

The Hon Robert Borsak MLC
Deputy Chair, Public Accountability Committee
Parliament House
Macquarie Street
Sydney NSW 2000

By email: <public.accountability@parliament.nsw.gov.au>

Dear Deputy Chair

I refer to your letter dated 10 November 2020 seeking clarification about the advice provided by the Department of Premier and Cabinet (**DPC**) relating to Ms Lau's appearance at the Public Accountability Committee's (the **Committee's**) public hearing on 23 October 2020.

Thank you for acknowledging DPC's role in facilitating the attendance of witnesses. I am pleased that DPC was able to assist the Committee in relation to the 23 October 2020 public hearing.

The Committee has asked for further clarification about the advice provided by DPC on 16 October 2020 relating to Ms Lau's attendance and its knowledge of the working advice notes referred to by Ms Lau in her evidence before the Committee.

As outlined in DPC's previous letter to the Committee dated 2 November 2020, Ms Lau and Ms Cruickshank both raised concerns with DPC directly upon being invited to attend the 23 October public hearing in person. DPC then contacted the Committee on behalf of those witnesses and was provided with further information by the Committee about the matters it wished to raise with each witness. Both witnesses then accepted the Committee's invitation and appeared at the 23 October hearing voluntarily.

I am advised that these steps were taken by the Office of General Counsel in consultation with the Premier's Office, having regard to the broader ramifications for the Executive of the Committee's decision to depart from the McMullan Principle (i.e. the principle that Ministerial staff should generally not be compelled to appear before parliamentary committees in a Westminster parliamentary democracy because it is Ministers, not their staff, who are required to be directly accountable to the Parliament).¹

DPC was not aware on 16 October 2020 of the evidence Ms Lau would give at the public hearing on 23 October 2020 beyond those matters canvassed in documents that had already been produced to the House under Standing Order 52 relating to the Stronger Communities Fund. DPC was also not aware at that time of the specific questions that Ms Lau would be asked by the Committee. I note that it is not DPC's practice to take a proof of evidence from witnesses before they attend public hearings of parliamentary committees. Rather, the Office of General Counsel offers public official witnesses practical guidance on what they can expect when they attend a public hearing, and advice on related legal and procedural matters.

¹ Lorraine Finlay, *The McMullan Principle: Ministerial Advisors & Parliamentary Committees*, 35 U. Tas. L. Rev. 69 (2016) at 73.

Parliamentary committees wield extraordinary powers under the *Parliamentary Evidence Act 1901* (NSW). The procedural fairness resolution of the House recognises the importance of affording proper process and fair treatment to witnesses who participate in parliamentary inquiries. As noted by Lovelock and Evans:

The issuing of a summons is an exercise of significant coercive power and should only occur after careful consideration of the repercussions and alternatives such as whether the information can be obtained from another witness or by other means, whether the witness's non-attendance will diminish the quality of the evidence obtained by the committee and the political ramifications of summoning a witness, **particularly if the witness is a public officer or ministerial adviser** [emphasis added].²

In the interests of procedural fairness, it is important that DPC be able to engage in frank discussions with parliamentary committees about the attendance of public officials at hearings. As the Committee appears to acknowledge in its letter of 10 November 2020, the representations made by DPC on behalf of witnesses on this occasion ultimately helped to facilitate their voluntary attendance at the Committee's public hearing on 23 October 2020.

Any person should be free to raise questions or concerns with a parliamentary committee about whether their attendance at a public hearing is necessary without fear that they will, with the benefit of hindsight, be publicly accused of impropriety or obstruction.

Thank you for the opportunity to clarify these matters with the Committee.

Yours sincerely

Tim Reardon
Secretary

20 November 2020

² Lovelock and Evans, *New South Wales Legislative Council Practice*, The Federation Press (2008), pp 496-7.