

Public Accountability and Works Committee – Inquiry into the Parliamentary Evidence Amendment Bill

Answers to questions on notice from Mr Latham

1. Ministerial staff appearing before the Legislative Council Committees without the Minister

Question on Notice (p.8)

The Hon MARK LATHAM: David Blunt, it seems to me the non-appearance of Jo Haylen at the inquiry was made more prominent or more reprehensible, really, by the fact that her chief of staff attended and answered questions. You had the remarkable circumstance of someone who worked for the Minister coming to the Committee to answer questions but the Minister herself refusing to do so. I said facetiously that maybe he should be the Minister. At least he turned up. Mr Blunt, in your lengthy experience with the Legislative Council, have we seen that before, where there's a chief of staff—or any staff member—attending but not a Minister, having refused to answer the invitation?

DAVID BLUNT: Mr Latham, I'm really glad you asked that question because it does bring up an issue I was hoping we might explore during this hearing. The straight answer to your question is I would have to take on notice whether we've got precedents of a chief of staff appearing and not a Minister, so I will come back to you on that. In relation to the particular circumstances that this Committee was dealing with in relation to the transport Minister, of course I'm not going to comment on that Minister's decision not to appear on that occasion. However, I would like to say something about chiefs of staff and ministerial staff attending before Legislative Council committees.

In some other jurisdictions, even today, from time to time there are statements that there's a convention or a practice that ministerial staff do not appear before parliamentary committees. Those sorts of suggestions were made here probably about 15 or 20 years ago. We've had reason to explore those conventions and also the lawfulness of the issuing of summonses to ministerial staff since that time, and we have a number of precedents here in the New South Wales Legislative Council of ministerial staff attending either in response to invitations, such as the Minister's chief of staff in the recent case, or indeed ministerial staff attending before Legislative Council committees in response to summonses. So that so-called convention, which is said to exist in other parliaments, is not accepted as being something that is in play here in the New South Wales Legislative Council.

Answer

As noted in *NSW Legislative Council in Practice*, there is no restriction under the *Parliamentary Evidence Act 1901* on inviting or summoning ministerial staff to attend and give evidence before Legislative Council committees. In 2004 various ministerial staff appeared before the General Purpose Standing Committee No. 4 inquiry into the approval of the Designer Outlet Centre – Liverpool.

- The Premier gave permission for his Chief of Staff to appear
- The Chief of Staff for the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration) declined the committee's invitation to appear on the basis that the minister had not authorised him to appear. He was then summoned by the committee to appear, and he ultimately appeared.
- Other ministerial staff invited to appear before the committee attended voluntarily.¹

¹ *New South Wales Legislative Council in Practice*, 2nd ed, p 804.

With regards to Mr Latham's specific question:

- during the **56th Parliament** (2015-2019) there were **no instances** where ministerial staff appeared before an LC committee and the relevant Minister did not appear.
- during the **57th Parliament** (2019-2023) ministerial staff appeared before Legislative Council Committees in the absence of the relevant Minister on **two** occasions:
 - Ms Sarah Lau, Senior Policy Officer, Office of the NSW Premier, appeared before the Public Accountability Committee's inquiry into **NSW Government grants programs** on 23 October 2020. While the Premier (the 'relevant' minister) did not appear, the Deputy Premier, the Hon John Barilaro, gave evidence to the committee.
 - Mr Bran Black, Chief of Staff to the NSW Premier, appeared before the Public Accountability Committee's inquiry into the **appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas** on 22 November 2022, but the Premier (the 'relevant' Minister) did not appear.

In addition, there were also several instances of **former** Chiefs of Staff giving evidence during the 56th and 57th Parliament, as documented in the attached table on pp 5-6

It should also be noted that in the current (58th) Parliament, Mr Scott Gartrell, the Chief of Staff to the Minister for Transport, appeared before the Public Accountability and Works Committee, but the Minister for Transport, the Hon Jo Haylen, declined the invitation to attend. The Minister's failure to give evidence was the impetus for the current inquiry into the Parliamentary Evidence Amendment Bill.

2. Committee Questions on notice (pp.8-9)

The Hon MARK LATHAM..... Would it available to the upper House to have a special standing order to give some type of extra status to questions on notice, say, coming from this particular Committee in its entirety in a circumstance where the Minister failed to attend? Say that status was the equivalent to SO 52 status, and the House thought that the Minister having refused the invitation to attend and then not having made a genuine attempt to answer the questions on notice arising from that, it would then trigger the sort of thing we do with an SO 52: the suspension of the Leader of the Government. So it would try to elevate questions on notice in this particular circumstance coming from an entire committee in recognition of ministerial non-attendance but also in recognition that too often on notice you get non-answers.

DAVID BLUNT: That is a really interesting proposition that you've put forward. I think it's certainly worthy of very careful consideration and scrutiny. Of course, the accountability arrangements—that is, accountability with sanctions arrangements in relation to orders for the production of documents whereby the Leader of the Government is the person who's ultimately responsible to the House and in the event of noncompliance can face censure by the House, can also face a motion of contempt and can be suspended from the service of the House, not as punishment but as a means to procure future compliance with the order. Those mechanisms were developed over the period during which the so-called Egan cases developed over a couple of years of parliamentary proceedings and then the various court cases. They were things that were developed very deliberately and very carefully over time. I think the sorts of ideas that you are putting forward now would need to be considered equally carefully. I would urge that they not be rushed into. They are definitely worthy of consideration. I think the idea of having an ability for a committee to effectively put questions on notice through the House is a really interesting one. It's not one that has come up before, but it's certainly worthy of further consideration.

The Hon. MARK LATHAM: Is it legally feasible that a committee in an extraordinary circumstance can go on notice to a Minister who has failed to attend and answer questions at an inquiry?

DAVID BLUNT: It is probably not so much whether it's legally feasible, as to whether it's in keeping with the standing orders. The House is bound by a number of things. The House is bound by statute, both the Constitution Act and other statutes like the Parliamentary Evidence Act that apply. The House is bound by the common law, by the sorts of principles that Professor Appleby was talking about earlier, and the House binds itself through its standing orders, for not only this parliamentary term but also future parliamentary terms, and it binds itself for the current term through sessional orders. All those sorts of things would need to be considered. Parliaments tend to rely on established practice and procedure. Precedent is vitally important, it's the first thing that the Clerk always looks at when required to provide advice to the President or any member of the House. If the Committee was minded to recommend something along the lines of what you are talking about, Mr Latham, I think it would be really important that I get my team to do some very thorough search through the 199 years of journals to see if there are any such precedents to date. As I say, it is certainly an interesting idea.

The Hon. MARK LATHAM: Could you possibly take it on notice?

DAVID BLUNT: Not only will I take it on notice, I would be delighted to. You will give me some really interesting work over the next few weeks.

The Hon. MARK LATHAM: I know you do interesting work, and we love you, so it sounds like it's a meeting of minds. My position is that I want to respect the principles of comity, while also acting on the intent of the bill, which is to improve the transparency of lower House Ministers to the Parliament in an extraordinary circumstance such as this. We are after answers to questions really and if we can't get them at a committee, can we get them through notice and put a spotlight on them so that they are genuine answers, not fobbing us off as sometimes lower House Ministers will do? Thank you very much for that.

Answer

The Procedure team have gone back through the "Journals" (that is the finalised versions of the business papers and detailed indexes) and have not been able to find any record of previous provisions for Questions on Notice from a Committee or Committee Chair on behalf of a committee forming part of the Questions and Answers paper. That is not to say that it would not be possible to make provision for such Questions on Notice.

I have also consulted with former Clerk of the Parliaments, John Evans PSM, and he has advised that:

"It would seem to me that there is no impediment to the House adopting a Sessional Order (as a trial, of course, before adopting a Standing Order) to allow a Committee Chair, with the authority of a Committee, to lodge Questions on Notice to a Minister. Of course, a majority of the Committee would necessarily have to agree to the terms of the written question.

My research of the Internet has found an interesting concept in the Danish Folketing. Chapter 8 (6) of the Standing Orders of the Danish Parliament, states:

"(6) A committee may ask a Minister to reply to questions put by the committee. Questions are submitted in writing, and the committee may request a written reply or ask the Minister to give an oral reply during a consultation at a committee meeting. The committee may request a reply to be given within a given time limit. If such a limit has not been indicated, the Minister should not later than 4 weeks after the question has been put have given a reply or have informed the committee as to when they can expect a reply. If the Minister is not in a position to give a reply, the Minister should at his/her earliest convenience – and at least within 4 weeks – state this in writing."

With some clever drafting by your excellent staff I am sure you can come up with some wording to give effect to the concept of a Committee asking a Question on Notice."

Standing Order 68 includes provisions to ensure that Questions on Notice are answered. Standing Order 69 includes provision for the debate to take note of Answers to Questions to include debate about the adequacy of Answers to Questions on Notice. Standing Orders 68 and 69 would apply to any Questions on Notice under a sessional order providing for Questions on Notice from a Committee or a Committee Chair on behalf of a Committee.

The only reservation I have about this idea is the risk that its existence could potentially lead to Legislative Assembly ministers seeing it as a substitute for appearing before Legislative Council Committees, thus leading to a drop off in the numbers of Legislative Assembly Ministers accepting invitations to give evidence before Legislative Council Committees.

Ministerial staff appearing before a committee in the 56th or 57th Parliaments without the relevant minister

Committee	Parliament	Inquiry	Relevant Minister	Ministerial Staff
Public accountability	57 th Parliament 2020	NSW Government grant programs	Premier	Ms Sarah Lau, Senior Policy Officer, Office of the NSW Premier, appeared before the committee on 23 October 2020. The Premier did not appear but the Deputy Premier (Barilaro) appeared.
Public accountability	57 th Parliament 2022	Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas	Premier	Mr Bran Black, Chief of Staff, Premier of NSW appeared before the Committee on 22 November 2022. Premier and current Premier did not appear but the <i>former</i> Deputy Premier (Barilaro) appeared.

Former ministerial staff appearing before a committee in the 56th or 57th Parliaments

Committee	Parliament	Inquiry	Relevant Minister	Former Ministerial Staff
Portfolio Committee No 4	56 th Parliament 2018/19	Museums and Galleries in NSW	Premier	Mr Bay Warburton, former Chief of Staff to the Premier, appeared before the Committee on 1 June 2019. Premier did not appear. Mr Mike Baird, <i>former</i> Premier, appeared before the committee on 28 May, 2018
Law & justice	57 th Parliament 2020	2020 Review of the Workers Compensation Scheme	Treasurer	Mr Nigel Freitas, former Chief of Staff, appeared before the committee in camera on 23 November 2020. Transcript of evidence subsequently published. Answers to Questions on Notice submitted on 8 January 2021. The Treasurer did not appear

Public accountability	57 th Parliament 2020	NSW Government grant programs	Premier	Ms Sarah Cruickshank, former Chief of Staff, Office of the NSW Premier, appeared before committee on 23 October 2020.
			Deputy Premier	Mr Matthew Crocker, former Policy Director, Office of the NSW Premier appeared before committee on 9 December 2020. Ms Laura Clarke, former Deputy Chief of Staff, Office of Mr John Barilaro, gave evidence on 9 December 2020.
			Former Minister for Local Government	Mr Kevin Wilde, former Chief of Staff, Office of the Former Minister for Local Government appeared before committee on 9 December 2020.
Public accountability	57 th Parliament 2022	Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas	Deputy Premier	Mr Mark Connell, former Chief of Staff, Office of Mr John Barilaro, declined to give evidence but provided confidential information to the inquiry on 18 July 2022. Joseph Brayford, former Senior Policy Advisor, Office of Mr John Barilaro, gave evidence in camera on 19 July 2022, which was subsequently published. Siobhan Hamblin, former Snr Policy Officer, Office of Mr John Barilaro, gave evidence on 5 August 2022. Mr Barilaro gave evidence in Feb 2021, resigned October 2021.