is that Ministers are members of one House or the other of Parliament. Ministers are individually accountable to the House of which they are a member, not the other House.

Exclusive cognisance and comity

The principle of "exclusive cognisance", which provides that each House of Parliament controls its internal proceedings, also derives from the Westminster system. Under this principle, courts may adjudicate upon the existence, but not the exercise, of the privileges of the Houses of Parliament.

The Constitution Act establishes the two Houses of the NSW Parliament as distinct, constituent parts of the Legislature. The relationships between the Houses are defined not only by legal and conventional limits on their powers (like the control each House has over its internal proceedings), but are also marked by the principle of comity or mutual respect.

The principle of comity finds expression in various ways. For example, a bill affecting the constitution or powers of one House alone should not be introduced in the other House; neither House may exercise authority over a member of the other House; neither House may inquire into the operations of the other; and respect is afforded to members and officers of the other House.

The principles underlying the concept of comity, and its practical operation, are helpfully described by the report of the present Committee on the *Implications of orders for the production of papers pertaining to the office of Speaker,* at [2.1]-[2.12]. That report notes, in particular, a ruling of the President of the Legislative Council in 2008 that (at [2.10]):

> A committee of this House should not investigate the proceedings in the other House, even where Members and officers of that House are willing to appear and give evidence voluntarily. Such matters are properly investigated by the Legislative Assembly as the sole arbiter of its own procedures and proceedings.

I also note the discussion by the former Clerk of the Senate that:[1]

> The various houses of parliaments generally follow the principle that one house cannot inquire into proceedings in another house.
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> A basis in law for this would be the immunity of parliamentary proceedings from impeachment or question in any other place, the Bill of Rights of 1689, article 9 immunity which adheres to all of the Australian parliaments, and which is interpreted as applying to each individual house.
>
> This does not affect political comment on events in other houses, but formal inquiries into other houses' proceedings are avoided. It would obviously be difficult properly to conduct bicameral relations within a jurisdiction, or federal relations between jurisdictions, in the absence of this rule, so it is a matter of comity apart from any question of law.
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> Unlike the other possible limitations considered here, this restriction applies regardless of whether witnesses and documents are summoned. Thus, a committee of one house does not hold an inquiry into events occurring in the course of proceedings in another house, and does not take evidence on such a matter from a member of the other house, even if the member appears and gives evidence voluntarily.

Interaction between the executive government and the Parliament and between the Houses of Parliament

Together, the principles of responsible government, exclusive cognisance and comity support an understanding of relationships between the executive government and the Parliament, and between the Houses of Parliament.

Under these principles, Ministers are liable to the scrutiny of the House of which they are a member in respect of the of the conduct of the executive government. It is through this scrutiny — which can take the form of questioning of Ministers during Question Time, during debate in the House, and through the House's committees — that Ministers are held "responsible" in the constitutional sense.

Additionally, under these principles, Members of one House cannot be compelled to attend the other House, or one of the other House's committees. However, each Minister is "represented" by a

[1] Evans, H, The Senate's Powers to Obtain Evidence, *Papers on Parliament*, no. 50, March 2009; references omitted.

Minister in the other House, for the purposes of answering questions without notice, tabling documents and carriage of bills. These ministerial arrangements help to ensure that the ability of a House of Parliament to scrutinise the executive government is not dependent on whether the Minister responsible for a given portfolio is a Member of that House.

These principles and the associated conventions, particularly regarding the principle of comity, render it constitutionally inappropriate for the Legislative Council to:

- inquire into the affairs of the Legislative Assembly, and
- purport to exercise coercive authority over the members of the Legislative Assembly.

It is therefore also inappropriate for the Legislative Council to circumvent their operation by:

- compelling the staff of Ministers who are members of the Legislative Assembly to answer questions contrary to the McMullan principle, and
- asking the staff of members of the Legislative Assembly questions concerning the operation and affairs of that House.

Where a matter relates to the proceedings in both Houses (such as the passage of a Bill through each House), consideration could be given to the establishment of a joint committee with membership from each House, if it is considered that the matter warrants inquiry and report.

Ministerial staff should not be held accountable for the actions or policy decisions of Ministers or their departments

Ministerial responsibility

Ministerial staff answer to a Minister as the person who employs them on behalf of the State. These staff are employed under the *Members of Parliament Staff Act 2013* (**Members of Parliament Staff Act**). The power to employ staff, and the terms and conditions of employment, may be subject to the approval of the Premier. The nature of this employment relationship should be taken into account in considering questions of accountability for actions of ministerial staff.

Relevantly, the employment of a person by a Minister under Part 2 of the Members of Parliament Staff Act terminates if the Minister ceases to hold office for any reason; on the day appointed for the taking of the poll for the next general election; or if the Minister dispenses with the services of the staff member. These aspects of the employment of ministerial staff highlight that they are, in a sense, personal staff of a Minister who are required by the NSW Office Holder's Staff Code of Conduct to maintain confidentiality in their dealings with their Minister.

McMullan Principle

The McMullan Principle is a convention that ministerial staff should not be required to appear and give evidence before parliamentary committees on the basis that ministerial staff should not be held accountable for the actions or policy decisions of Ministers or their departments. This reflects that only Ministers (and not ministerial staff) may lawfully exercise ministerial functions. With very limited exceptions,[2] it is not open to Ministers to delegate the exercise of these functions to ministerial staff.

The current edition of the *NSW Legislative Council Practice* notes that "it is generally recognised that ministerial staff should not be held accountable for the actions or policy decisions of ministers or their departments, and they are not frequently summoned as witnesses" (at p 804).

The McMullan Principle has gained some support in other Australian jurisdictions. While the practice in relation to the compelled attendance of ministerial advisers is not uniform or settled, there is

[2] For example, under the Members of Parliament Staff Act, the Premier may delegate to an 'authorised person' (including a ministerial staff member such as the Premier's Chief of Staff) any of the Premier's functions under Part 2 of that Act, other than the power of delegation (section 11).

precedent for governments refusing to allow ministerial advisers to appear before parliamentary committees, and for committees declining to compel attendance.

Notably, in 2002, the Australian Government referred to constitutional conventions preventing ministerial advisers from appearing before parliamentary committees in relation to the Senate Select Committee on a Certain Maritime Incident. The Senate Select Committee subsequently declined to compel the attendance of ministerial advisers in that inquiry.

Also notably, in 2010, the Victorian Government referred to constitutional conventions preventing ministerial advisers from appearing before parliamentary committees in relation to the Legislative Council Standing Committee on Finance and Public Administration's inquiry into the Hotel Windsor redevelopment planning process.

Sanctions associated with compelled attendance raise challenging legal and ethical issues

Enforcement powers

If a witness summoned by a committee under the Parliamentary Evidence Act fails to attend the relevant hearing, the Act sets out the steps required to enforce the attendance of the witness, as follows:

- On the request of a committee, the President or Speaker may certify facts to a judge of the Supreme Court, with a view to having the witness apprehended if the President or Speaker is satisfied that the witness failed to attend to give evidence 'without just cause or reasonable excuse'.
- The judge shall issue a warrant for the apprehension of the witness, for the purpose of bringing the person before the committee to give evidence.
- The witness may be retained in custody for the purposes of giving evidence, until discharged by the President or Speaker.

Committee hearings proceed by way of questions from Members and answers from witnesses. Witnesses summoned to appear before a committee are required to answer any 'lawful question'.

A witness may be deemed guilty of contempt of Parliament for refusing to answer any lawful question, may be committed into the custody of Parliament officials and, if ordered by the House, may be committed to gaol for any period not exceeding one calendar month.

Sanctions associated with compelled attendance

The NSW Parliament has never followed the procedures associated with compelled attendance to the point where a warrant has been issued for the arrest of a person, or where a witness has been deemed guilty of contempt for refusing to answer a lawful question. However, the President recently indicated his preparedness to approach a Supreme Court Judge to seek a warrant to secure the attendance of certain ministerial staff before the Select Committee, should it be necessary to do so.

Concerns with the application of sanctions to ministerial staff was referenced by the Senate Select Committee on a Certain Maritime Incident in support of its decision not to compel the attendance of ministerial advisers.

Additionally, while the role of the court in issuing a warrant under the Parliamentary Evidence Act has never been tested, the ministerial staff who were required to attend as witnesses before the Select Committee, through their legal representatives, questioned the validity of the conferral of that function on a court. The relevant jurisprudence includes the decision in *Wainohu v NSW* (2011) 243 CLR 181.

In circumstances where a person summoned under the Parliamentary Evidence Act doubts the validity of the provisions dealing with non-compliance with the summons, that person must either (i) act as if the law is valid and attend, or (ii) decline to attend and risk loss of liberty pending determination of the validity of the law. That is a highly unsatisfactory position for a witness to be placed in, particularly if those doubts are based on authoritative legal advice.

Compelled attendance of ministerial staff should be exercised consistently with the McMullan Principle

Unless the inquiry in question is properly concerned with the personal conduct of a ministerial adviser, the Parliamentary Evidence Act should not be used to compel the attendance of a ministerial adviser. The kind of circumstances where a parliamentary committee might properly examine the conduct of a ministerial adviser might include where there is an allegation of misconduct or wrongdoing by a staff member or where the parliamentary committee is examining the conduct of functions exercised under an Act by a ministerial office, such as functions under the *Government Information (Public Access) Act 2009* or the *State Records Act 1998*.

Where ministerial advisers do attend Parliament to give evidence, limits should be imposed on the questions they may be asked or required to answer. Relevantly, similar protocols which apply to public servants in those circumstances should also apply to ministerial advisers.

The Hon. Ron Hoenig MP
Minister for Local Government
Leader of the House