

Submission
No 3

**INQUIRY INTO PARLIAMENTARY EVIDENCE
AMENDMENT (MINISTERIAL ACCOUNTABILITY) BILL
2023**

Organisation: The Cabinet Office

Date Received: 18 October 2023

Ms Abigail Boyd MLC
Chair, Public Accountability and Works Committee
Parliament House
Macquarie Street, Sydney, NSW 2000
By EMAIL: PAWC@parliament.nsw.gov.au

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

Dear Ms Boyd,

Thank you for the opportunity to make a submission to the above inquiry.

I enclose a submission prepared by The Cabinet Office which addresses the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023.

The Cabinet Office has no objection to the enclosed submission being published on the Legislative Council's website.

Sincerely,

William Murphy PSM
Acting Secretary

Submission

Public Accountability and Works Committee Inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023

Executive Summary

- The Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 (**Bill**) seeks to amend the *Parliamentary Evidence Act 1901* (**Parliamentary Evidence Act**) to provide that Ministers of the Crown may be summonsed to attend and give evidence before a House of Parliament or a committee of Parliament. Consequential amendments are proposed to provide that a Minister is not entitled to be paid witness expenses.
- There is a longstanding convention, reflected in section 5 of the Parliamentary Evidence Act, that the attendance of Members before the Houses or their committees shall be procured in conformity with the procedure in the British House of Commons.
- In NSW, the practice is for a Minister to be *invited* to give evidence before a parliamentary committee. While there are examples of Ministers from both Houses accepting such invitations on a voluntary basis, committees do not seek to compel the appearance of Ministers from either House.
- This is an aspect of the principle of comity between the Houses; namely that neither House may exercise authority over a member of the other House. The principle of comity finds expression in the *Constitution Act 1902*, which establishes the two Houses of Parliament as separate and sovereign bodies with complete autonomy over their internal proceedings.
- The amendments proposed in the Bill are inconsistent with the principle of comity between the two Houses of Parliament.
- The coercive power proposed in the Bill is inconsistent with the institutional independence of the Houses.
- If the amendments are made, there is the potential for conflict between a summons issued under the Parliamentary Evidence Act and the Standing Orders of the Houses of Parliament.
- There is also the potential that the proposal may give rise to instances of attempts to interfere with the business of the other House.
- The current position in NSW is consistent with other jurisdictions.

The Parliamentary Evidence Act

The Parliamentary Evidence Act regulates the summoning, attendance and the giving of evidence by witnesses before parliamentary committees and the Houses of Parliament.

Absent the statutory power contained in the Parliamentary Evidence Act, the Houses of Parliament do not have an inherent power to compel witnesses to give evidence (*Fenton v Hampton* (1858) 11 Moore 347; 14 ER 727; *Egan v Willis* (1998) 195 CLR 424, per McHugh J at 468).

Section 4 of the Parliamentary Evidence Act provides that any person who is *not* a member of the Legislative Council or Legislative Assembly may be summonsed to attend and give evidence before the Council or Assembly or a committee.

The power to issue a summons under the Parliamentary Evidence Act is a coercive power. Failure to comply with a summons may result in a warrant for the apprehension of the person being issued by

a judge, upon certification by the Speaker or President, if the Speaker or President is not satisfied that there was a just cause or reasonable excuse for the failure to appear (sections 7 and 8). A witness who refuses to answer a lawful question is guilty of contempt of Parliament and is liable to imprisonment for up to one month.

Under the current law, different rules apply to the summoning of members of Parliament. Section 5 of the Parliamentary Evidence Act provides that members can be procured to attend in conformity (as far as practicable) with the procedure observed in the British House of Commons. As noted by Professor Anne Twomey in *The Constitution of New South Wales*, Members of the House of Commons, including Ministers who are members of that House, can only be *invited* to attend a House of Commons committee, rather than be summoned.

The *NSW Legislative Council Practice* (Federation Press, 2nd Edition, 2021) outlines the procedure in the British House of Commons (footnotes omitted):

In the United Kingdom, members of the House of Commons, including ministers, may not be formally summoned to attend as witnesses before House of Commons select committees. However, they may be requested to attend by written communication from the committee chair, and if they fail to attend the House may order their attendance. Members of the House of Lords, including ministers, may also not be formally summoned to attend as witnesses before House of Commons select committees, but are given leave under a standing order of the House of Lords to attend if they think fit. No messages are exchanged between the Houses.

The Bill is inconsistent with the principle of comity between the Houses

The Bill proposes to amend sections 4 and 5 of the Parliamentary Evidence Act to permit Ministers of the Crown to be summonsed to appear before a parliamentary committee or either of the Houses. Consequential amendments are also proposed to provide that a Minister is not entitled to be paid witness expenses.

The amendments proposed in the Bill are inconsistent with the principle of comity, or mutual respect, between the two Houses of Parliament.

The *Constitution Act 1902* establishes the two Houses of Parliament as separate and sovereign bodies with complete autonomy, subject to constitutional constraints, over their internal proceedings.

The principle of comity, which arises from this constitutional foundation, ensures the institutional integrity and equality of each House of Parliament. It includes the following elements:

- each House is equal with respect to each other;
- each House is totally independent of the other; and
- neither House can exercise authority over a member of the other.

The coercive power proposed in the Bill is inconsistent with the principle that neither House can exercise authority over a member of the other.

Ministers are accountable to the House in which they sit

Although not an express constitutional requirement, under the system of responsible government in NSW, convention requires that Ministers are members of one House or the other of Parliament. Chief Justice Gleeson has described this as a “conventional requirement” (*Egan v Willis* (1996) 40 NSWLR 650 at 660). Ministers are accountable to the House that they are a member of, not the other House.

In *Egan v Willis* (1998) 195 CLR 424, the High Court, Gaudron, Gummow and Hayne JJ considered the notion of ministerial responsibility, at 453:

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.

Professor Geoffrey Lindell has stated that *Egan v Willis* did not consider the exercise of coercive authority by one House over the members of the other House. Professor Lindell stated (in comments to the Senate Select Committee on a Certain Maritime Matter- Obligation of former ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees)¹:

It is unwise to assume that their Honours [in *Egan v Willis*] mean to suggest that an Upper House could exercise *coercive authority* over members of the other House in a bicameral parliament. For this purpose a distinction can and should be drawn between the ability to *inquire* over a matter and the *authority* that can be exercised in the course of carrying out that inquiry.

Similarly, Professor Enid Campbell, regarding ministerial accountability and responsibility to Parliament, observed (*Parliamentary Privilege*, Federation Press, 2003, pp.161-2):

The *Egan* litigation, it needs to be emphasised, was concerned primarily with the powers exercisable by a house in relation to a minister who is one of its own members. ...If the responsible minister is not a member of the house which seeks the information, the inquiry should be directed to the member of the house who represents that minister in proceedings before the House.

The Standing Orders currently provide the procedure for Members of Parliament to give evidence before a committee or House

Consistent with section 5 of the Parliamentary Evidence Act a member of the other House may be requested to appear before a House or committee and agree to do so *voluntarily*.

The Standing Rules of the Houses set out the current procedure for *requesting* the attendance of a Member to give evidence before a committee or House.

The General Committee chapter of the Standing Rules and Orders of the Legislative Council sets out the practice for summoning Members of Parliament. Standing Order 214(e) provides that a committee has the power to *request* the attendance of and examine members of the House.

Chapter 24 of the Legislative Assembly Standing Orders set out procedures for the attendance of witnesses, including Members of Parliament, before the Legislative Assembly and committees. The relevant Orders are:

- Order 324, which states that ‘The Clerk shall summons a witness, *not being Members*, to attend before the House’.
- Order 325 provides for the House to direct the attendance of one of its members for examination and the Speaker to issue an order.
- Order 326 provides that the Chair of a committee may *request* in writing a member to attend a hearing as a witness. If the member refuses, the committee shall take no action other than to report the refusal to the House.
- Order 327 provides that the House or committee can request to examine a member of the Legislative Council, and a message shall be sent to the Council *requesting* leave be granted.
- Similarly, Order 328 provides that if the Legislative Council or a committee wishes to examine a member or officer of the Legislative Assembly, the Legislative Assembly may authorise the member to attend, if the member *agrees*. The House may order an officer to attend.

It is unclear how the amendments would interact with procedures of the House

If the amendments are made, there is the potential for conflict between a summons issued under the Parliamentary Evidence Act and the Standing Orders of the Houses of Parliament.

¹ Available at:

https://www.aph.gov.au/~media/wopapub/senate/committee/maritime_incident_ctte/report/e02m_pdf.ashx

The Standing Orders are approved by the Governor pursuant to section 15 of the *Constitution Act 1902* and once approved become binding and of force.

There is a question as to how a conflict between the practices and procedures followed by both Houses that request the attendance and examination of a member of the other House and a summons issued under the Parliamentary Evidence Act, with coercive force, would be resolved.

The proposal may give rise to potential interference with the business of the other House

In 2002, a Senate committee inquiring into a Certain Maritime Incident (“the Children Overboard Inquiry”) sought to require former Minister Peter Reith, and several of his staff, to attend to give evidence.

Legal advice regarding the issue was obtained by the Clerk of the Senate from Mr Bret Walker SC and from the Clerk of the House of Representatives by Mr Alan Robertson QC and Professor Geoffrey Lindell.

In the advice given by Mr Walker, he notes the following rationale for the immunity against compulsion of a Member of another House:

...it is a public duty (not a private interest) of every Member of a House to attend to his or her business in its Chamber, freed of extraneous pressures. In a system of government which integrally involves legislation by proposal, debate and voting, and which involves responsibility of the Executive to the Houses of Parliament, by questions, enquiries, debate and resolutions (involving voting), it is obvious that the attendance of Members is a matter of cardinal importance.

In advice given by Mr Robertson, he considered that the purpose of the privilege or immunity is founded in institutional independence, and not simply in the need for Members to freely perform their day to day duties.

Professor Lindell considered that the immunity is:

likely based on the need for each House to function independently of, and without interference from, the authority of the other House.

There is the potential that the proposal may give rise to instances of attempts to interfere with the business of the other House – for example, by a committee seeking to compel one or more members of the other House to attend in order to stymie a vote on a government bill in the other House. As noted by the Legislative Review Committee in its review of the Bill, in the event a conflict arises, it is not clear how the conflict would be resolved. Where a person summoned to attend fails to attend, a warrant may be issued for the arrest of that person for the purpose of bringing the person before the House or committee to give evidence.

Alternative Ministerial accountability mechanisms are available under existing parliamentary practices and procedures

There are already numerous existing parliamentary practices and procedures which provide opportunities for members to question and seek information from Ministers to promote government accountability and transparency.

The existing accountability mechanisms include:

- Daily Question Time held each day the House sits which provides members of both Houses with an opportunity to ask questions without notice to Ministers who are members of the House.
- The annual Budget Estimates inquiry process, which will be conducted by the Legislative Council’s eight Portfolio Committees over 12-days in 2023, provides an opportunity for members of the Legislative Council to directly question, by invitation, Ministers from both Houses. It is

standard practice for the Premier and Ministers from both Houses to appear voluntarily before Budget Estimates inquiries.

- Motions of censure and no confidence. The Legislative Council has passed motions censuring a Minister in the Legislative Assembly. These censure motions do not offend the principle of comity and mutual respect between the two Houses as the motion relates to the conduct of a Minister in his or her capacity as a member of the executive government, rather than as a member of the Legislative Assembly.
- Cross-bench briefings which are held in every sitting week and provide an opportunity for members to ask questions of Ministers regarding Bills and related matters.
- Orders for papers pursuant to Standing Order 52 in the Legislative Council and Standing Order 269 in the Legislative Assembly to require a Minister to produce documents pursuant to an order of the House.
- Procedures under the recently developed *Protocol for proactive release of government information to Members of the Legislative Council*, including briefings with all members about government initiatives, policies, programs and decisions, special briefings and requests for documents.

Ministers have given evidence to committees on a voluntary basis

There are a number of examples of Ministers from either House being invited to give evidence to a committee of the Legislative Council and accepting the invitation.

For example, the following Ministers in the Legislative Assembly have appeared before Council committees:

- In 2007, the Hon. Reba Meagher, Minister for Health, voluntarily appeared before the Joint Select Committee on the Royal North Shore Hospital.
- In 2011, the Hon. Barry O'Farrell, when Premier, voluntarily appeared before the Legislative Council Select Committee on the Kooragang Island Orica Chemical Leak and also appeared before the Legislative Council Inquiry on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill.
- In 2015, the Hon. Michael Baird, when Premier, and the Hon. Gladys Berejiklian, when Treasurer, appeared before the Select Committee on the Leasing of Electricity Infrastructure.

There are also examples of Ministers in the Legislative Council voluntarily appearing before a Council committee. For example, in 2004, the Hon. Michael Egan, when Treasurer, appeared before the General Purpose Standing Committee No 1 Inquiry into the Mini Budget.

The existing provisions are consistent with other jurisdictions

The existing provisions of the Parliamentary Evidence Act are consistent with the practice of comparable jurisdictions.

In the United Kingdom, a Member of one House cannot be summoned or compelled by a committee of the other House to attend as a witness. Instead, each House asserts its right to grant or withhold leave for the Member to appear before the other House. As a matter of practice, each House will invariably grant leave (and has done so in general or standing terms) for the Member to attend the other House if the Minister so consents.

In the Commonwealth, a House of Parliament does not seek to compel the attendance of members of another House. The practice is for members to appear by invitation or request before another House or committee.

In the Victorian Parliament, the standing rules provide for a message to be sent by the House to the other House indicating that the House or committee wishes to examine a member and asking for

leave for that member to be examined on matters stated in the message. The South Australian Parliament standing orders are of similar effect.