

**INQUIRY INTO CONSULTATION ON HIGHLY
CONTENTIOUS BILLS**

Organisation: Unions NSW
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Unions NSW Submission

Consultation on highly contentious bills

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Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with over 65 affiliated trade unions and Trades and Labour councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce.
2. Unions NSW welcomes the opportunity to make a submission in relation to the consultation process to be implemented for inquiries into highly contentious bills (the **New Inquiry Process**) that was proposed to the Legislative Council by the Honourable Mark Latham on Thursday 20 June 2019.
3. Unions NSW and its affiliated unions have a proud history of engaging in the legislative process to protect and represent the interests of union members. Unions NSW frequently makes submissions in relation to law making in areas involving industrial relations and other issues which may impact members.
4. This submission is split into two sections. The first section will demonstrate that the New Inquiry Process is an unnecessary reform in light of the Legislative Council's existing power of inquiry, and by comparison to existing processes in comparable jurisdictions. The second section will set out Unions NSW's concerns and requests in the event the New Inquiry Process is implemented.
5. In the view of Unions NSW, the New Inquiry Process may be a beneficial addition to the means of consultation available to the Legislative Council, but as a mandatory procedure is an unnecessary and potentially cumbersome addition to legislative development.

Current Inquiry Powers

6. The New South Wales Parliament has the power and an obligation to inform itself. Unlike the Federal Parliament's constitutional power of inquiry, the New South Wales Parliament draws its own ability to commence inquiries into subjects of its concern from common law.

7. The principle of ‘reasonable necessity’ describes the powers, rights and privileges the Parliament enjoys in the process of discharging its duties and functions. *Egan v Willis*¹ affirmed the interdependent nature of the relationship between Parliament’s dual roles of legislating and scrutinising and also endorsed Parliament’s central involvement in the operation of responsible government.
8. The test of ‘reasonable necessity’ was described in *Egan v Willis* as follows:

*What is ‘reasonably necessary’ at any time for the ‘proper exercise of the ‘functions’ of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council*².
9. The Council’s power to inform itself is a fundamental tool in the discharge of its duties. This tool is one which can be applied to private member’s bills, meaning that a research and deliberative process can already be utilised in the scrutiny of these bills. Accordingly, Unions NSW considers the proposal under subsection (b) of the Terms of reference unnecessary as the Council already has the ability to pursue such a process in considering bills.
10. The Legislative Council’s broad power of inquiry is one that has been perpetuated through the measures taken by the Council to ensure the proper exercise of its functions. It evolves naturally and is adaptable according to the needs of Parliament.
11. Unions NSW acknowledges there is a need for close scrutiny and consultation regarding highly contentious bills. The New Inquiry Process may well be a beneficial method of assessing certain bills but may not be the most efficient way of creating public dialogue around others.
12. The New Inquiry Process outlines a very broad array of bills which will be subject to the new procedure. The broad definition of highly contentious bills provided feasibly encompasses a vast majority of legislation introduced to Parliament, meaning a large amount of these will be encumbered by the mandated process. Unions NSW is concerned about the feasibility of the New Inquiry Process given the anticipated lengthy timeframes and the broad definition of highly contentious legislation, meaning many bills could be going through the process at any given time.

¹ (1996) 40 NSWLR 650; (1998) 195 CLR 424

² (1998) 195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ

13. The Green and White Paper method stipulated by the New Inquiry Process represents a strong step away from the “reasonably necessary” approach and requires a substantial amount of legislation to be reviewed by default, irrespective of the consensus of the house. Additionally, it seems there is little room for flexibility where such a process is not the most appropriate or efficient for the Council to inform itself.
14. Unions NSW also notes the New Inquiry Process is inconsistent with the practices currently employed throughout other jurisdictions. Whilst it is acknowledged that Green and White Papers are used by other legislative bodies from time to time, the compulsory nature of the proposal seems to detract from the Council’s duty to do what is “reasonably necessary” in the legislative process.
15. Parliaments around the world are recognising the value in public participation and consultation in the legislation process. Our own Commonwealth Parliament, which draws its unfettered power of inquiry from the Commonwealth Constitution, has often employed a variety of methods to engage and measure relevant stakeholders’ views on new and amended laws. However, like in other jurisdictions, the processes to be employed are not prescribed and may be employed as most appropriate on a case-by-case basis.
16. For example, the Canadian Justice Department made a commitment to public participation in 2000 by developing a framework to guide that Department’s engagement of Canadian citizens and other stakeholders (i.e. community groups) in the policy making and legislative processes³. This policy places a large emphasis on transparency of the policy development process and allows for public consultation to be employed on an as-needed basis and in the form that is “tailored to the purpose and desired outcomes, the participants involved, and the time available”. Under this policy, public participation is encouraged throughout the entire process and is adaptable to the subject matter of the discussion.
17. If the Legislative Council wishes to enshrine a public engagement or consultative process, it may be prudent to look to models in other jurisdictions when building a formal structure around how the Legislative Council exercises its functions. Unions NSW recognises it will be important to find a balance in forming a process which legitimately improves the quality of legislation and policy making. This process should not be so cumbersome as to disincentivise parties from introducing pivotal bills during the short electoral cycle.

³ <https://www.justice.gc.ca/eng/cons/pol.html>

18. In the opinion of Unions NSW, making the New Inquiry Process mandatory for all highly contentious bills is an unnecessary change to current processes and powers of inquiry currently available. There is no objection to having the process available as one of a number of options available to the Legislative Council, so that it can be used where appropriate and beneficial. The discussion paper does not identify a clear problem that this change in procedure is responding to or seeks to address. There are no clear examples given in the discussion paper of legislation where deficiencies due to a lack of consultation have been identified. In the absence of strong evidence and examples, it is difficult to envisage that the introduction of a mandatory rigorous new procedure will bring about sufficient change as to make it worthwhile.

Unions NSW Concerns

19. Unions NSW proposes that the New Inquiry Process should be made as one of a number of options available to the Legislative Council. In the event a mandatory New Inquiry Process is assented to and implemented into the Legislative Council's procedure of law-making, Unions NSW recommends several modifications to the proposal before it is implemented.
20. The modifications proposed are as follows:
- That an 'escape clause' be included, such that bills for which the New Inquiry Process is not practicable (either due to urgency, previous inquiries or pre-existing Council and/or community support) will not be subject to the mandatory costly and lengthy process. In instances of urgency, the Council should be able to pass bills on the numbers of members.
 - A trial period for the mandatory procedure, inclusive of the trial currently on foot for private members' bills, after which a review of the effectiveness and benefits of the New Inquiry Process is conducted.
 - The terms "likely to substantially alter" and "provoke widespread public interest" are more stringently defined so the process for determining which bills the New Inquiry Process will apply to is straightforward and efficient.
21. In the legislative process, consultation should involve meaningful engagement with affected groups and communities and key stakeholders (including experts) to develop a genuine and practical dialogue around the issue at hand. Unions NSW recommends provisions be included

in the New Inquiry Process to ensure any consultation process is carried out with this principle at its core. It is imperative legitimate stakeholders are included to inform the Legislative Council in a manner that is more than ideological and ensure the voices of those who may be affected by proposed legislation are not drowned out by popular opinion.

22. In addition, Unions NSW requests that if the New Inquiry Process is implemented, Unions NSW and its affiliate unions are adequately notified of inquiries pertaining to issues within their remit and are given the opportunity to actively engage in the consultation process. Unions NSW also requests the inquiries under this proposal be publicly accessible to all relevant parties so they are able to actively participate in them. This will help to ensure that legislation is passed with both informed Council and community support.

Conclusion

23. Unions NSW does not consider there exists a substantive need for the New Inquiry Process to be implemented by the Procedure Committee of the Legislative Council. In light of the existing power of the Council to inform itself in respect of legislative matters before it, Unions NSW does not support this motion in its current remit. Unions NSW does support the New Inquiry Process being available as one of a number of options for consultation.
24. In the event the proposal is implemented, Unions NSW requests certain modifications be made, as outlined above, and that the inquiries are publicly accessible and notified to relevant parties so they are able to actively participate in them.