REPORT ON PROCEEDINGS BEFORE

PUBLIC ACCOUNTABILITY AND WORKS COMMITTEE

PARLIAMENTARY EVIDENCE AMENDMENT (MINISTERIAL ACCOUNTABILITY) BILL 2023

CORRECTED

Virtual hearing via videoconference on Monday 23 October 2023

The Committee met at 9:05.

PRESENT

Ms Abigail Boyd (Chair)

The Hon. Mark Buttigieg
The Hon. Anthony D'Adam
The Hon. Scott Farlow (Deputy Chair)
The Hon. Mark Latham
The Hon. Peter Primrose
The Hon. Damien Tudehope

* Please note:
[inaudible] is used when audio words cannot be deciphered.
[audio malfunction] is used when words are lost due to a technical malfunction.
[disorder] is used when members or witnesses speak over one another.

The CHAIR: Welcome to the hearing of the Public Accountability and Works Committee's inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023. I am the Chair of the Committee, and I am sitting on the lands of the Awabakal, Guringai and Darkinjung people. I acknowledge the traditional custodians of the various lands from which everyone is joining us today, and any Aboriginal and Torres Strait Islander people participating or watching the broadcast. I pay respect to Elders past and present and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters in New South Wales.

Today's hearing is being conducted entirely virtually, with all members and witnesses participating via videoconference. Parliamentary privilege applies to witnesses in relation to the evidence they give today. However, it does not apply to what witnesses say outside of this hearing. I urge witnesses to be careful about making comments to the media or to others after completing their evidence today.

In addition, the Legislative Council has adopted rules to provide procedural fairness for inquiry participants. I encourage Committee members to be mindful of these procedures. To assist Hansard to transcribe today's virtual hearing, I ask all Committee members to mute their microphones when they are not speaking, to clearly identify who their questions are directed to and to avoid speaking over each other so that we can all be heard clearly. I now welcome our witnesses.

Mr DAVID BLUNT, Clerk of the Legislative Council and Clerk of Parliaments, sworn and examined

Professor GABRIELLE APPLEBY, University of New South Wales Law and Justice, affirmed and examined

The CHAIR: Welcome. I thank you both for making the time to give evidence today. There is an opportunity for you to make a short opening statement. Professor Appleby, would you like to make a statement?

GABRIELLE APPLEBY: Yes, thank you, Chair. Thank you to the Committee for the invitation to attend and give evidence. I apologise I wasn't in a position to provide a written statement prior to this hearing for various reasons. I have prepared some opening remarks and I'll deliver them to the Committee now. This bill amends the Parliamentary Evidence Act 1901 to extend the privileges of the Houses and the committees of Parliament to summon Ministers of the Crown to attend and give evidence.

The most contentious aspect of this bill is not the general requirement for Ministers to give evidence but the likelihood that this will result in Ministers from the Legislative Assembly being summoned by the Legislative Council to give evidence and thus breach the principle of comity and the right of each House to control their internal proceedings. This principle is currently reflected in the standing orders and practices of both of the Houses that allow for requests for Ministers from one House to attend and give evidence in the other, but no power to compel.

The New South Wales Court of Appeal in the 1997 decision of *Arena v Nader and Another* [1997] 42 NSWLR 427 at 434 has held that an amendment that enlarges the privileges of the Parliament does not engage the referendum requirement under section 7A of the Constitution Act 1902 for two key reasons. These rest on implied limits to the otherwise broadly stated requirement in that section. The court of appeal—justices Priestley, Hanley and Meagher—held that the requirement in that section is limited to the powers associated with the lawmaking function of the power and not the scope of parliamentary privilege. Secondly, according to a purposive construction, the requirement in section 7A is impliedly limited to alterations that lessen the powers of the Parliament. Thus, the current case law in New South Wales indicates that this bill does not trigger the referendum requirement in section 7A and could be passed by the Parliament.

I frame the substance of my opening remarks by reference to two key constitutional principles that exist somewhat in tension. They must be balanced or reconciled in relation to the key question that this bill raises—that is, as I said, whether members of one House in their capacity as government Ministers should be subject to the power of summons in the other House. The first principle is the responsibility of government through its Ministers to the Parliament. Here it's particularly important to note the constitutional role and functions of the Legislative Council, reinforced by the judgements of the High Court in Egan and Willis, as the Chamber from which the government is not formed and, therefore, its particular responsibility in holding the government to account. The powers of the Houses extend to all that is reasonably necessary to perform these constitutional functions.

The second principle that I want to reinforce is the constitutional position of the Parliament and the distinct constitutional positions of the two Houses, which give rise to parliamentary privileges and powers that ensure that Parliament is able to undertake its role and that the members of each House are able to fulfil their responsibilities free from interference. This gives rise to the principle that there are certain matters over which the Parliament and the Houses have exclusive cognisance. This extends to the privilege of one House to transact its business free from interference from the other House. This has been referred to as the principle of comity. So there is a tension between constitutional principles, responsibility and the necessary powers to give effect to that on the one hand and parliamentary privilege and comity on the other.

Historically, in the practice of New South Wales, this tension has been resolved in the following way. In its accountability and responsivity role, the Legislative Council does have power to call for documents from Ministers, including those from the other House. It has power to ask questions on notice from Ministers, including those from the other House. But, as following the position in the House of Commons, those powers do not extend to calling Ministers from another House to attend and give evidence. While the powers of a House include the power to direct its members, including to attend and give evidence and to discipline them, they have not extended to the power to the direct members of the other House. Rather, if one House seeks to call a member from the other House, it is done through a request and attendance by consent—although, of course, the other House retains the power to direct a member to attend if it chooses.

It is important to remember that in New South Wales, constitutional principles, particularly those in relation to responsible government, are achieved through a combination of statute, common law, parliamentary orders, convention and practice. Whether a harder or softer form of response is best required to achieve particular constitutional principles will depend on the practice and culture of the Parliament itself. In the New South Wales

Parliament, there is a longstanding practice of Ministers from the Legislative Assembly appearing voluntarily before the Council's committees, particularly the important budget estimates committees.

At the present time—and notwithstanding the individual incident that has given rise to the introduction of this bill—it would not appear that there is repetitive practice that has given rise to a pressing need to change the present position and the balance that has been historically struck between the competing tensions of responsibility and privilege. However, I would say to the Committee that future practice of the government's Ministers may indicate that the culture of New South Wales Parliament and government has changed, and this perhaps should be revisited. If it were to be revisited, I would advise the Parliament to consider carefully how this should be achieved, in particular whether simply extending the current powers and consequences in the Parliamentary Evidence Act, as is done in this bill, is the best way to do so.

There are two matters that I think need to be given greater consideration. The first is whether there should be different consequences for breach by a Minister. As Professor Twomey points out in her submission to the Committee, the consequences that currently flow from section 11 of the Parliamentary Evidence Act, which is a finding of contempt and imprisonment, raised the possibility of partisan show trials and the possible abuse of the powers in the Act. The second is whether the amendment should be accompanied by amendments to the standing orders designed to facilitate the attendance of Ministers in a way that does not disrupt the business of the other House, including things such as attendance at crucial votes—or, I should say, that disrupts as little as possible. It is better to achieve a balance between the competing constitutional principles that I have outlined at the start of my opening remarks. Thank you, Chair.

The CHAIR: Thank you. That was very useful. Mr Blunt, would you like to make an opening statement?

DAVID BLUNT: Thank you, Chair. I think Professor Appleby's opening comments illustrate why this is such an interesting and difficult conundrum that the Committee is grappling with in this inquiry and that the bill that's before the House is seeking to address. There really are a number of competing principles and competing conventions here. I would just like to address two matters, if I could, in my opening statement, not to in any way go over or repeat the same sorts of things that Professor Appleby has covered.

Firstly, I just want to deal with the question of whether the government and then secondly whether Ministers who are members of the Legislative Assembly are accountable to the Legislative Council. I think this is a really fundamental question. It was Mr Egan who in the 1990s argued before the New South Wales Court of Appeal through his lawyers and then before the High Court of Australia that the government is only accountable to the Legislative Assembly because that's the House where government is formed. Both the court of appeal and the High Court dismissed that argument. I have quoted in my submission from both the joint judgement of Gaudron, Gummow and Hayne and also from the judgement of Kirby that puts that suggestion to rest. The government is accountable to the Legislative Council.

Are Ministers who are members of the Legislative Assembly accountable to the Legislative Council? I guess there could be a semantic argument about the meaning of accountability. The Cabinet Office seems to suggest that to be accountable requires that you are subject to some form of sanction for noncompliance. I would accept that Ministers who are members of the Legislative Assembly are not liable to sanction for noncompliance with accountability to the Legislative Council. But I would argue that accountability is broader than just being subject to some sort of sanction for noncompliance; accountability is about being required to answer and being required to be responsible.

I think, in terms of the Parliamentary practice in New South Wales, there is no doubt that Ministers who are members of the Legislative Assembly are indeed accountable in that they are required to answer to not only the Legislative Assembly but the Legislative Council through such things as answers to questions on notice and through their offices and the agencies for which they are responsible being subject to orders for papers. In relation to orders for papers, the Leader of the Government in the Legislative Council is the person who is held to account if a Minister in the LA does not comply with such an order. In relation to questions on notice, if a Minister in the LA does not answer a question on notice then it is the Minister who represents them in the Legislative Council who is ultimately accountable. That is the first point I would make.

The second point I would make is that I have had the committee office do some research for me since making the submission so I can just add some statistics for you in relation to Ministers and Parliamentary secretaries who are members of the Legislative Assembly voluntarily appearing before Legislative Council committees in recent years. The office has kindly looked back at both the fifty-sixth and the fifty-seventh parliaments. That is the period from March 2015 through to February 2023. In the Fifty-Sixth Parliament, from 2015 to 2019, there were four Legislative Council committee inquiries at which a total of five Ministers voluntarily accepted invitations to give evidence and appear before those committees. During the Fifty-Seventh Parliament,

from 2019 to 2023, there was a total of nine inquiries at which 15 Ministers accepted invitations to appear voluntarily and gave evidence on 20 occasions. That is in general in relation to general inquiries.

Professor Appleby also referred to budget estimates and the unique position that we have here in New South Wales, where it is not only upper House Ministers who appear at budget estimates hearings, but it's also Legislative Assembly Ministers as well. Since 2018 there have been a total of 144 witness appearances by Ministers or Parliamentary Secretaries at Legislative Council budget estimates committee hearings, all by way of acceptance of invitations to appear. Otherwise, my submission stands. I also note the submissions from others, including my esteemed predecessor, John Evans. Clerks stand on the shoulders of those who have gone before, so of course I regard John Evans' submission with great respect and would associate myself with what he's said as well. Thank you.

The CHAIR: Thank you very much. That was also incredibly useful and illuminating. What we've decided to do is go to the Opposition first. Then we will have crossbench, followed by Government. Then we will perhaps do a bit of free flow, depending on what the online format allows. I am going to start, I think, with Mr Tudehope, if you're ready.

The Hon. DAMIEN TUDEHOPE: Thank you. Thank you both for making yourselves available today. Can I just start with you, Mr Clerk? Perhaps Professor Appleby can comment if she sees fit. Would you agree with me that this bill would require the passing of both Houses of the legislature if it was to become law?

DAVID BLUNT: Yes. I think that's beyond doubt.

The Hon. DAMIEN TUDEHOPE: If it passed both Houses of Parliament, you would agree with me, that would then potentially respect the democratic will of the people?

DAVID BLUNT: Yes, assuming that the points that Professor Appleby has made in relation to section 7A and the Arena and Nader decision are correct. I have no reason to doubt the position she has put there.

The Hon. DAMIEN TUDEHOPE: If, in fact, the growing tendency of the manner in which the political discourse is conducted in New South Wales is to enhance transparency in the way that the Executive conducts itself, would you agree with me that both Houses of the Parliament could in fact prioritise transparency over comity?

DAVID BLUNT: Yes. That would be a democratic choice that the Parliament could make.

The Hon. DAMIEN TUDEHOPE: So, in those circumstances, where there appears to be a battle between two principles, one where there is an increasing emphasis by the Parliament and by the Council to, in fact, stress the obligations in relation to transparency, the provisions of this bill could, in fact, enhance that level of transparency, could it not?

DAVID BLUNT: Yes. That is indeed the case, although there are complexities around that that I presume you'll explore in further questions. I wouldn't want a very brief answer to that question to be taken out of context or stand by itself.

The Hon. DAMIEN TUDEHOPE: Did you want to comment, Professor Appleby?

GABRIELLE APPLEBY: Yes, Mr Tudehope. I just wondered if I could provide a comment in relation to your prior question and this question as well. Just in relation to section 7A of the Constitution Act, the position that I outlined was the position of the New South Wales Court of Appeal in the Arena litigation. That's the case law as it currently stands. That's the position of the current case law in relation to this bill engaging section 7A. In relation to whether this bill would demonstrate a shift between the balances of what you refer to as transparency over comity and I referred to as responsibility and comity and privilege, I think I'm just going to echo Mr Blunt's comments in relation to the change in that balance and that there may be other considerations that should come into play in terms of determining where the balance should exactly lie. This would definitely represent a shift in that balance, but there may be other considerations that could come into play and there are other options that might be available for the Parliament to consider.

The Hon. DAMIEN TUDEHOPE: Such as, Professor, what other considerations?

GABRIELLE APPLEBY: Such as, as I outlined in my opening statement, in relation to what the consequences should be in relation to a Minister's breach of a summons and providing evidence—at the moment, the consequences flow, in section 11, a finding of contempt and imprisonment. As Professor Twomey indicated, this may give rise to concerns around abuse and the potential for show trials. So there should be consideration given to whether there might be alternatives for consequences. The other point that I raised is whether such an amendment should be accompanied by changes to standing orders that would facilitate the attendance of Ministers in a way that doesn't disrupt the business of the other House or disrupts as little as possible the business from the

other House, including things such as attendance at crucial votes, which is one of the concerns in relation to the inclusion of such a power—finding a slightly different balance than one that just simply removes the exclusion of Ministers from the current bill.

The Hon. DAMIEN TUDEHOPE: You would agree with me that both those issues could be addressed by amendments to this bill, could they not?

GABRIELLE APPLEBY: Could be addressed through legislation or through—

The Hon. DAMIEN TUDEHOPE: Through amendment to this bill, to address both those issues which you've identified.

GABRIELLE APPLEBY: Yes. That's correct—or through an amendment to the bill, coupled with an introduction to an amendment of standing orders, yes.

DAVID BLUNT: If I could just come to the competing principles that are at stake here and the importance of the principle of comity. Comity is certainly something that's a living, breathing principle for the Parliament of New South Wales. We see it play out frequently. There's a member of the Committee who, when President, gave some very important rulings in relation to the principle of comity, not that many years ago. So it is very much a live principle. I think it needs to be remembered that the principle is important, not just to protect members of the Legislative Council from the Legislative Assembly. It also works just as much in the reverse in that it's a protection for the Legislative Council and its members from the risk of interference by the other House—a House where, except once in a generation, the Government of the day tends to have a large majority. So members of the Legislative Council are well served by the principle of comity from interference from, potentially, a hostile majority in the other place. So I do think that needs to be borne into account. These matters are finely balanced and complex.

The Hon. DAMIEN TUDEHOPE: But, bearing in mind, of course, that your opening remarks suggested that the principal role of the Council was, as articulated in Egan's cases, a House of review and that its powers should not be diminished in respect of its obligations, you would agree with me, would you not, that in fact that last consideration—about whether Ministers in the Council should be concerned about appearing before the Legislative Assembly—does not necessarily apply in terms of the review responsibilities of the Council?

DAVID BLUNT: I'm not quite sure that I follow you.

The Hon. DAMIEN TUDEHOPE: The Assembly doesn't act as a House of review for the decisions of the Council, does it?

DAVID BLUNT: Not frequently. It usually happens the other way around.

The Hon. DAMIEN TUDEHOPE: You would agree with me, would you not, that this is a bill which only applies to the Executive Government?

DAVID BLUNT: Yes. The bill seeks to distinguish the roles of members of both Houses between their role as a member—that is as what the Americans would call as a legislator—and as a member of the Executive. It's a really interesting bill. It's a serious attempt to grapple with fundamentally difficult constitutional principles and conventions. I commend you for introducing it as a contribution to a legal consideration of these matters and to scholarship. It will be of great interest, not only here in this Parliament but around Australia and in other places as well. However, whilst it's a serious attempt to grapple with these matters, difficulties remain in relation to the seriousness of the principles of comity.

The Hon. DAMIEN TUDEHOPE: The two principles that seem to be the concerns not so much of yourself but of Professor Appleby appear to be issues that can be dealt with by way of amendments to this bill, so far as is necessary, and to the standing orders, could they not?

DAVID BLUNT: Absolutely. In relation to amendments to the standing orders, I was interested in Professor Appleby's observations there. As I indicated, I always treat the views of my predecessor, John Evans, with the greatest of respect. I notice that he has also suggested that these matters could be dealt with by way of standing order. I'm not seeing exactly how that could assist us in this matter at the moment, given that it hasn't been necessary for the Legislative Council to adopt standing orders in this matter so far. And yet, as I mentioned in my opening, we've seen 20 ministerial appearances before the Legislative Council committees during the last parliamentary term and 144 ministerial and Parliamentary Secretary appearances before Legislative Council committees in the last Parliament. So I'm not sure that standing orders are necessary for Ministers from the Legislative Assembly to be accountable to Legislative Council committees.

The Hon. DAMIEN TUDEHOPE: On that basis, then, the accountability provisions could be addressed, could they not, by an amendment to the legislation, if in fact there were concerns about that?

DAVID BLUNT: I am not a parliamentary drafter. If there was an amendment to the bill, that would certainly be something that I'd look at and I'm sure many other people would look at with great interest.

The Hon. DAMIEN TUDEHOPE: If this Committee decided that transparency trumped comity, then that would be the correct approach for addressing the issue of accountability, would it not?

DAVID BLUNT: That would certainly be one option that's available.

The Hon. DAMIEN TUDEHOPE: Currently, of course, Ministers in the Legislative Council can be compelled, can they not?

DAVID BLUNT: Yes, I believe a Minister in the Legislative Council could be compelled by an order of the Legislative Council to appear before a Legislative Council committee.

The Hon. DAMIEN TUDEHOPE: There is no suggestion that any of those Ministers have been the subject of show trials, has there?

DAVID BLUNT: I think that's a matter for judgement by members rather than by me.

GABRIELLE APPLEBY: I wanted to clarify a couple of points. There might have been a misunderstanding in relation to my opening remarks or my subsequent remarks. I agree with Mr Blunt that a change to the powers of the House to compel Ministers from the other House would require legislative change and could not be done through standing orders only. My reference to amendments to standing orders was in relation to achieving a balance, should an amendment be made to the legislation to extend that power, in relation to how that might be exercised to continue to respect, to the extent possible, the processes in the other House. It wasn't a submission that the entire objectives of this bill could be achieved through an amendment to standing orders.

I would just follow up and reinforce the point that Mr Blunt was making in relation to the existing powers of the Legislative Council to compel Ministers in the Council to attend. This rests on the power to issue a direction to the members of the House and the power to discipline them. It doesn't rest on the Parliamentary Evidence Act, and the consequences that flow do not flow from section 11 in relation to a finding of contempt and imprisonment, and would be at the discretion of the House. So it's different consequences that flow in relation to the current powers of the Legislative Council to compel its own members. I wanted to clarify that point.

The Hon. DAMIEN TUDEHOPE: It would probably depend upon how egregious the breach was, of course.

GABRIELLE APPLEBY: That's my point in relation to consequences. At the moment, the current power of the House to compel its own members is a much more tailored and discretionary response in relation to that power to discipline, as opposed to relying on the consequences in section 11 of the Parliamentary Evidence Act.

The Hon. DAMIEN TUDEHOPE: Would you agree with me, Mr Clerk, that the impact of this bill would be to increase the accountability of Executive Government?

DAVID BLUNT: Yes, it would. However, again I don't want that answer to stand in isolation from the rest of my evidence as to the complexity of these matters.

The Hon. DAMIEN TUDEHOPE: I accept the complexity. But if the object of this Act is to increase accountability of the Executive Government, this bill would achieve that, would it not?

DAVID BLUNT: Yes.

The Hon. SCOTT FARLOW: Back to the question, Mr Clerk, in terms of those who have appeared before parliamentary inquiries from the Legislative Assembly, have you got any data in terms of the number of members over those Parliaments that have not appeared after the Legislative Council has made a request?

DAVID BLUNT: No, I don't. I'm very grateful to the committee office for the research they've done. Essentially they've gone back through the records of witness lists that appear in committee reports and have tallied up the number of ministerial and Parliamentary Secretary attendances from those witness lists for general inquiries over two parliamentary terms and for budget estimates over five years. Exploring where invitations have been issued and they have been declined would be a far more administratively burdensome task, and I have not required that of the committee office at this point in time.

The Hon. SCOTT FARLOW: I appreciate the burden of that, but I will say that from being a member of those Parliaments, I do remember. I will acknowledge that they were members of a government that I was a part of at the time, but I do remember there being invitations that were declined as well, for both Ministers and Parliamentary Secretaries in those terms of Parliament. You outlined the unique position we have in New South

Wales where budget estimates has the presence of Government Ministers, which we, of course, are appreciative of. But there is no requirement for that to be the case, is there?

DAVID BLUNT: No. The Ministers and Parliamentary Secretaries from the Legislative Assembly appear in response to invitations. They appear voluntarily. There is no way of compelling their attendance. Back in the early 1990s, during the Fiftieth Parliament, when the budget estimates process began in New South Wales—initially with joint committees and then from 1995 the process came over to the Legislative Council—for about six or seven years there were formal messages exchanged between both Houses. Nevertheless, the messages did not have the effect of compelling attendance. They were just the formality that was followed at that point of time. My understanding is that the exchange of messages fell away when practice in the House of Commons and the House of Lords changed. There was a falling off in the exchange of messages between those two Houses when members or Ministers of either House were to appear. For the past 20 years, certainly since 1999—so that's 24 years—it has simply been by way of invitation issued by a committee which has resulted in LA Ministers and Parliamentary Secretaries attending the budget estimates.

The Hon. SCOTT FARLOW: Professor Twomey in her submission outlined that, effectively, the Houses had "long been satisfied" by Ministers being represented in either House. Mr Clerk, is that a requirement that Ministers be represented in either House or is that just another form of practice that has emerged in New South Wales?

DAVID BLUNT: It is a form of practice that has emerged. It is one of the outworkings of the balance of the competing principles that we've been exploring this morning and the way in which the New South Wales Parliament has addressed this matter. For many, many years Ministers have been represented by Ministers in the other House. It is the Ministers in the Legislative Council who represent LA Ministers who are ultimately responsible for, for instance, the answers to questions on notice that an LA Minister provides.

The Hon. SCOTT FARLOW: While it isn't practice, of course, it is technically possible that a government could both not attend budget estimates or not have Ministers attend budget estimates and could have no representative in the Legislative Council. Is that true?

DAVID BLUNT: If the government of the day took a decision to instruct its Ministers and Parliamentary Secretaries in the LA not to attend budget estimates then, yes, they could do that. That would certainly be not in keeping with the practice and the conventions that have developed over some time. I think it would be a matter that they would have to justify to their colleagues.

The Hon. SCOTT FARLOW: It would certainly make the headlines.

DAVID BLUNT: Yes.

The Hon. MARK LATHAM: I thank Professor Appleby and our Clerk for their involvement in the inquiry, and also the authors of the four excellent submissions that have been made. Professor Appleby, in reading your submission and also listening to your opening statement I personally feel like we're in no position to overturn the longstanding principles of comity, but I am interested in the possibility if the bill was passed by both Houses of the Parliament but then challenged in the courts. What do you think would be the outcome?

GABRIELLE APPLEBY: As I indicated, there is precedent of a unanimous Court of Appeal of New South Wales that's considered this question of whether section 7A of the Constitution Act would require a bill that amended the powers of the Parliament in relation to privilege in a way that expanded rather than reduced those powers. The court there indicated, for two reasons that I outlined in my opening remarks, that they didn't think that the construction of section 7A extended to this type of bill. That's the position of that court. I have reviewed it closely over the last few days in preparing my remarks for the Committee.

My view is that it would be open to a further challenge and it may be brought before the courts, but you would have a unanimous decision of the Court of Appeal that would need to be overturned in order for that decision to be successful. You've got those two key strands of reasoning which draw on the purpose of section 7A and the reason why it was enacted as to why they have interpreted it in that way. In terms of prospects of success, I think you're looking at relatively limited prospects. In terms of likelihood of a challenge, you can never rule out a challenge. I've just come from the debate in relation to the Federal referendum. You can never rule out the fact that there might be a challenge, but that's the current position of the case law in relation to this particular issue.

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.

The Hon. MARK LATHAM: It's an interesting point. Ministers are not only responsible to the Parliament but they've also got to be responsible for the actions of their staff and their department. So you could take the chief of staff's evidence as being de facto ministerial evidence, but that's a separate question. Mr Blunt, in your submission you've set out some of the actions, other than this particular bill, that the Committee and the LC could take. I want to explore a further option in light of what seems to be the unprecedented decision of the transport Minister not to attend when her chief of staff did, and that is to go to the heart of the purpose of a ministerial attendance: We want to ask questions. The other forum in which we can ask questions, aside from budget estimates, is on notice.

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 though 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.

The CHAIR: Thank you, Mr Latham. Go ahead, Professor Appleby.

GABRIELLE APPLEBY: I wanted to add one comment in relation to my views on Mr Latham's questions and Mr Blunt's response. It would be my view that the House would have the legal capacity to make a change of such sorts. But I think Mr Blunt's comments are really important, which are that you would need to review the full context in which such a change would happen and make sure it's consistent or takes into account existing standing orders, sessional orders and practice. But I would just say that this consideration of other options by way in which to get the balance between that responsibility and comity would be, I think, a really fruitful thing for the Committee to explore this idea that Mr Latham has put forward, but other options as well, because I think the exact calibration of the balance is a really important thing for the Committee to be mindful of. Thank you. Sorry, Chair.

The CHAIR: That's okay. Thank you. I think we could be talking for hours if we had the opportunity. I wanted to test the bounds of the comity principle. I fully understand that under the principle it is important that we are not having LA members interfering with the operations of the LC and vice versa. However, there is a difference between a person's membership of a House and that person's membership of the Executive. I wanted to test that, because we do have this tension. But by seeking to call a Minister to an LC Committee in order to hold the Executive accountable to the Parliament, that is not the same as interfering in the operations of the House in terms of telling it what it can and can't do with its members, I would think. I am curious to where that bound is, and back to Mr Tudehope's points about if you did have this principle, what sort of amendments would we need to make, in addition to what's been proposed in the bill, in order to ensure that that principle of comity is still ensured, while also holding those people to account in their capacity as Minister, not as in their capacity as members of the LA? I ask you first, Mr Blunt.

DAVID BLUNT: Thanks, Chair. That's a great question as well. One issue that I think needs to be considered is the extent to which the dual responsibilities of a member of the LA who is also a Minister—their Executive roles and their parliamentary membership roles—can be divorced from one another. Certainly, the bill seeks to do that and make that distinction. Of course, if we are operating in a non-parliamentary system, in a presidential system, then there would be no issue because members of the Executive are just members of the Executive and the separation of powers is very clear. In a Westminster style parliamentary system, that distinction is not clear because Ministers are members of Parliament. I don't know that it's necessarily possible to completely separate the roles. The second thing that I would say is that I'm not as concerned as, for instance, Professor Twomey is about the risk of Legislative Council committees turning appearances by LA Ministers into show trials. I have great faith in members of the Legislative Council to act with good judgment and to hold Ministers to account without unduly traversing on their rights.

However, once something is put in law, there are risks around the way in which potential future generations of members might not be as reasonable as all of you are or act with the good judgement that you exercise but might seek to exercise such a power in a way that was unreasonable or that genuinely did interfere with the operations of the Legislative Assembly. I think that's the risk of addressing—whilst I commend the object of the bill and the contribution that it's made to consideration of these really interesting, difficult and conflicting principles, the risk of doing it by way of legislation is what the consequences for the future are.

There's also another risk that I think my predecessor, John Evans, explored, or touched on, in his submission, which is that as soon as the Parliament legislates in relation to anything that it does, the powers that it exercises and the way it goes about exercising those powers—once something is in legislation, rather than just done by way of parliamentary practice and procedure and the standing orders, it automatically becomes justiciable and therefore invites the courts in to get involved in casting judgements about the way in which the Parliament

goes about its work. I'm glad that John Evans has raised that point because it's one that hadn't occurred to me when I made my submission. I do think one needs to be very mindful about the risks associated with legislating and, therefore, allowing the courts to intrude into the operations of Parliament.

The CHAIR: I'll go to Professor Appleby. A lot of what I've read in these submissions is making that point about how we are relying on tradition and culture in a huge way. I take your points, Mr Blunt, in relation to the dangers of putting things in legislation but also needing to—you referred to how the Legislative Council obviously wouldn't turn these things into a show trial because of the nature of who we currently have—futureproof that against what future members we may have. Similarly, we could have a government in the future who, for example, decides to avoid all accountability for Ministers by having them all in the lower House or continues to do what we have seen in terms of refusing to have a Minister attend a Legislative Council inquiry. Don't we need to futureproof against that as well? We seem to be, at this moment of—we have been relying on tradition but things are gradually being broken down. With those thoughts, Professor Appleby, did you want to comment?

GABRIELLE APPLEBY: Yes, thank you, Chair. I would just reinforce the important point that Mr Blunt makes in relation to the Westminster system that we have in New South Wales and elsewhere in Australia that, unlike with a system with full the separation of powers between the Executive and the Legislature, the strength is through responsible government in the sitting of Ministers in Parliament. The complexity, then, relates to the principle of comity and respecting that dual role that an individual may have in relation to being a member of the Legislative Assembly whilst also being a member of the Executive.

The crystallisation of that complexity, in this particular bill, relates to where a person may be called as a Minister—and the amendment in the bill is very carefully drafted to focus on those members who hold ministerial portfolios—but also sit as members of the Legislative Assembly. As Mr Blunt points out in his submission, that means that powers such as this couldn't allow a future Council to disrupt the proceedings of the Assembly by requiring attendance of a person in their ministerial capacity when the House requires their attendance in a legislative capacity. There is a complexity of holding both hats and it is not possible, I don't think, in our system of government to entirely distinguish those two roles that a single individual plays. As I said, it's a strength of our system, but it's a complexity that must be navigated.

In relation to the point about relying on tradition and culture, I think that is a really important point. Having been involved in a number of committee inquiries—not just here in New South Wales but across Australia—in relation to potential amendments of parliamentary privileges legislation, that, both in terms of futureproofing and how it may operate in practice, really must be kept in mind. Mr Blunt's response, for example, to Mr Latham's proposition about needing to review what the current standing orders and the practices are to properly understand how that might operate in New South Wales is really well taken and is a really important one. I think the point that you make, Chair, in relation to futureproofing is also a really important point. That is the spirit in which the final remarks in my opening remarks were made. I am encouraged by the way this hearing has proceeded in relation to the Committee considering the different ways in which that futureproofing may be achieved, and that one way is through the proposal in the bill.

As we've talked about, this raises concerns as to whether that collaboration between the competing principles has been correctly achieved, or whether there may be alternative ways to futureproof against such an incident, which may rely on changes to the standing orders and questions on notice—as we've just considered—or on combined changes to legislation as well as standing orders, in relation to consequences and processes for how such a power may be exercised. I think that when we're talking about futureproofing, the practice of the New South Wales Parliament currently and the potential for the practice in the future both need to be taken into account. That development and exploring of options is a really important thing for the Committee to be doing.

The CHAIR: Thank you very much. Mr Blunt wanted to respond. Then I will go to the Labor members.

DAVID BLUNT: Thank you very much, Chair. My response is in relation to one aspect of your preamble to your question to Professor Appleby, which was about current practice or what we may be seeing happen at the moment. I think it's another reason why this inquiry is so timely and why the introduction of the bill is helpful—in that it's triggered this discussion—because it is very early in the new parliamentary term. My understanding is that, at this stage of the Fifty-Eighth Parliament, we've had two committees invite Legislative Assembly Ministers to attend before them. One of those Ministers accepted the invitation and attended voluntarily, while one of the Ministers did not.

We do, however, have budget estimates starting tomorrow and we have 22 Ministers who have accepted invitations to attend over the next three weeks, so, at this stage, it would look like the trend from the last two parliamentary terms, reflected in the statistics that I quoted, could be assumed to continue. If that was not the case and if, for instance, there was a decision taken by the New South Wales Government to direct Ministers and Parliamentary Secretaries not to attend that budget estimates, then I think the tone of my answers to particularly

Mr Tudehope's questions about where the balance is stuck and whether this sort of legislation would be an appropriate response to such a trend would be quite different.

The Hon. PETER PRIMROSE: I have two questions for both witnesses. I'd be interested in your comments on the conclusions from two of the submissions we've received. The first one is from Professor Anne Twomey. The last paragraph says:

> The responsibility of ministers to the Houses of Parliament has long been satisfied by Ministers in one House being represented in the other House by Ministers who are Members of that House. This may also be supplemented by voluntary appearances, as already permitted by both the *Parliamentary Evidence Act 1901* and the existing Standing Orders. I see no good reason for change.

You would agree with that, wouldn't you?

DAVID BLUNT: I refer back to the answer that I just gave to the Chair. Certainly, provided that the sorts of trends we've seen in recent Parliaments continued into the future.

GABRIELLE APPLEBY: I refer back to not my submission but my opening remarks. If the practice of the Government were to change as such, that the concerns in relation to where the current balance lies between respecting comity and responsibility were to shift, this proposal should be given really serious thought and the possibility of different options, as I've indicated in those opening remarks, should be canvassed. Although I should say that this consideration by the Committee at this time, where there is the current incident that gave rise to the introduction of the bill, as well as the commencement of the new Government—it's an opportune time to consider some alternatives. As I said, the discussions of the Committee today have been really constructive in relation to the different ways in which the balance between the principles might be shifted, which could involve changes to legislation, perhaps in conjunction with changes to standing orders—or even making changes to standing orders only—and leveraging further the existing mechanisms that Professor Twomey refers to in that paragraph in different ways.

The Hon. PETER PRIMROSE: My understanding then from both of you is that it's an interesting hypothetical given that we may have some sort of dystopian future in which the Parliament changes its direction. The second quote is from paragraph 15 of John Evans' submission. It says:

> I feel there are ample opportunities for Members of the Council to obtain relevant information from the Executive Government through, for example, Orders for productions of Papers, Questions on Notice and calling Public Servants to appear as a witness before a committee, without resort to amendment of the law.

I think that is probably similar to the conclusion of Professor Twomey. I'm just giving you both the opportunity to again comment in respect of the possible dystopian future in which this law would be required.

DAVID BLUNT: Sorry, I was waiting for Professor Appleby to go first, if she wishes to. I will never disagree with the views expressed by my predecessor, John Evans, except in very exceptional circumstances. I won't disagree with them now. I endorse what he has had to say there, with two qualifications. The first is that if we did see a change in practice in terms of, for instance, a government ordering its Ministers and Parliamentary Secretaries in the Legislative Assembly not to attend before budget estimates, or if we saw a growing trend of Ministers declining invitations to attend, in those circumstances, yes, the tone of my answers to many of the questions today would be different about where the balance should be struck.

The second qualification that I would make would be to again reiterate that, at the same time as endorsing Mr Evans' conclusion, I would also wish to commend Mr Tudehope for bringing forward the bill that's before the House and being considered by the Committee. It's very timely, at the early stages of a new parliamentary term, when there has been a Minister decline an invitation to attend, to see these matters receive the attention that they have and the very careful deliberation that's occurring today.

GABRIELLE APPLEBY: I think the conclusion that you read out in paragraph 15 of Mr Evans' submission is largely the same as that from Ms Twomey's submissions. At a time when there isn't the moment of crisis that a change in future practice may bring, and the sense of tension and political tension that may bring, it is actually an opportune time for the Committee and the Council to be considering the current practice—even if not moving on amendments, whether that be to legislation or standing orders—and different options as to how the House may in future recalibrate where that balance lies, such as the consideration of options that Mr Latham has put forward. It's a really opportune time for this Committee hearing, whether or not this bill proceeds, because it could then very constructively produce a series of options that the Council may have before it, should the future practice change, and different ways in which that calibration between the principles can be tweaked rather than doing so at a point of future crisis. I commend the introduction of the bill, the consideration of this Committee and the discussion so far for that reason.

The Hon. PETER PRIMROSE: So it's an interesting hypothetical for a future time. Thank you very much.

The Hon. MARK BUTTIGIEG: In the danger of sounding like I got caught up in some of the intricacies of legal speak, I will distil what I took as the thrust of the evidence. That is that, on balance—and I stress the word "balance"—there are numerous mechanisms for accountability that the House has asserted successfully over many years, including the current term, and that, if we were to pass Mr Tudehope's bill, the balance would be tipped to a point where disruption of the House's proceedings would be a by-product of the bill passing. In other words, a mendacious upper House could in fact disrupt the Parliament by virtue of the powers that are being proposed in Mr Tudehope's bill. Is that a fair enough assessment of the evidence today?

GABRIELLE APPLEBY: I would add to that summary, at least from my evidence—I don't want to speak for the Clerk, Mr Blunt—that I think it's a very constructive and productive exercise to consider alternatives through which accountability can be achieved by the Council in the event of a future where the government is not as cooperative in relation to those requests for Ministers to appear, which currently performs a very important part of the practice of accountability, if not the enforcement of accountability. That is part of the evidence that has been put forward today. There should be options available to the House, whether it be in the form of this legislation or other options that we've discussed.

DAVID BLUNT: I just refer to my earlier answers and evidence, Mr Buttigieg. Ministerial accountability is absolutely essential to the operations of the Westminster parliamentary system of government and responsible government. The principle of comity is long-established and really important for both Houses. There are principles and conventions that are in tension here. This bill is an attempt to tweak, to recalibrate, to rebalance the operation of those conventions. It's commendable. Is it absolutely necessary right now? Well, it is probably not necessary right now if the practice that we've seen in the last couple of parliamentary terms, as reflected in the statistics that I quoted, continues. That practice continuing, though, does rely upon the goodwill and indeed the good sense and good judgement of government—the Government today and governments into the future—to take a long view of the importance of responsibility and accountability. In relation to accountability through answers to things like questions on notice and responses to orders for the production of documents, it also relies upon good practices by governments in responding to both those things. I think I'd leave it there.

The Hon. MARK BUTTIGIEG: So in the current environment, and given the current practice of Executive Government, both in the last term and in the current term, this is unnecessary, but it may be necessary in the future where a government became obstinate—that is essentially what you are both saying?

DAVID BLUNT: Whether it's necessary is ultimately going to be a matter for the judgement of, initially, this Committee as it deliberates and reports to the House, and then for the House to form its view on the bill. But again I'd refer back to my earlier evidence and answers.

GABRIELLE APPLEBY: I would just say, in relation to that, as Mr Blunt referred to, this is a new term with a new government. There has been this instance of a Minister of refusing to attend on invitation. In a sense there is notice to keep watch, but there is also indication that the Government intends to comply with existing practice. I think it's an on opportune time for this consideration to be given. The introduction of this bill provides that as well, and the Council should consider the options before it.

The Hon. ANTHONY D'ADAM: I think Ms Boyd foreshadowed a scenario where the Executive chose not to name any Ministers in the upper House. That is practically impossible, isn't it? I mean, the Legislative Council couldn't operate without a Minister, so that would be an unprecedented and—well, it would render the Council unable to meet, wouldn't it, Mr Blunt?

DAVID BLUNT: The Leader of the Government, Ms Sharpe, also has the title of Vice-President of the Executive Council. She is the Government's representative in the Legislative Council, if you like. In years gone by, for many years there were no Ministers as such in the Legislative Council. However, there has always been a member designated as the representative of the Government in the Council. You're right: It would be impossible for government to function in New South Wales without an official representative in the Legislative Council, and that person has always been the Vice-President of the Executive Council.

Over recent years, though, we've seen numbers of Ministers—well, certainly since 1978 and the reconstitution of the Legislative Council as democratically, directly elected by proportional representation, which is where the modern history of the Council starts, there have always been Ministers, sometimes as few as two. During the last years of the Labor Government prior to the election of the O'Farrell Government I think we got to something like seven Ministers at one stage. So the number varies, but certainly since 1978 there have always been at least two Ministers in the Council. But prior to that, for many years no Ministers but a representative of the Government.

The Hon. DAMIEN TUDEHOPE: Of course, this bill has been precipitated by a particular course of conduct by a particular Minister in respect of her decision not to appear. It is common practice, of course, in the

Commonwealth Government for Ministers not to appear. In fact, I'm sure Mr Latham would agreed that he would have welcomed an opportunity to question Peter Reith in relation to the children overboard inquiry.

The Hon. MARK LATHAM: [Audio malfunction] I was never a senator.

The Hon. DAMIEN TUDEHOPE: Well, Labor Party senators might have welcomed an opportunity to. In fact, if we were to pass the bill into law, it would be the first such indication that houses of review take accountability to a new and significant level, would it not?

DAVID BLUNT: As I said, I think this bill will be looked at with considerable interest in other parliaments. It would certainly set a very significant precedent if it was enacted. While you make reference to the situation involving Mr Reith and the Senate committee inquiry into the children overboard matter, I make this point that in New South Wales whilst a serving Minister or Parliamentary Secretary who is a member of the Legislative Assembly cannot be summoned to appear before a Legislative Council inquiry—members of the Legislative Assembly are the only class of citizens who cannot be summoned to appear—a former Minister can be summoned. That's because here in New South Wales the powers in relation to the summoning of witnesses to attend either before the House or committees have been dealt with in legislation in the Parliamentary Evidence Act.

One of the consequences of the Parliamentary Evidence Act—even though the Act has some curious provisions, some of which Professor Appleby has referred to today, such as the consequences for not answering a lawful question or not attending in response to a summons in certain circumstances and it contains olde-worlde and outdated language, it is a powerful piece of legislation. Mr Reith, once he had ceased to be a Minister, would not have had the same luxury of not being summoned to appear before an upper House committee here in New South Wales.

The Hon. DAMIEN TUDEHOPE: That's an important point that you make: that there are a very narrow class of people who cannot be summonsed to appear. Just about every other person in the State can be compelled to appear except this very narrow class of people, some of whom constitute the Executive Government. This change, should it be made, would be to add that group of people who occupy positions in the Executive Government to be more accountable, would it not?

DAVID BLUNT: It would indeed have that effect. However, I'd want that answer to be read in conjunction with everything else that I've said this morning.

The Hon. DAMIEN TUDEHOPE: I'm sure you would. But what I put to you is that it has been put by Mr Primrose that this is a bill for a future time. What I want you to comment on Mr Blunt, is this: The nature of political discourse is such that in circumstances where we have an increased focus on transparency of the Executive Government, now is the appropriate time to actually consider these matters and to say, does this provision which excludes members of the Executive Government from being accountable in this manner, being compelled to appear before an upper House inquiry—is this not a sentiment for the present rather than waiting for some future time?

DAVID BLUNT: Mr Tudehope, I couldn't agree with you more that now is the right time to consider these matters. I think I've made that point on a number of occasions this morning. It's really timely that these matters are considered. Whether it's the right time to make the change and recalibrate the competing principles and conventions is a matter that you are all considering deeply and carefully and that the House will no doubt come to a sound decision on.

The CHAIR: We have unfortunately run out of time but I will allow—

The Hon. DAMIEN TUDEHOPE: No, I'm fine. I think I've obtained the evidence that I need. Thank you.

The CHAIR: Okay. We'll just let Professor Appleby have a final comment as well. Go ahead.

GABRIELLE APPLEBY: Thank you, Chair. I just wanted to add in relation to Mr Tudehope's comments in relation to the current exclusion of a very narrow group of people from the power in the Parliamentary Evidence Act to summons, that this very narrow group of people occupy a distinct constitutional position that engages the principle of comity, as we've discussed at length, but also this group of people is subject to accountability to the Council in other ways, and so it's appropriate that the Committee consider those principles in tangent when looking at whether to remove the current exclusion. Thank you, Chair.

The CHAIR: That does conclude our hearing for today. Thank you very much for your evidence. The secretariat will contact you in relation to any questions taken on notice. The Committee did resolve that questions

on notice from today's hearing be due on Monday 6 November, which is a little bit earlier than normal, but the Committee secretariat will be in touch to discuss. Thank you all for your attendance.

(The witnesses withdrew.)

The Committee adjourned at 10:35.