New South Wales Legislative Council

Witnesses before the Select Committee on the Relationship between the Dural Caravan Incident and the Passage of Relevant Bills through the Legislative Council (Committee)

Opinion

A. Introduction

1. The President of the Legislative Council is considering whether to certify certain facts under his hand and seal to a Judge of the Supreme Court under s 7 of the *Parliamentary Evidence Act 1901* (NSW) (**Act**). Those facts include, relevantly, that five members of ministerial staff did not have just cause or reasonable excuse to not attend to give evidence at a hearing of the Committee after having been summoned to do so in accordance with s 4 of the Act.

2. The consequences of the President's certification under s 7 of the Act are:

   (a) the Judge of the Supreme Court "shall issue a warrant" for the apprehension of the staff members for the purposes of bringing them before the Committee to give evidence (s 8 of the Act); and

   (b) that warrant will be sufficient authority to apprehend and retain the staff members for the purposes of appearing or until they are discharged by order of the President (s 9 of the Act).

3. The individuals have referred to "important reasons" that they, as ministerial staff, should not be compelled to appear "*on the basis, it is Ministers, rather than their staff, who are accountable to the Parliament in a Westminster parliamentary democracy*" and that "*it is generally recognised that ministerial staff should not be held accountable for the actions or policy decisions of ministers or their departments, and they are not frequently summoned as witnesses*".[1] The staff members also referred to the fact that the Government had already provided extensive public comment on the matter during Question Time and Budget Estimates.[2]

[1] Emails from the staff members dated 9 May 2025. See also letter dated 19 June 2025 from the staff members to the President.
[2] Emails from the staff members dated 9 May 2025.

4. The Government raised concerns with the Committee's terms of reference and its "implications for exclusive cognisance" on the basis that Committee seeks to "scrutinise the discourse of the House and the conduct of its Members" (whether Ministers or otherwise).[3] The concerns related to "whether any parliamentary privilege of the Assembly may be infringed" (with reference to Article 9 of the *Bill of Rights 1688*) and "the observance of the principle of comity and the relationship between the two Houses".[4] The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics then commenced an inquiry into the implications for exclusive cognisance raised by the Committee (**Inquiry**).

5. The staff members referred to those concerns in correspondence seeking to excuse their failure to attend to give evidence.[5] They have (a) said that the summonses were not validly issued, are infected with jurisdictional error and liable to be set aside, (b) said that they otherwise had a reasonable excuse or just cause for not attending the hearing, (c) challenged the constitutionality of ss 7-9 of the Act, and (d) requested certain incidents of procedural fairness be complied with before the President proceeds to certification under s 7 of the Act.[6]

6. For the reasons below, in our opinion:

   (a) the summonses issued to the staff members were validly issued and not otherwise infected by jurisdictional error;

   (b) the staff members did not have just cause or reasonable excuse for not attending the hearing;

   (c) ss 7-9 of the Act are not open to serious challenge to their constitutionality.

7. In the circumstances, including in light of the correspondence between the staff members and the Committee, we do not consider the dictates of procedural fairness (such as they may be, in any case) require further notice or any hearing to be given to the staff members before the President proceeds to certification.

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[3] Legislative Assembly Hansard (29 May 2025).
[4] Legislative Assembly Hansard (29 May 2025).
[5] Letter dated 19 June 2025 from the staff members to the President.
[6] Letters dated 20 and 23 June 2025 from Kate Plowman to the President.

B. Summonses were validly issued and not infected by jurisdictional error

The Committee's power to compel witnesses

8. The power of the Committee to summon witnesses and compel those individuals to give evidence is regulated by s 4 of the Act. There is apparently no challenge proposed to the constitutional validity of s 4 of the Act. Apparently, any such challenge is to the way in which that power is provided with statutory means of enforcement (ss 7-9 of the Act) and is addressed below.

9. Section 4 provides that the Committee:

    a. has the power to summon "any person not being a Member of the Council or Assembly" to attend and give evidence before the Committee;

    b. by an order of the Committee signed by the Chair of the Committee and served on the person.

10. There is no common law approach, of statutory interpretation or otherwise, that permits the term "Member" to be construed as extending to a person who happens to be under current bureaucratic arrangements a member of ministerial staff. The expression "any person..." is intractably comprehensive.

11. The Committee issued summonses to each of the staff members (following a resolution to do so if invitations were declined by a specified time, which they were). Each summons complied with the relevant formal requirements as they were signed by the Chair of the Committee, specified the name of the Committee (and the inquiry) to which they related, together with the time, date and place of the hearing and were served personally on the staff members together with cheques.[7]

12. Prima facie, therefore, the Committee had validly exercised its power to compel the staff members to attend to give evidence at the hearing. However, the staff members say they have provided compelling reasons why the summonses were not properly issued (which is understood as a reference to the concerns outlined in paragraphs 3 to 5 above).

The Legislative Council's implied powers of inquiry

13. Section 4 assumes the implied powers, privileges and immunities of each House of Parliament, being those which are reasonably necessary for the proper exercise of its

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[7] Act, s 4; Stephen Frappell and David Blunt (eds), *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021) pp 799-800.

functions.[8] The Legislative Council's broad powers of inquiry stem from its primary legislative function as well as its accountability function with respect to the Executive.[9]

14. It was reasonably necessary, and in accordance with conventional practices established and maintained by the Legislative Council,[10] for the Legislative Council to establish the Committee: the terms of reference of which are to inquire into and report on the relationship between the Dural caravan incident and the passage of certain Bills through Parliament (related to its legislative function) including into what was known by the Executive at that time (related to its accountability function).[11]

Principles of comity and parliamentary privilege in the sense of immunity under Art 9

15. "Comity", as a value to be observed in dealings between the Houses, relates to decorum in their mutual dealings. Comity is reflected in the conventions and courtesies observed in relations between the two Houses in a bicameral legislature. While an aspect of comity is that neither House routinely inquires into matters which solely concern the operations of the other,[12] it does not follow that the other House's powers of inquiry are lawfully limited in that fashion for the following reasons.[13]

16. First, even to the extent reflected in Standing Orders (e.g. Standing Order 96(3)) comity cannot operate as a legal limit on a House's power given that Standing Orders may be dispensed with. Standing Orders, made pursuant to s 15 of the *Constitution Act 1902*, "*assume the existence of a power, but do not operate as a source of power; rather they regulate in certain respects the exercise of a power, which, if it exists, must have some other source.*"[14]

17. Second, and fundamentally, each House has legislative functions in the enactment, amendment and repeal of legislation;[15] and each House has, in our system of responsible government, accountability functions with respect to the Executive.[16] The Legislative

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[8] *Egan v Willis* (1998) 195 CLR 424, 453-454 [48] (Gaudron, Gummow and Hayne JJ).
[9] *Egan v Willis* (1998) 195 CLR 424, 451 [42], 453 [45], 454 [49] (Gaudron, Gummow and Hayne JJ); *Egan v Chadwick* (1999) 46 NSWLR 563, 568 [15] (Spigelman CJ).
[10] *Egan v Willis* (1998) 195 CLR 424, 454 [50] (Gaudron, Gummow and Hayne JJ).
[11] Committee Terms of Reference, referred to the Committee by the Legislative Council on 19 March 2025 as amended on 28 May 2025.
[12] Stephen Frappell and David Blunt (eds), *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021) p 849.
[13] Cf *Egan v Willis* (1996) 40 NSWLR 650, 662-663 (Gleeson CJ).
[14] *Egan v Willis* (1998) 195 CLR 424, 508 [174] (Callinan J); *Egan v Willis* (1996) 40 NSWLR 650, 664 (Gleeson CJ).
[15] *Egan v Chadwick* (1999) 46 NSWLR 563, 592-593 [136]-[137] (Priestly JA).
[16] *Egan v Willis* (1998) 195 CLR 424, 453 [45] (Gaudron, Gummow and Hayne JJ).

Council's inquiry powers stem from those functions.[17] The fact that something has been debated in the Legislative Assembly does not limit the powers of the Legislative Council (or vice versa). To say otherwise would create a perverse and inefficient incentive to be the "first past the post". It would also ignore a common way which Bills come to be considered by the Houses of Parliament; introduction and debate in the Lower House, following which the Bill passes into the Upper House, in which there is also debate. The notion that the Upper House would not engage in debate in matters which had previously been debated in the Lower House does not survive a moment's scrutiny. Comity is incapable of limiting the lawful function and powers of debate and inquiry of the Upper House.

18. Issues of "parliamentary privilege" would ordinarily be understood to refer to the immunity conferred by Article 9 of the *Bill of Rights 1688*,[18] which provides: *That the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.*

19. Relevantly, however, for the immunity to apply, the Committee hearing must be a "Place out of Parliament." As it applies here, "Parliament" means the Parliament of New South Wales,[19] being the legislature, "*hence to each of the chambers which constitute it in which "speech and debates or proceedings" take place, including the Council*":[20] "*[w]hat is said or done within the walls of* ***a parliamentary chamber*** *cannot be examined* ***in a court of law***".[21] Neither the Committee, nor a hearing of the Committee, is a "place out of Parliament". Article 9 is inapt to, does not intend to, and does not, regulate the relationship between the two Houses. The immunity afforded by Art 9 of the *Bill of Rights 1688* does not fetter the Legislative Council's powers of inquiry in the sense claimed. It has nothing to do with present question.

20. The Act itself establishes a bright line between who can (any person other than a Member), and who cannot (a Member), be compelled under s 4 of the Act.

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[17] *Egan v Willis* (1998) 195 CLR 424, 451 [42], 453 [45], 454 [49] (Gaudron, Gummow and Hayne JJ).
[18] Which remains in force in NSW: s 6 *Imperial Acts Application Act 1969* (NSW); *Gipps v McElhone* (1881) 2 LR (NSWR) 18; Anne Twomey, *The Constitution of New South Wales* (2004) p 494.
[19] *Egan v Willis* (1998) 195 CLR 424, 445 [23] (Gaudron, Gummow and Hayne JJ); 489 [129] (Kirby J).
[20] *Egan v Willis* (1998) 195 CLR 424, 489 [129] (Kirby J).
[21] *Egan v Willis* (1998) 195 CLR 424, 461 [67] (McHugh J), quoting *Bradlaugh v Gossett* (1884) 12 QBD 271 (emphasis added).

Summonses not otherwise infected by jurisdictional error

21. Finally, the staff members refer to matters which may, in orthodox jurisprudence concerning the judicial review of administrative action, amount to mandatory considerations before the Committee can exercise its powers to compel witnesses. What they are supposed to be remains somewhat obscure. To the extent the staff members are asserting jurisdictional error on this basis,[22] the resolution of the Committee to issue the summonses showed that it viewed it as necessary to issue the summonses to carry out its functions. While the Supreme Court may well have supervisory jurisdiction over the lawfulness of the decision to exercise the power,[23] the appropriateness of that judgment is not for a court to decide.[24]

Conclusion on valid issuance of summonses and jurisdictional error

22. Accordingly, the summonses were validly issued and not otherwise infected with jurisdictional error.

23. Our opinion, however, is not to be understood as detracting to any degree from the propriety of the Legislative Council regulating its affairs and the conduct of its Members by insisting upon appropriate circumspection in relation to criticisms of parliamentary conduct.

C. Certification under s 7 of the Act and "just cause or reasonable excuse"

24. The pendency of the Inquiry (or for that matter, any mooted constitutional litigation) is incapable of detracting from the binding statutory force of ss 4 and 7-9 of the Act. In the case of the staff members to which those provisions apply, none of the following amounts to "just cause or reasonable excuse" for non-attendance:

    a. the fact that the Inquiry had commenced;

    b. the fact that the staff member does not consider they would provide useful information to the Committee, including because they assert they hold no information or no information beyond what the Government has already provided, or because they were on leave at the relevant time – noting that the rules of evidence do not apply to a Committee hearing;

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[22] See e.g. *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J).
[23] *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
[24] Cf *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162, 166.

c. the fact that the Government has already provided extensive comment, including within Parliament; or

d. it is the Minister who is accountable to Parliament, not the staff member.

25. It is an error to concentrate solely on accountability to a House of Parliament in relation to the conduct of investigations and enquiries by those Houses. In this case, the matters do seem largely concerned with accountability in the conduct of Government responsible to the Houses. But the legislatively assisted and statutorily regulated powers of investigation and inquiry implicit by definition in each House of the Legislature also extend to the consideration of matters regarded as useful by Members of the House in relation to possible future legislation, without any real element of holding the Executive to account.

26. There is a distinction, however, between the President being satisfied that a person has "just cause or reasonable excuse" on the one hand; and on the other hand, the President declining to take the step of certifying the relevant facts after a balancing of interests. This Opinion should not be read as disapproving the possibility of a President in a particular case declining to certify, or regarding matters that might not constitute "just cause or reasonable excuse" in some other case as providing that ground for non-attendance in the particular case. Furthermore, a President would not be proceeding unlawfully, in our opinion.

27. Satisfaction as to the "facts" necessary for certification requires an evaluative exercise, involving norms of behaviour and balancing the powers and functions of the House against the rights and interests of the individual. The merits of the question as to whether the individual had "just cause or reasonable excuse", culminating in certification under s 7 of the Act, are for the intramural decision of the presiding officer, subject to the control of the House. Any judicial review of such decisions would not, in any event, permit a judge to act on his or her view of the merits of the proffered "just cause or reasonable excuse". The appropriateness of the President's judgment is not for review by the Supreme Court.[25]

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[25] Cf *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, 166.

D. The constitutional challenge

28. The potential witnesses assert that ss 7-9 of the Act are "*constitutionally invalid in that they are incompatible with the institutional integrity of the Supreme Court of NSW contrary to Chapter III of the Commonwealth Constitution*".[26] The issue is said to arise as to the "*validity of the use of a State judge [to issue a warrant under s 8 of the Act] as it may be inconsistent with the exercise of federal judicial power by a State court*".[27]

29. For the challenge to be sustained, there must be an incompatibility between:[28]

    a. the statutory power or function in question – here, the power in s 8 of the Act, which compels (through use of the word, "shall") a Judge of the Supreme Court of New South Wales to issue a warrant on certification by the President;

    b. the qualities of "judicial"[29] power, namely: integrity, impartiality and independence from the executive (the incompatibility being with the Judge's Constitutional position as a potential repository of Federal judicial power under s 77(iii) of the *Constitution*).[30]

30. Section 8 of the Act cannot sensibly be said to infringe the judicial qualities of integrity or impartiality. The designated Judge adjudicates nothing of substance, but is required to act on the President's certificate as to those matters of substance. The issue of just cause or reasonable excuse for non-attendance in response to a summons or order from the Committee, was not, in the absence of the Act, in any sense justiciable. No judicial function of the Supreme Court is compelled in a sense incompatible with the character of that Court as the repository of Federal judicial power. Nor does it effect an "impermissible executive intrusion into the process or decisions of the court"[31] because the Legislative Council is not the Executive.

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[26] Letter dated 23 June 2025 from Kate Plowman to the President.
[27] Letter dated 20 June 2025 from Kate Plowman to the President citing, Anne Twomey, *The Constitution of New South Wales* (2004) at p 516, fn 118, citing *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[28] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 116 (McHugh J), 134-5 (Gummow J).
[29] *Constitution*, s 71.
[30] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 591 [15] (Gleeson CJ).
[31] *Wainohu v New South Wales* (2011) 243 CLR 181, 210 [46] (French CJ and Kiefel J), citing: *South Australia v Totani* (2010) 242 CLR 1 at 52 [82] per French CJ; at 67 [149] (Gummow J); at 160 [436] (Crennan and Bell JJ); at 173 [481] (Kiefel J); see also at 92-93 [236] per Hayne J.

E. Conclusion

31. Our answers to the questions asked are as follows:

32. ***Question 1:*** *Were all the appropriate processes under sections 4 and 6 of the* Parliamentary Evidence Act 1901 *followed in the issuing of summonses to the five witnesses?*

    Answer: Yes.

33. ***Question 2:*** *If so, was the committee entitled to take the step that it did under section 7 of the* Parliamentary Evidence Act 1901 *in writing to the President, requesting the President to certify these matters to a Judge of the Supreme Court, with a view to the issuing of a warrant for the apprehension of the witnesses for the purposes of bringing them before the committee?*

    Answer: Yes.

34. ***Question 3:*** *Is the President required to provide – or would it be advisable for the President to provide – the five witnesses with an opportunity 'to be heard' before he reaches a position as to whether there is 'just cause or reasonable excuse' for the non-attendance of the witnesses within the meaning of section 7, noting the request at paragraph 28 of the witnesses' letter to the committee of 19 June and paragraph 11 of the letter of Kate Plowman, Partner at Minter Ellison, together with the resolution of the committee at its deliberative meeting on 20 June 2025? I note that on Monday 23 June 2025, the Leader of the Government in the Legislative Council met with the President to put the Government's views again in this regard.*

    Answer: No.

35. ***Question 4:*** *Is the non-attendance of the witnesses 'without just cause or reasonable excuse' within the meaning of section 7? I note in particular the concerns expressed by the Government that ministerial staff should not be held responsible for the actions of their ministers, and that compelling ministerial staff to attend and give evidence may interfere with the exclusive cognisance of the Legislative Assembly?*

    Answer: Yes.

    If there is no just cause or reasonable excuse for the non-attendance of the witnesses, would the President be justified in certifying such facts to a Judge of the Supreme Court?

Answer: Yes.

36. ***Question 5:*** *Is there any likelihood that a certificate issued by the President would be 'quashed by the Supreme Court' as asserted as a possibility by Kate Plowman at paragraph 13 of her letter?*

    Answer: No

37. ***Question 6:*** *Are there any questions as to the constitutional validity of section 8 of the Parliamentary Evidence Act 1901, as raised by Kate Plowman at paragraph 14 of her letter?*

    Answer: No.

38. ***Question 7:*** *Should the President proceed to certify these matters to a Judge of the Supreme Court, with a view to the issuing of a warrant for the apprehension of the witnesses for the purposes of bringing them before the committee, do you have any advice as to the mechanics of how these processes could be best managed, particularly with a view to minimising the period of time in which persons may be held in custody?*

    Answer: The President is entitled to proceed to certification. Whether he should is a matter for the President. The appropriate civility of treatment of the apprehended persons would, we hope and expect, extend to ready agreement to them being spared any custody beyond the simple conveyance to a Committee hearing room. Arrangements ought, as a matter of decency, be possible to achieve their attendance as witnesses without any appreciable duration of detention. For example, release after initial apprehension upon reliable undertakings to attend would be, in our opinion, entirely suitable.

26 June 2025

Bret Walker

Frances Leitch