Submission No 1

INQUIRY INTO PARLIAMENTARY EVIDENCE AMENDMENT (MINISTERIAL ACCOUNTABILITY) BILL 2023

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D23/105174

Inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023

Submission by the Clerk of the Parliaments

Background

The Public Accountability and Works Committee (PAWC) has invited me to make a submission to its inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 (the bill).

The bill was referred to the Committee by the Legislative Council on 20 September 2023.

The purpose of the bill, as expressed in the Explanatory Memorandum to the bill, is to amend the *Parliamentary Evidence Act 1901* (the PE Act) to provide that Ministers of the Crown may be summoned to attend and give evidence before a House of Parliament or a committee of Parliament.

The bill achieves this by amending sections 4 and 5 of the PE Act to remove the current exemption of members of the Council and the Assembly from being summoned to appear and give evidence before a House of the Parliament or a committee, and by inserting after the existing section 4(2):

> (3) This section does not apply to a Member of the Council or Assembly, other than a Minister of the Crown. (emphasis added)

The effect of proposed section 4(3) above is that the exemption of members of the Council and the Assembly from being summoned is continued, except for ministers.

As members of the committee would be aware, the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 was introduced in the Legislative Council by the Leader of the Opposition, the Hon Damien Tudehope, following the decision by the Minister for Transport, the Hon Jo Haylen MP, not to attend and give evidence before a hearing of PAWC.

Following that decision by the minister, I was invited by the PAWC to provide advice on the matter. For completeness I attach a copy of that advice, dated 5 September 2023, at Attachment A.

I now make the following further submission.

The accountability of ministers to the Legislative Council

I start by observing, as I did in my previous advice, that it cannot be doubted that the executive government, including ministers in the Assembly, are accountable to the Legislative Council for the

administration of their portfolios, albeit usually indirectly via Legislative Council ministers, as outlined below. So much is abundantly clear from the reasoning of all the justices of the High Court in *Egan v Willis*. Although often cited, it is worth repeating some of those judgements. In their majority decision, Gaudron, Gummow and Hayne JJ observed:

> One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the Ministry must command the support of the Lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.[1]

In his judgment, Kirby J observed:

> The fact that the Executive Government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the royal assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a Parliament of a State of Australia. Its power to render the Executive Government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a House of Parliament.[2]

I note the fuller citation of these judgements at pages 300-301 of the second edition of *New South Wales Legislative Council Practice*. But suffice it to say that the accountability of the executive government to the Council is a fundamental aspect of the system of responsible government in New South Wales.

There are various means by which ministers in the Assembly are accountable to the Council, including through questions on notice and through the order for papers process. Orders for papers agreed to by the Legislative Council routinely require the production of documents in the possession, custody or control of Legislative Assembly ministers and the agencies for which they are responsible. Ultimately, it is the Leader of the Government in the Legislative Council who is responsible for compliance with such orders and is liable to censure or being found in contempt of the House for non-production (including by a Legislative Assembly minister).

Questions on notice directed to Legislative Assembly ministers are answered via the Legislative Council minister who represents them in the Legislative Council, and it is ultimately the Legislative Council ministers who are responsible to the Council for the answers provided.

In addition, as observed in my previous advice at Attachment A, ministers (including Legislative Assembly ministers) also routinely appear voluntarily before budget estimates each year, and have in the past often appeared before other Council inquiries as well.

Comity between the Houses

In tension with the undoubted accountability of Legislative Assembly ministers to the Legislative Council is the principle of comity between the Houses. One aspect of comity between the Houses is

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[1] *Egan v Willis* (1998) 195 CLR 424 at 453 per Gaudron, Gummow and Hayne JJ.
[2] *Egan v Willis* (1998) 195 CLR 424 at 502-503 per Kirby J.

that neither House may exercise authority over a member of the other House.[3] As adopted in 1901, the PE Act clearly embodied this principle by specifying that members of the Assembly may not be summoned to appear before a committee of the Council, or vice versa. Instead, the PE Act continues to provide that their attendance shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons.

There is clearly good reason for comity between the Houses in relation to members of the other House. The *Constitution Act 1902* establishes the two Houses of the Parliament as separate and sovereign bodies with complete autonomy, subject to constitutional constraints, over their internal proceedings. In addition, the courts have long accepted that there is a sphere of operation concerning the internal decisions and processes of houses of parliaments generally over which the control of the houses is absolute and exclusive. This is often referred to as 'exclusive cognisance'. The same observance of 'exclusive cognisance' is equally recognised by each house in a bicameral parliament.

The question arises, though, whether comity should be extended to ministers in the other House in their capacity as members of the executive government rather than as members of the other House? This is clearly what the bill before the committee contemplates.

These matters are addressed further at pages 300-301 of the second edition of *New South Wales Legislative Council Practice*. Citing the principle of comity between the Houses, and sections 4 and 5 of the PE Act as an example of it, the book continues:

> It is clear, however, that whilst the Legislative Council cannot exercise authority over members of the Legislative Assembly in their capacity as a member, or vice versa, this does not extend to members of the Legislative Assembly in their capacity as ministers. Under the system of responsible government in New South Wales, the government, through its ministers, including ministers in the Legislative Assembly, is accountable to the Council. Whilst ministers in the Assembly may not be compelled to give evidence to a Council committee, they are nevertheless accountable in other ways.

There is in that paragraph, I think, an acceptance that whilst a distinction should be drawn between members of the Assembly in their capacity as members and ministers, nevertheless it is accepted that ministers in the Assembly may not be compelled to give evidence before a Council committee. They need to be held to account for their administration of their portfolios in other ways.

At a practical level, this means for example that the Council could not disrupt the proceedings of the Assembly by requiring the attendance of a minister in the Assembly before a committee of the Council at the time that the Assembly was sitting. Obviously this flows both ways; it equally prevents the Assembly disrupting a sitting of the Council in the same matter. The inherent right and superior claim of the Houses of the Parliament to the attendance and service of their members is a fundamental tenet of the law of parliamentary privilege.

At the Commonwealth level, in 2003, the former Clerk of the Senate, Mr Harry Evans, provided the following advice to the Senate Finance and Public Administration Committee on the matter:

> In the United Kingdom it is well established that the House of Commons cannot summon members of the House of Lords. This rule in that jurisdiction probably has a great deal to do with the status of the lords as peers of the realm, and on this basis the limitation would not automatically transfer to Australia.

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[3] New South Wales Legislative Council Practice, 2nd edn, (The Federation Press, 2021) p 848.

> In the procedural rules of the Australian Houses, however, there is a well-established principle that each House does not seek to compel the members of the other House. This is based on a requirement for comity between branches of the legislature.
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> It is possible that the courts in Australia might find this rule to have a legal basis in the Constitution, but it is at least just as likely, on past performance, that the courts would say that it is a matter for the two Houses to resolve between themselves and not a legal question. In the Senate this rule of comity has been regarded as extending to members of state and territory legislatures, and the Senate and Senate committees have accepted and acted on advice to that effect.[4]

This passage adopts two arguments against compelling the appearance of a member of another House before a committee, even if they are a minister: the argument that the two Houses at the Commonwealth level are established as independent and sovereign Houses and the further argument that as a matter of comity the Houses should not seek to interfere in the operations of the other. The same position is expressed in *Odgers*.[5] The same should apply in New South Wales.

Conclusion

The system of responsible government in New South Wales clearly requires the accountability of Assembly ministers to the Council, and vice versa. As such, the object of the bill, that ministers in the one House in their capacity as members of the executive government should be required to give evidence before a committee of the other House, including if necessary under compulsion, is understandable and not without merit.

However, this object needs to be balanced against the principle of comity and mutual respect between the Houses, founded as it is on the constitution of the two Houses in New South Wales as separate and sovereign bodies with complete autonomy, subject to constitutional constraints, over their internal proceedings. Just as parliamentary privilege is central to ensuring the independence of parliament from the other branches of government – the executive and the judiciary – so it might be said that principle of comity and mutual respect between the Houses is central to preserving the autonomy of the Houses from one another.

Mechanisms for the accountability of ministers in the Legislative Assembly to the Legislative Council have been developed and are now well established. These include accountability by way of orders for papers and answering Questions on Notice, with the Leader of the Government and ministers in the Legislative Council ultimately responsible for compliance by Assembly ministers with these mechanisms.

In recent decades, these mechanisms have been supplemented and enhanced by the attendance of Assembly ministers to give evidence at Budget Estimates hearings and before other Council committee inquiries. In both cases, whilst now well established processes, they remain voluntary. They are, however, an important example of the strength of the current parliamentary system in New South Wales. It is to be hoped that Assembly ministers will continue to respect this tradition and be prepared

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[4] H.Evans, 'The Senate's Power to Obtain Evidence', September 2003, updated September 2009, cited at https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop50/thesenatespowertoobtainevidence#_ftnref5

[5] R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), pp 564-565.

to be accountable in this way without the need for the Legislative Council to seek the sort of legislative changes envisaged by this bill, which would put at risk the principle of comity and mutual respect between the two Houses. This may require the Legislative Assembly ministers to take a long view of the importance of a strong and robust parliamentary system and the importance of ministerial accountability. It may also require Legislative Council members to take a similarly long view, respecting the importance of comity and mutual respect between the two separate and sovereign Houses.

I would be happy to expand on these comments or to appear at a hearing of the committee if required.

David Blunt AM
Clerk of the Parliaments

11 October 2023

ATTACHMENT A

Advice for the Public Accountability and Works Committee for the inquiry into the appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner

Background

At a meeting on Thursday 31 August 2023, the Public Accountability and Works Committee resolved to seek my advice in relation to the Chair moving a notice of motion in the House requesting that the Minister for Transport, the Hon Jo Haylen MP, attend a hearing for the inquiry.

This resolution followed Minister Haylen declining an invitation from the committee to give evidence at a hearing. In written correspondence to the committee from the minister's office, dated 30 August 2023, the minister declined on the basis that there is a convention that 'House of Representatives MP's are not required to attend Legislative Council inquiries'.

Advice

As members would be aware, under section 4 of the *Parliamentary Evidence Act 1901*, members of the Legislative Council and Legislative Assembly are unable to be summoned to attend and give evidence before a Council committee.[6] Under section 5 of the *Parliamentary Evidence Act 1901*, their attendance 'shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons'.[7]

In the House of Commons, members of the other House, the House of Lords (including ministers), may not be formally summoned to attend as witnesses before House of Commons select committees, although they may be requested to attend by written communication from a committee chair. Members of the House of Lords are given leave under a standing order of the House to attend as they see fit. No messages are exchanged between the Houses.[8] These arrangements are described in detail in Erskine May.[9]

This means that there is no power to compel the attendance of a minister in the Legislative Assembly before PAWC at the current time. While the Council could send a message to the Assembly requesting that the Assembly pass a resolution granting Minister Haylen leave to appear before the PAWC, and such messages have been adopted in the past,[10] such a step would have very little utility as it is clear that the Minister could already appear before PAWC if she wished without the leave of the Legislative Assembly. It could also be argued that such a step would not be consistent with the more contemporary practice in the House of Commons.

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[6] As a matter of comity and mutual respect between the Houses, neither House may exercise authority over the members of the other House. This is just as much a protection for members of the Legislative Council being subjected to inappropriate interference in the performance of their parliamentary duties by a hostile majority in the Legislative Assembly, as it is in the reverse.

[7] s 5, *Parliamentary Evidence Act 1901.*

[8] Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021), p 802.

[9] D Natzler KCB and M Hutton (eds) *Erskine May's Treatise on the The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 38.34.

[10] L.Lovelock and J.Evans, *New South Wales Legislative Council Practice* (Federation Press, 1st ed, 2008), pp 498-499.

Whilst section 4 precludes the summoning of Minister Haylen to appear before PAWC, it should be noted that the 'convention' on which the Minister Haylen declined to attend – that members in the Assembly are not required to attend Legislative Council inquiries - is clearly contrary to a modern understanding of the system of responsible government in New South Wales. It is clear from the reasoning of the High Court in *Egan v Willis* in 1998 that the government and its ministers are accountable to both Houses of the Parliament. This is discussed in further detail in the second edition of *New South Wales Legislative Council Practice* at pages 18-20 and 848. As such, whilst section 4 as it currently stands encapsulates the important concept of comity between the Houses, its implications in relation to ministers could be seen as to some extent out of step with the modern system of responsible government in New South Wales as it has come to be understood and practiced in NSW.

Members would be aware that that there have been many instances in which ministers in the other House have voluntarily appeared before Legislative Council committees. Former Premier Baird and former Treasurer Berejiklian attended a hearing to give evidence for the inquiry into the leasing of electricity infrastructure in 2015, and former Premier O'Farrell and three other Ministers gave evidence before the Select Committee on the Kooragang Island Orica Chemical Leak in 2011. It is also standard practice for ministers from both Houses and the President to appear before the Council's Portfolio Committees during Budget Estimates.[11]

Arguably, these examples in which ministers from the Assembly have attended Council inquiries are evidence of a growing understanding that the executive government and its ministers are responsible to both Houses of the Parliament and that the Upper House plays a significant role in holding the executive to account.

Options available to the PAWC

In the current circumstances, the most appropriate immediate step for the PAWC, should it consider it essential to hear evidence from the Minister in order to complete the inquiry, would be to write to the Minister for Transport to ask her to re-consider the invitation to appear, noting that as a minister she is accountable to the House and that the inquiry may be extended if necessary to enable her attendance.

Should the Minister decline a further invitation, and in the context of section 4 of the *Parliamentary Evidence Act*, options available to the Committee and to Members of the Legislative Council would include:

- authorising the Chair to make a statement to the media about the issue, which may influence the minister to re-consider the invitation and attend
- a member moving a censure motion in the House in relation to the Minister for Transport's decision not to attend to given evidence before PAWC
- further evidence relating to the inquiry being pursued through orders for papers in the House
- raising the inquiry issues with the minister during her appearance at Budget Estimates.[12]

It has been suggested that another option that might be considered would be the House suspending the Leader of the Government in the Legislative Council until such time as Minister Haylen appears

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[11] Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021), p 802.

[12] Should the Minister continue to refuse to attend to give evidence to PAWC, the House could consider further 'creative' approaches such as declining to pass bills from the Minister for Transport or some other similar arrangement until the minister appears before the committee.

and gives evidence. However, in my opinion, this would not be appropriate or within the 'self-defensive' power for the House to adopt this approach. Whilst the Leader of the Government can ultimately and rightly be held responsible for returns to order to the House, in my view it is doubtful whether the Leader of the Government can reasonably be held responsible for the decision of a minister in the other House not to attend a committee hearing.

David Blunt AM
5 September 2023