



LEGISLATIVE COUNCIL

PUBLIC ACCOUNTABILITY AND WORKS COMMITTEE

Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023



Report 1

November 2023

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Public Accountability and Works Committee

Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023

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Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023

"November 2023"

Chair: Ms Abigail Boyd MLC



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Table of contents

	Terms of reference	iv
	Committee details	v
	Chair’s foreword	vi
	Recommendations	viii
	Conduct of inquiry	ix
Chapter 1	Overview	1
	Background to the bill	1
Chapter 2	Key issues	7
	Are ministers responsible to both Houses of Parliament?	7
	Does ministerial accountability need to be strengthened?	9
	Are existing accountability mechanisms and practice sufficient?	10
	The Houses as sovereign and distinct chambers, and the principle of comity	11
	Legal uncertainty and possibility of court challenges	12
	Potential misuse of the expanded power	14
	Is now the right time to consider this change?	15
	Alternative ways to strengthen Ministerial accountability	16
	Committee comment	17
Appendix 1	Submissions	19
Appendix 2	Witnesses at hearings	20
Appendix 3	Minutes	21

Terms of reference

That:

- (a) the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 be referred to the Public Accountability and Works Committee for inquiry and report
- (b) the committee report by 27 November 2023.

The terms of reference were referred to the committee by the Legislative Council on 20 September 2023.¹

¹ *Minutes*, NSW Legislative Council, 20 September 2023, pp 510-511.

Committee details

Committee members

Ms Abigail Boyd MLC	The Greens	<i>Chair</i>
Hon Scott Farlow MLC	Liberal Party	<i>Deputy Chair</i>
Hon Mark Buttigieg MLC	Australian Labor Party	
Hon Dr Sarah Kaine MLC	Australian Labor Party	
Hon Mark Latham MLC	Independent	
Hon Peter Primrose MLC	Australian Labor Party	
Hon Damien Tudehope MLC*	Liberal Party	

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- * The Hon Damien Tudehope MLC substituted for the Hon Bronnie Taylor MLC from 3 October 2023 for the duration of the inquiry.

Secretariat

Peta Leemen, Principal Council Officer
 Emily Whittingstall, Administration Officer
 Beverly Duffy, Clerk Assistant Committees
 Tina Higgins, Clerk Assistant Committees

Chair's foreword

The object of the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 is to amend the *Parliamentary Evidence Act 1901* (the Act) to provide that Ministers of the Crown may be summoned to give evidence before a committee or either House of the Parliament. Currently the Act excludes members (including ministers) from being summoned as witnesses.

The bill was introduced in response to a minister declining an invitation to appear before this Committee and there was little we could do to secure the minister's attendance. Under the circumstances, the proposal to allow ministers to be summoned has a certain appeal, but given the potential implications should it be passed, I was pleased to support referral of the draft legislation for inquiry and report.

The committee was fortunate to receive evidence from several authorities on parliamentary law and practice and I would like to take this opportunity to thank them for sharing their expertise and considered views.

According to these experts, the proposal to allow ministers to be summoned raises complex constitutional issues pertaining to two key conventions in our system of government: the accountability of ministers to Parliament and comity – often expressed as the right of each House to control its own proceedings. They advised that both principles are important to good government and we should strive to maintain an effective balance between the two.

As has been demonstrated throughout this inquiry, the role of the Legislative Council in scrutinising the executive is critically important, especially in the current climate of heightened mistrust in our political institutions. While the proposal to allow ministers to be summoned might enhance the Council's accountability function, it also encroaches on the ability of each House to regulate its own proceedings. To date, with the recent exception of the Minister for Transport, the voluntary attendance of Assembly ministers before Budget Estimates and other inquiries has been routine. Members are also able to utilise the various mechanisms already in place to secure the accountability of Legislative Assembly ministers to the Council, including questions with and without notice and orders for the production of documents.

Given the general preparedness of Assembly ministers to appear before Council committees, the need for change is not pressing. I genuinely hope that the non-attendance of the Minister for Transport was an unfortunate 'one off'. However, should governments seek to frustrate efforts by Council members to undertake their accountability functions in future, there may be reason to revisit this conclusion.

With that in mind, suggestions raised during the inquiry to reform the punitive aspects of the *Parliamentary Evidence Act* and to introduce sessional orders governing the voluntary attendance of ministers before committees should be explored, perhaps by the Privileges Committee which is currently undertaking an inquiry into the broader aspect of the Act.

The discussion in this report of other innovative ways for the Council to respond, should ministers refuse an invitation to appear before a committee in future, should continue. I hope that the Government will respect the long-standing conventions of the Parliament that has seen Assembly ministers routinely voluntarily attend Council inquiry. However, should that not be the case, the inquiry into this Bill has traversed a number of options that could be adopted by the House to ensure ministerial accountability in the future.

I would like to thank my fellow committee members for their contribution to an important inquiry and to the secretariat for their diligent support.

A handwritten signature in black ink, appearing to read 'Boyd', written in a cursive style.

Ms Abigail Boyd MLC
Committee Chair

Recommendations

Recommendation 1

18

That the Legislative Council proceed to debate the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 and that the issues identified by stakeholders as set out in this report, be addressed during debate in the House.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 20 September 2023.

The committee received four submissions.

The committee held one public hearing via videoconference.

Inquiry related documents are available on the committee's website, including submissions, the hearing transcript and answers to questions on notice.

Chapter 1 Overview

This chapter provides an overview of the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023, including its provisions and referral for inquiry and report.

Background to the bill

- 1.1** The stimulus for this bill was the Hon Jo Haylen MP, Minister for Transport, declining to appear at a hearing for this committee's inquiry into the appointment of Josh Murray to the position of Secretary for Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner. As a reason for her declining to appear, Ms Haylen's office cited a 'convention' that 'House of Representatives MP's are not required to attend Legislative Council inquiries'.²
- 1.2** Frustrated in its efforts to gather key evidence on Minister Haylen's actions in appointing the Secretary for Transport, the committee sought the Clerk's advice on options to reinforce its request to Minister Haylen to attend a hearing and give evidence.³
- 1.3** The Clerk's advice, provided on 5 September 2023, noted that, under section 4 of the *Parliamentary Evidence Act 1901*, members of the Legislative Council and Legislative Assembly are unable to be summoned to attend and give evidence before a Council committee, although they may (and frequently do) appear voluntarily.⁴ In regard to the 'convention' cited as the basis for Ms Haylen declining to appear, the Clerk's advice suggested this understanding is contrary to a modern understanding of the system of responsible government in New South Wales, which holds that the government and its ministers are accountable to both Houses of Parliament.⁵
- 1.4** This bill would amend sections 4 and 5 of the *Parliamentary Evidence Act* to remove the restriction on summoning ministers to appear before a committee. In bringing it forward, the Hon Damien Tudehope MLC, Leader of the Opposition in the Legislative Council, explained that the bill seeks to reinforce the powers of the Legislative Council to hold government ministers to account:

While the Minister for Transport's actions and comments may have been the immediate trigger for this bill, changing this legislation is about asserting the rights and powers of this House to undertake its constitutional duty—holding the executive government of the day to account. This is not about one inquiry and it is not about one Minister but about a change to the law to let this House get on with its job—to hold the Executive to account.⁶

² Correspondence from the Office of the Hon Jo Haylen MP, Minister for Transport, to the Public Accountability and Works Committee secretariat, 30 August 2023.

³ Submission 1, Clerk of the Parliaments, Attachment A, (Clerk's Advice for the Public Accountability and Works Committee for the inquiry into the appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner, 5 September 2023).

⁴ Submission 1, Clerk of the Parliaments, Attachment A, pp 6-7.

⁵ Submission 1, Clerk of the Parliaments, Attachment A, p 7.

⁶ *Hansard*, NSW Legislative Council, 13 September 2023, p 4 (Damien Tudehope).

- 1.5 Mr Tudehope further stated that the power to issue summonses and compel evidence 'is a key power of the House to conduct its work', asserting that 'the power should also be available in relation to Ministers of the Crown'.⁷

Referral of the bill

- 1.6 This bill was introduced to the House on 13 September 2023, by the Hon Damien Tudehope, Leader of the Opposition in the Legislative Council.⁸

- 1.7 On 19 September 2023, the Legislation Review Committee published its review of the bill. The Legislation Review Committee highlighted a number of issues for consideration by Parliament, including:

- constitutional difficulties with legislating to compel Ministers in one House to attend and produce evidence in the other House, due to the principle of 'exclusive cognisance' of the Houses, and lack of clarity as to how a conflict would be resolved
- possible impact on the separation of powers, with potential for the Legislature to intrude on the functioning of the Executive, due to ministers' duty to maintain cabinet confidentiality.⁹

- 1.8 During the second reading debate on the bill on 20 September 2023, members noted several broader concerns with the operation of the *Parliamentary Evidence Act 1901*. The Hon John Graham MLC, Special Minister of State and Deputy Leader of the Government in the Legislative Council, noted serious questions of privilege and comity raised by the bill, and suggested that these may be best dealt with by the Privileges Committee.¹⁰ Mr Graham also noted issues relating to the operation of the *Parliamentary Evidence Act* that arose during the Hills Shire Council inquiry.¹¹

- 1.9 In early 2023, during the Hills Shire Council inquiry, Portfolio Committee no. 7 – Planning and Environment experienced significant difficulties exercising its powers to summon witnesses, due to efforts to evade service. It recommended that, at the beginning of the 58th Parliament, the NSW Legislative Council:

- refer an inquiry into the *Parliamentary Evidence Act 1901* to the Privileges Committee, with a view to identifying amendments to ensure it is fit for purpose and modernised, including in relation to the summoning of witnesses; and,
- send a message to the NSW Legislative Assembly requesting that that House refer the same inquiry to its Standing Committee on Parliamentary Privilege and Ethics.¹²

⁷ *Hansard*, NSW Legislative Council, 13 September 2023, p 4 (Damien Tudehope).

⁸ *Minutes*, NSW Legislative Council, 13 September 2023, p 459.

⁹ Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest No. 4/58 – (2023)*, pp 38-44.

¹⁰ *Hansard*, NSW Legislative Council, 20 September 2023, p 49 (John Graham).

¹¹ *Hansard*, NSW Legislative Council, 20 September 2023, p.50 (John Graham).

¹² Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), pp x, 23 (Recommendation 5).

- 1.10** Following the second reading debate on 20 September 2023, the provisions of the bill relating to the power to summon ministers, were referred to this committee for inquiry and report by 27 November 2023.¹³
- 1.11** At the same time, the House also resolved to refer the provisions of the *Parliamentary Evidence Act 1901* to the Privileges Committee for inquiry and report 'with a view to identifying amendments to ensure it is fit for purpose and modernised, including in relation to the summoning of witnesses' as per the recommendation of Portfolio Committee no. 7.¹⁴ This inquiry is currently underway.¹⁵

The bill's key purpose and provisions

- 1.12** The *Parliamentary Evidence Act 1901* confers significant coercive power on both Houses of Parliament and their committees to summons witnesses to attend and give evidence. The legislation prescribes serious consequences, including imprisonment, for failing to appear or answer lawful questions.¹⁶ Currently, the only category of citizens in New South Wales exempt from being summoned under the Act are Members of the Council or Assembly.¹⁷
- 1.13** Section 4 of the *Parliamentary Evidence Act 1901* currently states that:

4 Witnesses how summoned

(1) Any person not being a Member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly by notice of the order of the Council or Assembly signed by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be, and personally served upon such person.

(2) Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the Chair thereof and served as aforesaid.

- 1.14** Section 5 provides that:

5 Members of Parliament

The attendance of a Member of the Council or Assembly to give evidence before the Council or Assembly or a committee shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons.

- 1.15** As noted in the Clerk's advice provided to the committee on 5 September 2023, the current procedure observed in the House of Commons is that members of the other House (the House of Lords) may not be summoned to attend as witnesses before House of Commons committees, however they may be requested to attend by written communication from a committee chair,

¹³ *Minutes*, NSW Legislative Council, 20 September 2023, p 511.

¹⁴ *Minutes*, NSW Legislative Council, 20 September 2023, p 511.

¹⁵ Privileges Committee, NSW Legislative Council, website: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=192>

¹⁶ *Parliamentary Evidence Act 1901*, ss 7-9, 11, 13. See also, Legislation Review Committee, *Legislation Review Digest No. 4/58*, pp 43-44; Submission 3, The Cabinet Office, p 2.

¹⁷ Evidence, Mr David Blunt AM, Clerk of the Legislative Council and Clerk of the Parliaments, 23 October 2023, p 13.

and are given leave under a standing order of the House of Lords to attend as they see fit.¹⁸ Messages are not exchanged between the Houses.¹⁹

- 1.16** In New South Wales, the Legislative Assembly has standing orders setting out relevant procedures through which the Assembly could seek the attendance of a Council member at a committee (SO 327) and authorise a member to attend a Council committee if the member agrees (SO 328).²⁰ There is no direct equivalent order in the Legislative Council, although there are multiple examples of Legislative Assembly ministers attending Legislative Council committees by invitation. Noting this, the Clerk explained that the adoption of standing orders has not been seen as necessary for Ministers from the Legislative Assembly to be accountable to Legislative Council Committees.²¹ The practice of exchanging messages between the Houses has not been in operation since 1999 – members have appeared by invitation from a committee.²²
- 1.17** This bill aims to remove the restriction on summoning Ministers of the Crown to attend and give evidence before either House or a committee of Parliament through the following amendments to sections 4 and 5 of the *Act*:
- omitting the words 'not being a Member of the Council or Assembly' from section 4(1) of the Act
 - inserting a new subsection 4(3), stating that section 4 does not apply to a Member of the Council or Assembly other than a Minister of the Crown
 - inserting the phrase 'other than a Minister of the Crown' in section 5.
- 1.18** The bill also proposes inserting a new section 6(3) of the Act to provide that, unlike other witnesses, a Minister of the Crown summoned to attend a House of Parliament, or a committee of a Parliament is not entitled to be paid witness expenses.

¹⁸ Submission 1, Clerk of the Parliaments, Attachment A, p 6, references D Natzler KCB and M Hutton (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis 2019), para 38.34; See also, *Legislation Review Digest 4/ 58* (2023), p 40.

¹⁹ Submission 1, Clerk of the Parliaments, Attachment A, p 6, references D Natzler KCB and M Hutton (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis 2019), para 38.34.

²⁰ Submission 2, Professor Emerita Anne Twomey, p 2; Submission 3, The Cabinet Office, p 3.

²¹ Evidence, Mr Blunt, 23 October 2023, p 5.

²² Evidence, Mr Blunt, 23 October 2023, p 7.

1.19 These proposed amendments specify that only a Member who is a Minister may be subject to summons by the other House of Parliament. During the second reading debate for the bill, Mr Tudehope stressed this point, noting that the bill applies only to the Executive Government, by distinguishing members who are Ministers from other members.²³ All other members would still follow the procedures of the House of Commons, as per section 5, meaning the restriction on their being summoned remains.²⁴

²³ *Hansard*, NSW Legislative Council, 13 September 2023, pp 3-4 (Damien Tudehope); Evidence, the Hon Damien Tudehope, Leader of the Opposition in the NSW Legislative Council, 23 October 2023, p 5.

²⁴ Legislation Review Committee, *Legislation Review Digest No. 4/58* (2023), p 39.

Chapter 2 Key issues

This chapter considers the legal and constitutional issues raised by the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023. First, it looks at the issue of ministerial responsibility in New South Wales, and whether it is necessary to strengthen ministerial accountability in light of existing practices. Second, it considers implications associated with enacting the bill, such as whether the principle of comity might be undermined, as well as other legal issues. Finally, the chapter touches upon whether there are alternative ways to strengthen ministerial accountability, without compromising the legal and constitutional principles raised by this particular bill.

Are ministers responsible to both Houses of Parliament?

- 2.1 As noted in Chapter 1, the genesis for this bill was an instance of a minister in the Legislative Assembly declining to appear before this committee, in the inquiry into the appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner. The Minister's office advised that, by 'convention', House of Representatives MP's were not required to attend Legislative Council inquiries, implying that the Minister was only accountable to the Assembly.²⁵
- 2.2 The accountability of the Executive to Parliament is a fundamental aspect of the system of responsible government adopted in New South Wales. As noted in *NSW Legislative Council Practice*, the doctrine of ministerial accountability in bicameral Parliaments has traditionally been associated with lower houses, or the house whose confidence is required in order to form government.²⁶ However, as Mr David Blunt AM, Clerk of the Parliaments, told the committee, it is 'abundantly clear' from the reasoning of all the justices of the High Court in *Egan v Willis* (1998) that ministers are accountable to both Houses of Parliament.²⁷ The Clerk cited the majority decision of Gaudron, Gummow and Hayne JJ:

One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the Ministry must command the support of the Lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.²⁸

²⁵ Correspondence from the Office of the Hon Jo Haylen MP, Minister for Transport, to the Public Accountability and Works Committee Secretariat, 30 August 2023.

²⁶ See discussion in Stephen Frappell and David Blunt (eds), *NSW Legislative Council Practice* (2nd edition) (Federation Press 2021), p 299.

²⁷ Submission 1, Mr David Blunt AM, Clerk of the Parliaments, Attachment A, p 7, see also discussion in Stephen Frappell and David Blunt (eds), *NSW Legislative Council Practice* (2nd edition), pp 18-20 and 848.

²⁸ Submission 1, Mr David Blunt, p 2, cited *Egan v Willis* (1998) 195 CLR 424 at 453 per Gaudron, Gummow and Hayne JJ.

2.3 The Cabinet Office and Professor Anne Twomey AO, Professor Emerita, University of Sydney, however, did not support the argument that ministers are accountable to both Houses, asserting that Ministers are only accountable to the House in which they sit. The Cabinet Office quoted Professor Geoffrey Lindell's advice to a Senate committee:

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.²⁹

2.4 The Cabinet Office also cited Professor Enid Campbell who similarly argued that the Egan litigation 'was concerned primarily with the powers exercisable by a house in relation to a minister who is one of its own members'.³⁰

2.5 In her submission, Professor Twomey argued that as one House does not have any power or jurisdiction over a member of the other House, members are only responsible to the House of which he or she is a member.³¹ Professor Twomey noted that this principle is reflected in the *Parliamentary Evidence Act*, which only provides for persons who are *not a member of either House*, from being summoned to appear. In her view, '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', supplemented by voluntary appearances as already permitted under the *Parliamentary Evidence Act* and existing standing orders.³²

2.6 In his evidence, Mr Blunt argued that, just because the Council is not able to impose a sanction on a member of the other place for non-compliance with an order of the Council, does not mean a minister in the Assembly is not accountable to the Council:

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.³³
[Emphasis added]

2.7 The Clerk cited various examples of ways in which Legislative Assembly ministers are accountable to the Council, including through questions on notice, orders for papers and via the routine appearance of Assembly ministers at Budget Estimates and other Council inquiries:

²⁹ Submission 3, The Cabinet Office, p 3, citing Professor Geoffrey Lindell advice to the Senate Select Committee on a Certain Maritime Incident.

³⁰ Submission 3, The Cabinet Office, p 3, citing Professor Enid Campbell, *Parliamentary Privilege*, Federation Press, 2003, pp 161-2.

³¹ Submission 2, Professor Twomey, p 1.

³² Submission 2, Professor Twomey, p 3.

³³ Evidence, Mr Blunt, 23 October 2023, p 3.

Orders for papers agreed to by the Legislative Council routinely require the production of documents in the possession, custody or control of Legislative Assembly ministers and the agencies for which they are responsible. Ultimately it is the Leader of the Government in the Legislative Council who is responsible for compliance with such orders and is liable to censure or being found in contempt of the House for non production ... Questions on notice directed to Legislative Assembly ministers are answered via the Legislative Council minister who represents them in the Legislative Council, and it is ultimately the Legislative Council minister who are responsible to the Council for the answers provided.³⁴

Does ministerial accountability need to be strengthened?

2.8 Articulating the case for this bill in the House, Mr Tudehope suggested it is necessary to shore up the ability of the Legislative Council to hold this government, and future governments, to account, in line with its role as a house of review.³⁵ While Mr Tudehope acknowledged that there are existing practices through which ministers in the Legislative Assembly may be held accountable to the Legislative Council, the ability to hear directly from a minister (as distinct from a minister representing a minister from the other House) is a critical aspect of the Council's review function:

In relation to an inquiry being conducted by a Legislative Council committee where the committee believes that a particular Minister may have evidence relevant to the inquiry, it is not practical for another Minister to represent that Minister. Evidence must be based on what a witness personally knows. In some cases, a witness may be the only source of evidence about a particular matter relevant to an inquiry, or critical to testing the veracity or comprehensiveness of the evidence provided by other witnesses.³⁶

2.9 Mr Tudehope suggested that: 'If, in fact, the growing tendency of the manner in which political discourse is conducted in New South Wales is to enhance transparency in the way that the Executive conducts itself', then it is open to both Houses of Parliament to enhance transparency over comity in this way.³⁷

2.10 Mr Tudehope further suggested that the power to compel the attendance of Ministers is necessary in the event a Minister attempts to frustrate efforts by the Legislative Council to subject the Executive Government to scrutiny:

The power to issue summonses and compel evidence is a key power of the House to conduct its work. The Opposition believes that the power should also be available in relation to Ministers of the Crown. ... when a Minister has questions to answer, the Parliament needs a mechanism to get those answers. It is not good enough for the Executive Government to hide from scrutiny by the democratically elected representatives of the people of New South Wales.³⁸

³⁴ Submission 1, Mr David Blunt, p 2.

³⁵ *Hansard*, Legislative Council, 13 September 2023, p 3 (Tudehope).

³⁶ *Hansard*, Legislative Council, 13 September 2023, p 4 (Tudehope).

³⁷ Evidence, Mr Tudehope, 23 October 2023, p 4.

³⁸ *Hansard*, Legislative Council, 13 September 2023, p 4 (Tudehope).

2.11 While the Clerk of the Parliaments agreed with Mr Tudehope's contention that if passed, the bill would increase the accountability of the Executive Government, he added that he would not want his answer on this to be considered in isolation, noting the complexity of weighing up various considerations, including comity.³⁹

Are existing accountability mechanisms and practice sufficient?

2.12 Several inquiry participants noted that the New South Wales Parliament has a robust culture of ministerial accountability, underpinned by practices and procedures through which the Council fulfils its role as a house of review. The former Clerk of the Parliaments, Mr John Evans PSM, noted that there are various opportunities for Members of the Council to obtain relevant information from the Executive Government, such as through orders for papers, questions on notice, and calling public servants to appear before a committee.⁴⁰

2.13 The current Clerk of the Parliaments similarly highlighted existing mechanisms through which ministers in the Legislative Assembly are held accountable to the Legislative Council including via orders for State papers and questions with and without notice.⁴¹

2.14 In addition to the budget estimates process and orders for papers, the Cabinet Office identified the following accountability mechanisms in place:

- daily question time in each House
- motions of censure and no confidence, noting that the Legislative Council has passed motions censuring a Minister in the Legislative Assembly
- cross-bench briefings held every sitting week, providing an opportunity for members to ask questions of Ministers regarding bills and related matters
- procedures under the recently developed *Protocol for proactive release of government information to Members of the Legislative Council*.⁴²

2.15 There are also existing mechanisms through which ministers in the Legislative Assembly may appear voluntarily before Legislative Council committees. Professor Twomey suggests these procedures are evidence of recognition and respect for the privileges of the Houses and their respective Members, in line with the principle of comity.⁴³

2.16 The Clerk emphasised that New South Wales is in a 'unique' position in terms of routinely having Lower House ministers appear at budget estimates. Mr Blunt noted that since 2018 there have been a total of 144 appearances at budget estimates by Assembly ministers by way of invitations to appear.⁴⁴ The Clerk also noted that for the past 20 years Legislative Assembly

³⁹ Evidence, Mr Blunt, 23 October 2023, p 6.

⁴⁰ Submission 4, Mr John Evans PSM, former Clerk of the Parliaments (NSW), p 2.

⁴¹ Evidence, Mr Blunt, 23 October 2023, p 3.

⁴² Submission 3, The Cabinet Office, pp 4-5.

⁴³ Submission 2, Professor Twomey, p 2.

⁴⁴ Evidence, Mr Blunt, 23 October 2023, p 4.

Ministers have appeared by way of simple invitation, without the need for messages to be exchanged between the Houses.⁴⁵

- 2.17** According to the Clerk, in the 57th Parliament (2019-2023) there were 20 instances, across 9 inquiries (outside of Budget Estimates), of Ministers from the Legislative Assembly giving evidence to Legislative Council Committees on a voluntary basis. There were also 5 instances across 4 inquiries in the 56th Parliament (2015-2019).⁴⁶
- 2.18** The Cabinet Office also acknowledged that it is open to Ministers in the Legislative Assembly to voluntarily appear before Legislative Council committee inquiries.⁴⁷
- 2.19** The Clerk further noted that the 'so-called convention' that ministerial staff do not appear before parliamentary committees, which is said to exist in other Parliaments, is not accepted in New South Wales.⁴⁸ He told the committee:

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.⁴⁹

- 2.20** Indeed, the committee received evidence to show that there have been several instances in New South Wales in recent Parliaments where ministerial staff have attended Legislative Council committees, whether by invitation or summons.⁵⁰

The Houses as sovereign and distinct chambers, and the principle of comity

- 2.21** The *Constitution Act 1902* establishes the two Houses of Parliament as separate and sovereign bodies with complete autonomy, subject to constitutional restraints, over their internal proceedings. From this constitutional foundation arises the principle of comity, or mutual respect between the two Houses.⁵¹

⁴⁵ Evidence, Mr Blunt, 23 October 2023, p 7.

⁴⁶ Evidence, Mr Blunt, 23 October 2023, p 3.

⁴⁷ Submission 3, The Cabinet Office, p 5.

⁴⁸ Evidence, Mr Blunt, 23 October 2023, pp 8, 11.

⁴⁹ Evidence, Mr Blunt, 23 October 2023, p 8.

⁵⁰ Evidence, Mr Blunt, 23 October 2023, p 8. See also Answer to Questions on Notice, Mr Blunt, 8 November 2023, pp 1-2.

⁵¹ Stephen Frappell and David Blunt (eds), *NSW Legislative Council Practice* (2nd edition), p 846.

- 2.22** Although the bill aims to strengthen ministerial accountability, it also creates a tension with the principle of comity. As noted by The Cabinet Office, the principle of comity includes the following elements: that 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.⁵²
- 2.23** In seeking to enable one House to compel a member of another House to appear before one of its committees, the Cabinet Office contended that this bill potentially undermines the longstanding principle of comity between the Houses, which is embedded in the New South Wales constitution.⁵³ The Cabinet Office argued that the coercive power proposed in this bill is 'inconsistent with the principle that neither House can exercise authority over a member of the other'.⁵⁴
- 2.24** According to Mr Evans, the rules of the two Houses of Parliament have not been adopted arbitrarily, but have evolved to ensure comity in the relationship between the Houses, with each House being independent and unable to interfere with the other. He suggested that:
- The privilege from attendance of any member before a committee is not the privilege of the member, but the privilege of the House. Only the House can grant the privilege of attendance of a member before a committee of the other House.⁵⁵
- 2.25** The current Clerk of the Parliaments acknowledged the importance of the principle of comity for the Legislative Council, noting: 'Comity is certainly something that's a living, breathing principle for the Parliament of New South Wales'. He pointed out the protection it gives members of the Legislative Assembly from coercion by the Legislative Council, and how it also works to protect the Legislative Council from interference from a potentially hostile majority in the other place.⁵⁶ Reflecting on this, the Clerk agreed that 'there is clearly good reason for comity between the Houses in relation to members of the other House'.⁵⁷

Legal uncertainty and possibility of court challenges

- 2.26** There were three specific legal issues raised by participants in relation to the bill. The first was whether the bill would be lawful in light of section 7A of the *Constitution Act 1902*, a matter raised by the former Clerk of the Parliaments, Mr John Evans.
- 2.27** Section 7A of the *Constitution Act 1902* provides that the Legislative Council shall not alter its powers unless it occurs via a referendum of electors. Noting this provision, Mr Evans queried:

⁵² Submission 3, The Cabinet Office, p 2. See also Stephen Frappell and David Blunt (eds), *NSW Legislative Council Practice* (2nd edition), pp 846-849, as referenced in Submission 4, Mr John Evans, p 2.

⁵³ Submission 3, The Cabinet Office, p 2.

⁵⁴ Submission 3, The Cabinet Office, p 2.

⁵⁵ Submission 4, Mr John Evans, p 2.

⁵⁶ Evidence, Mr Blunt 23 October 2023, p 5.

⁵⁷ Submission 1, Mr David Blunt, p 3.

Quaere whether the 1901 Act, being inconsistent with section 7A cannot be amended to confer a new power on the Council to summon Ministers to appear before a Council Committee, except by complying with the referendum requirements in section 7A of the Constitution Act.⁵⁸

- 2.28** Professor Gabrielle Appleby, UNSW Law and Justice, and Professor Twomey disagreed that this constitutional restriction applies. Both Professors pointed to the case of *Arena v Nader* (1997), with Professor Twomey stating that 'the NSW Parliament has the power to legislate to diminish or terminate the privileges of the Houses or their Members, as long as this is clearly expressed'.⁵⁹
- 2.29** In *Arena v Nader* (1997), Professor Appleby explained that the NSW Court of Appeal held that any 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. First, the requirement in that section is limited to the powers associated with the lawmaking function and not the scope of parliamentary privilege. Second, the requirement in section 7A is impliedly limited to alterations that lessen the powers of the Parliament. Thus, Professor Appleby's view was that 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 Parliament.⁶⁰
- 2.30** Professor Appleby acknowledged that the legislation may be open to a challenge in the courts on constitutional grounds, although she noted that there is a unanimous ruling of the Court of Appeal that would have to be overturned in order for such a challenge to be successful. In her view, the prospects of a successful challenge may be limited.⁶¹
- 2.31** The second legal concern was whether the bill, if enacted, would enable the courts to interfere with the matters of both Houses. On this issue, the former Clerk of the Parliaments suggested that amending the *Parliamentary Evidence Act* in this way could 'open the door for the Courts to interfere in the internal proceedings of the Houses'.⁶² His view was that 'such matters are best left to the goodwill of the two Houses to resolve between themselves'.⁶³
- 2.32** This point was reinforced by the current Clerk of the Parliaments, Mr Blunt, who stated 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...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'.⁶⁴
- 2.33** Questions were also raised as to how the amendments provided by the bill would interact with the procedure of the House. The Cabinet Office noted that if the legislation is passed, there is potential for a conflict between a summons issued under the *Parliamentary Evidence Act* and the Standing Orders of the Houses of Parliament, taking into account the Standing

⁵⁸ Submission 4, Mr John Evans, p 1.

⁵⁹ Submission 2, Professor Twomey, p 2, cites *Arena v Nader* (1997) 71 ALJR 1604, 1605; and (1997) 42 NSWLR 427, 434.

⁶⁰ Evidence, Professor Gabrielle Appleby, UNSW Law and Justice, 23 October 2023, p 2.

⁶¹ Evidence, Professor Appleby, 23 October 2023, p 7.

⁶² Submission 4, Mr John Evans, p 2.

⁶³ Submission 4, Mr John Evans, p 2.

⁶⁴ Evidence, Mr Blunt, 23 October 2023, pp 9-10.

Orders are approved by the Governor pursuant to section 15 of the Constitution Act and once approved become binding and of force. Reflecting on this, the Cabinet Office stated:

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.⁶⁵

Potential misuse of the expanded power

2.34 Several inquiry participants argued that by favouring accountability over comity, the good intentions of the bill could be misapplied or abused.

2.35 For example, the Cabinet Office raised the prospect of a committee seeking to compel one or more members of the other House to attend and give evidence in order to stymie a vote on a government bill in that House, thus interfering with the business of the other House.⁶⁶

2.36 Relevant to this was advice from Mr Bret Walker SC to the Clerk of the Senate regarding requests for Ministers to appear before the 'Children Overboard Inquiry'. The advice noted the rationale for 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.⁶⁷

2.37 Professor Twomey also noted the potential of this legislation to 'increase the likelihood of partisan attacks rather than considered scrutiny'. The Professor suggested that 'the temptation for 'show-trials' of Ministers for partisan advantage would be politically irresistible'.⁶⁸

2.38 Both Professor Twomey and the Cabinet Office expressed concern about the significant penalties currently in the Act, including the possibility of arrest for failing to attend when summoned, and gaol for a witness who refuses to answer a lawful question during examination.⁶⁹

2.39 The Legislation Review Committee's report also noted concerns about the lack of exception on any grounds, including Cabinet confidentiality, from penalties under the Act. It stated that the bill could lead to Ministers breaching cabinet confidentiality if, in refusing to answer a question, they were required to indirectly disclose details of cabinet deliberations.⁷⁰ The

⁶⁵ Submission 3, The Cabinet Office, pp 3-4

⁶⁶ Submission 3, The Cabinet Office, p 4, citing advice given by Mr Bret Walker SC to the Senate Select Committee on a Certain Maritime Incident.

⁶⁷ Cited in Submission 3, The Cabinet Office, p 4.

⁶⁸ Submission 2, Professor Twomey, p 2.

⁶⁹ Submission 2, Professor Twomey, pp 2-3; Submission 3, The Cabinet Office, p 4.

⁷⁰ Legislation Review Committee, *Legislation Review Digest No. 4/58 (2023)*, pp 43-44.

report suggested that this may infringe on the separation of powers, and constitute an intrusion from the Legislature into the functioning of the Executive.⁷¹

- 2.40** In this regard, both Professor Twomey and Professor Appleby identified a need to look at the penalties for non-compliance under the *Parliamentary Evidence Act*, given that the potentially severe consequences for ministers who did not comply with a summons under the Act could lead to abuse of the power.⁷² Professor Appleby suggested consideration should be given to alternative consequences for Ministers, should they not comply with a summons under an amended *Parliamentary Evidence Act*.⁷³
- 2.41** Professor Appleby also suggested that the bill, if passed, should be accompanied by changes to standing orders that would facilitate the attendance of Ministers in a way that did not disrupt the business of the other House.⁷⁴ This could help mitigate the risk of the power being used to stymie certain votes, as identified in the Cabinet Office submission.⁷⁵
- 2.42** On whether the powers were open to misuse, Mr Blunt commented that he has '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, he also noted that, once something is put in law, there are risks that future generations of members might seek to exercise this power in a way that was 'unreasonable' or that interfered with the operations of the Legislative Assembly.⁷⁶

Is now the right time to consider this change?

- 2.43** Although the impetus for this bill was a Minister declining to attend and give evidence before a committee, inquiry participants discussed whether the bill was necessary at this time, taking into account the fact that there have been many other instances in which ministers have appeared voluntarily.
- 2.44** As noted earlier, there have been 25 instances in the 56th and 57th Parliament in which a minister appeared voluntarily before a committee. The Clerk of the Parliaments also noted that in this Parliament, in addition to 22 ministers, including Legislative Assembly ministers, appearing before budget estimates hearings, there has also been one other instance in which a minister accepted an invitation to appear at an inquiry.⁷⁷
- 2.45** Reflecting on the trend from the last two Parliaments, the Clerk suggested that the practice of ministers voluntarily appearing before committees could be assumed to continue.⁷⁸ Given signs that the current government intends to continue complying with existing accountability

⁷¹ Legislation Review Committee, *Legislation Review Digest No. 4/58* (2023), p 44.

⁷² Submission 2, Professor Twomey, p 2; Evidence, Professor Appleby, 23 October 2023, p 3.

⁷³ Evidence, Professor Appleby, 23 October 2023, p 4.

⁷⁴ Evidence, Professor Appleby, 23 October 2023, pp 4-5.

⁷⁵ Evidence, Professor Appleby, 23 October 2023, pp 3, 5; Submission 3, The Cabinet Office, p 4.

⁷⁶ Evidence, Mr Blunt, 23 October 2023, p 9.

⁷⁷ This was the inquiry into the Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023, see Portfolio Committee no. 7, Report 19, 2023.

⁷⁸ Evidence, Mr Blunt, 23 October 2023, p 10.

practices, Mr Blunt agreed that the bill may not be needed at this time. The Clerk did, however, suggest that it was worthwhile considering the issues raised by the bill, in case there should be a change in practice in future, such as Ministers and Parliamentary Secretaries in the Legislative Assembly declining to appear before budget estimates hearings.⁷⁹

- 2.46** Professor Appleby similarly suggested that now is an opportune time to consider current practice, without the sense of urgency or crisis that a deterioration of ministerial accountability practice might bring in future. Without advocating for changes to legislation or standing orders at present, Professor Appleby suggested that it is worthwhile, whether or not the bill proceeds, to consider different options the Council could pursue in the event a future change in practice makes it necessary.⁸⁰

Alternative ways to strengthen Ministerial accountability

- 2.47** The committee also considered alternative ways ministerial accountability could be strengthened without undermining the principle of comity between the Houses.
- 2.48** The former Clerk of the Parliaments, Mr John Evans, noted that matters such as this should be resolved by rules of procedure of the two Houses, rather than changes to the law.⁸¹ He suggested the Houses should adopt Standing Orders to govern the attendance of members (including Ministers) of one House before the other.⁸² The former Clerk also noted that both the United Kingdom House of Commons and House of Lords have adopted standing orders which provide for any Member to attend as a witness before a committee of the other House, if the member thinks fit.⁸³ He noted it is open to the Legislative Council to lead by example in adopting a Sessional or Standing Order.⁸⁴
- 2.49** The committee also explored with witnesses whether it would be possible to put in place a special standing order through which a committee could put questions on notice to a minister in the Legislative Assembly, should they decline to attend in person, with consequences for the Leader of the Government in the House should the questions not be answered.⁸⁵
- 2.50** The Clerk of the Parliaments, Mr Blunt, noted that the mechanisms developed under Standing Order 52 – where the Leader of the Government is the person ultimately responsible to the House in relation to the production of documents – were developed 'very deliberately and very carefully over time', and the idea of putting questions from a committee on notice with consequences for non-compliance would need to be considered equally carefully.⁸⁶ Mr Blunt advised that there is no precedent for questions being put on notice from a committee or committee chair.⁸⁷

⁷⁹ Evidence, Mr Blunt, 23 October 2023, p 11.

⁸⁰ Evidence, Professor Appleby, 23 October 2023, p 11.

⁸¹ Submission 4, Mr John Evans, p 1.

⁸² Submission 4, Mr John Evans, p 2.

⁸³ Submission 4, Mr John Evans, p 2.

⁸⁴ Submission 4, Mr John Evans, p 2.

⁸⁵ Evidence, 23 October 2023, p 8.

⁸⁶ Evidence, Mr Blunt, 23 October 2023, p 8.

⁸⁷ Answers to questions on notice, Mr Blunt, 8 November 2023, pp 3-4.

2.51 On this point, the former Clerk advised that:

It would seem to me that there is no impediment to the House adopting a Sessional Order (as a trial, of course, before adopting a Standing Order) to allow a Committee Chair, with the authority of a Committee, to lodge Questions on Notice to a Minister. Of course, a majority of the Committee would necessarily have to agree to the terms of the written question.⁸⁸

2.52 The current Clerk noted that Standing Order 68 includes provisions to ensure that questions on notice are answered, and Standing Order 69 includes provision for debate to take note of answers to questions to include debate about their adequacy. He observed that these could apply to any questions under a sessional order providing for questions on notice from a committee or a committee chair on behalf of a committee.⁸⁹

2.53 The Clerk noted however a risk that the existence of such a mechanism could potentially lead to Legislative Assembly ministers seeing it as a substitute for appearing before Legislative Council committees, thus leading to a decline in Legislative Assembly ministers accepting invitations to give evidence before Legislative Council Committees.⁹⁰

2.54 And finally, in the event a committee were faced with a similar scenario as faced by this committee with regards the Minister for Transport, a committee could also use a range of devices to 'persuade' a minister to attend. In his advice to this committee concerning Minister Haylen's refusal to appear for the inquiry into the appointments of Josh Murray and Emma Watts, the Clerk set out various options available to the committee, such as:

- the Chair making a statement to the media about a Minister declining to give evidence, which may influence the minister to re-consider the invitation and attend
- a member moving a censure motion in the House in relation to the Minister's refusal to attend and give evidence
- pursuing further evidence relating to the inquiry through orders for papers in the House
- raising the inquiry issues with the Minister during Budget Estimates.⁹¹

Committee comment

2.55 This bill has provided a valuable opportunity to reflect on fundamental principles of our system of government in New South Wales, in particular, ministerial accountability to Parliament and the right of each House to control its own proceedings. The committee welcomes this focus on key aspects of our parliamentary democracy.

⁸⁸ Answers to questions on notice, Mr Blunt, 8 November 2023, pp 3-4, citing advice from former Clerk of the Parliaments, Mr John Evans PSM.

⁸⁹ Answers to questions on notice, Mr Blunt, 8 November 2023, pp 3-4.

⁹⁰ Answers to questions on notice, Mr Blunt, 8 November 2023, pp 3-4.

⁹¹ Submission 1, Mr David Blunt, Attachment, p 7.

- 2.56** While the role of the Legislative Council in scrutinising the Executive is of critical importance, it should not trump the principle of comity. A way must be found to maintain a balance between these two key conventions.
- 2.57** At present, this balance is achieved by the Council drawing on a wide array of accountability mechanisms, including questions with and without notice and orders for the return of State papers, as well as by holding committee inquiries. Over the past 20 years literally dozens of Assembly ministers have appeared appear before Council committees, including the annual Budget Estimates inquiries. Additionally, in New South Wales there is no convention against ministerial staff appearing before parliamentary committees and there are numerous precedents of ministerial staff giving evidence before a committee, with or without a summons.
- 2.58** This is not to say that things might not change; there is always the possibility that at some point in the future, a government might instruct its ministers not to attend before a Council committee. It is therefore important to take this opportunity to plan for such a scenario. The idea of enabling a committee to put questions on notice to ministers in the Legislative Assembly is worth considering; as is the suggestion from the former Clerk, Mr Evans regarding standing orders to govern the appearance of members, including ministers, of one House before another. And there is always the option for a committee faced with a recalcitrant minister, to employ some of the 'creative' approaches outlined by the Clerk in his advice to this committee.
- 2.59** If the bill were to be passed, it would be important to consider some of the suggestions made by inquiry participants, including in relation to the penalties applicable to ministers who fail to comply, as well as amending the standing order to reduce any likelihood that a minister's attendance before a Council committee could conflict with their obligations to their House.
- 2.60** The committee recommends that the Legislative Council proceed to debate the bill and that the issues identified by stakeholders as set out in this report be addressed during debate in the House.

Recommendation 1

That the Legislative Council proceed to debate the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 and that the issues identified by stakeholders as set out in this report, be addressed during debate in the House.

Appendix 1 Submissions

No	Author
1	Mr David Blunt AM
2	Professor Anne Twomey AO
3	The Cabinet Office
4	Mr John Evans PSM, Former Clerk of the Parliaments (NSW)

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Monday 23 October 2023	Professor Gabrielle Appleby	UNSW Law and Justice
Videoconference	Mr David Blunt AM	Clerk of the Legislative Council and Clerk of the Parliaments

Appendix 3 Minutes

Minutes no. 15

Tuesday, 3 October 2023

Public Accountability and Works Committee

Room 1136, NSW Parliament House, 3.32 pm

1. Members present

Ms Boyd, Chair

Mr Buttigieg

Mrs Taylor (*via videoconference*)

Mr Latham (*via videoconference*)

Dr Kaine (*via videoconference*)

Ms Munro (*substituting for Mr Farlow*)

Mr Primrose

2. Previous minutes

Resolved, on the motion of Mr Buttigieg: That draft minutes no. 13 and 14 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 5 September 2023 – Email from Mr Alex Claassens, Branch Secretary, Rail, Tram and Bus Union (NSW Branch), to the secretariat, declining the invitation to appear at a public hearing on 6 September 2023
- 5 September 2023 – Email from Mr Ivan Mills, A/Manager, Government Relations, NSW Fire + Rescue, to the secretariat, advising it requires an extension of 15 days to return answers to certain supplementary questions to consult third parties as required by the GIPA Act
- 5 September 2023 – Email from Mr Gerald Jaworski to the secretariat providing further comment on the matters in his submission no. 22
- 7 September 2023 – Letter from an inquiry participant to the Chair regarding the use of consultants by Fire + Rescue NSW
- 13 September 2023 – Email from Mr Gary Wilson, APA (NSW), reiterating the request to keep his letter of 31 August 2023 confidential due to commercial sensitivity of the information
- 19 September 2023 – Letter from Mr David Deverall, Chief Executive, TCorp, to the Chair, providing a correction to evidence given at the hearing on 6 September 2023
- 19 September 2023 – Letter and attachments from Mr Leighton Drury, State Secretary, Fire Brigade Employees' Union, to the Chair, outlining FBEU concerns with answers to questions on notice provided by Fire + Rescue NSW
- 20 September 2023 – Letter from Mr Bill Browne, Director, Democracy and Accountability Program, The Australia Institute, to the Chair, making a correction to Submission no. 27
- 20 September 2023 – Letter from Ms Heather Watson to the Chair, responding to possible adverse mention in answers to questions on notice from Emeritus Professor James Guthrie et al
- 20 September 2023 – Letter from Ms Heather Watson to the Chair, responding to possible adverse mention in Submission no. 27
- 21 September 2023 – Letter from Ms Vanessa Chapman, Group Executive, General Counsel and Corporate Assurance, CA ANZ, to the Chair, responding to potential adverse mention in Submission no. 22
- 27 September 2023 – Letter from Ms Kathryn Danks, A/Executive Director, Office of the Commissioner, Fire and Rescue NSW, to the Chair, providing corrections to answers to supplementary questions received on 7 September 2023

- 28 September 2023 – Email from Mr Daniel Rindfleish, Government Relations Advisor, Sydney Water, to the secretariat requesting an extension to the deadline to return certain answers to certain supplementary questions due to the resources required to compile information.

Sent

- 6 September 2023 – Email from the secretariat to Mr Ivan Mills, Fire + Rescue NSW, noting the request for an extra 15 days to provide answers to supplementary question no. 2 from the 9 August hearing
- 7 September 2023 – Email from the secretariat to Mr Gary Wilson, APA (NSW) seeking agreement to publication of his letter dated 31 August 2023, which the committee had previously resolved to keep confidential
- 7 September 2023 – Email from the secretariat to Ms Vanessa Chapman, CA ANZ, seeking clarification of CA ANZ's confidentiality request regarding submission no. 22.

Resolved, on the motion of Ms Munro: That the committee keep the letter from an inquiry participant, received 7 September, confidential as per the request of the author, and that the author's name be redacted from minutes no.15.

Resolved on the motion of Mr Buttigieg: That the committee authorise:

- the publication of the letter from Mr David Deverall, received 19 September 2023, providing a correction to evidence given at the hearing on 6 September 2023
- the insertion of footnotes at the relevant points in the transcript of 6 September noting that correspondence clarifying the evidence had been received and providing a hyperlink to the published correspondence.

Resolved, on the motion of Mr Buttigieg: That the committee authorise publication of the following items of correspondence:

- Letter from Mr Bill Browne, received 20 September 2023, correcting an error in Submission no. 27 from The Australia Institute
- Letter from Ms Heather Watson, received 20 September 2023, responding to possible adverse mention in Submission no. 27
- Letter from Ms Heather Watson, received 20 September 2023, responding to possible adverse mention in answers to questions on notice from Emeritus Professor James Guthrie et al
- Letter from Ms Vanessa Chapman, CA ANZ, received 21 September 2023, responding to possible adverse mention in Submission no. 22
- Letter from Ms Katherine Danks, Fire and Rescue NSW, received 27 September 2023, providing corrections to answers to supplementary questions received on 7 September 2023.

4. Inquiry into the NSW Government's use and management of consultants

4.1 Partially confidential submission - Submission no. 22

Resolved, on the motion of Ms Munro: That the committee authorise the publication of Submission no. 22, with the exception of potential adverse mention which is to remain confidential, as per the recommendation of the secretariat.

4.2 Answers to questions on notice and supplementary questions

The following answers to questions on notice were published under the resolution establishing the committee:

- Health Services Union NSW received on 17 August 2023
- NSW Treasury (supplementary questions) received on 6 September 2023
- NSW Procurement (supplementary questions) received on 6 September 2023
- NSW Treasury (questions on notice) received on 6 September 2023
- Fire + Rescue NSW on 7 September 2023 and 11 September
- icare, received on 12 September 2023

- NSW Health, received on 13 September 2023
- SIRA (questions on notice) received on 13 September 2023
- SIRA (supplementary questions) received on 13 September 2023
- Public Service Association, received on 13 September 2023
- Deloitte, received on 13 September 2023

Resolved, on the motion of Mrs Taylor: That the committee keep answers to a question on notice and a supplementary question from Deloitte, received on 13 September 2023, confidential, as per the request of the author, as they contain identifying and/or sensitive information.

4.3 Transcript corrections

Resolved, on the motion of Mr Primrose: That the committee authorise the insertion of footnotes at the relevant points in the transcript of 9 August noting that correspondence clarifying the evidence had been received from Ms Nancy Milne, Chairman, Accounting Professional & Ethics Standards Board, and providing a hyperlink to the published correspondence.

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

5.1 Terms of reference

Committee to note the following terms of reference referred by the House on 20 September 2023:

That:

- The Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 be referred to the Public Accountability and Works Committee for inquiry and report
- The committee report by 27 November 2023.

5.2 Proposed timeline

Resolved, on the motion of Mrs Taylor: That the committee adopt the following timeline for the administration of the inquiry:

- Thursday 19 October – closing date for submissions
- Monday 23 October – public hearing
- Monday 6 November – answers to questions on notice due
- Thursday 16 November – Chair's draft report to committee
- Monday 20 November (after 1 pm) – report deliberative
- Monday 27 November – report tabled.

5.3 Stakeholder list

Resolved, on the motion of Mr Latham: That:

- the following stakeholders be invited to make a submission and/or give oral evidence to the inquiry:
 - Clerks of other Australian bicameral parliaments
 - Clerk of the Parliaments, NSW
 - Clerk of the NSW Legislative Assembly
 - Mr Bret Walker SC
 - Professor Anne Twomey
 - Professor Gabrielle Appleby
 - The NSW Cabinet Office
 - Mr John Evans (former clerk of the NSW Legislative Council)
- members have until **4pm Wednesday 4 October** to propose amendments or nominate additional stakeholders
- the committee agree to the stakeholder and witness list by email, unless a meeting of the committee is required to resolve any disagreement.

6. Adjournment

The committee adjourned at 3.46 pm, until Monday 23 October 2023 (time tbc, public hearing for the parliamentary evidence bill inquiry).

Peta Leemen

Committee Clerk

Minutes no. 16

Monday, 23 October 2023

Public Accountability and Works Committee

Via videoconference, 8.46 am

1. Members present

Ms Boyd, Chair

Mr Farlow, Deputy Chair

Mr D'Adam (*substituting for Dr Kaine*)

Mr Buttigieg (to 10.32 am)

Mr Latham (to 10.32 am)

Mr Primrose

Mr Tudehope (*substituting for Mrs Taylor for the duration of the inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023*)

2. Previous minutes

Resolved, on the motion of Mr Primrose: That draft minutes no. 15 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 25 September 2023 – Letter from Mr Josh Murray, Secretary, Transport for NSW, to committee, asking the committee to consider a number of matters regarding his appearance for the reserved hearing on Friday 17 November 2023, for the inquiry into appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner
- 29 September 2023 – Email from Ms Gloria Hill, Manager Strategic Coordination, EnergyCo, to the secretariat, seeking an extension of time to provide answers to supplementary questions from hearing on 6 September 2023, for the inquiry into the NSW Government's use and management of consulting services
- 29 September 2023 – Email from Mr Gerald Jaworski to the secretariat, seeking an update on publication of his submission, for the inquiry into the NSW Government's use and management of consulting services
- 3 October 2023 – Email from Miss Deyi Wu, Office of the Opposition Whip, to the secretariat, advising that the Hon Damien Tudehope MLC will substitute for the Hon Bronnie Taylor MLC for the duration of the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 4 October 2023 – Letter from Mr Darren Cleary, Managing Director, Hunter Water, to the Chair, requesting that the unredacted version of Attachment A to their answers to questions on notice be kept confidential, for the inquiry into the NSW Government's use and management of consulting services
- 4 October 2023 – Email from Ms Ali Nelson-Watt, Ministerial and Parliamentary Services, Infrastructure NSW, to the secretariat, providing clarifications to evidence given at the public hearing on 5 September 2023, for the inquiry into the NSW Government's use and management of consulting services
- 4 October 2023 – Letter from Mr Peter Perdikos, Executive Director Commercial, Procurement and Transformation, Transport for NSW, to the Chair, regarding the scope and timeframe for answering

supplementary questions 1 and 11 from the hearing on 5 September, for the inquiry into the NSW Government's use and management of consulting services

- 4 October 2023 – Email from Professor Gabrielle Appleby to the Chair advising her availability to give evidence at the hearing on 23 October, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 5 October 2023 – Email from Mr Gerald Jaworski to the secretariat, regarding redactions made to his submission, for the inquiry into the NSW Government's use and management of consulting services
- 5 October 2023 – Email from Mr Mitch Dudley, Manager, Parliamentary Services, Transport for NSW, to the secretariat, regarding the scope and timeframe for answering supplementary questions 1 and 11 from the 5 September public hearing, for the inquiry into the NSW Government's use and management of consulting services
- 6 October 2023 – Email from Ms Caroline Davoren on behalf of Mr Bret Walker SC, to the secretariat, declining the invitation to give evidence at the hearing on 23 October, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 8 October 2023 – Email from Mr Gerald Jaworski to the secretariat, regarding his submissions and redactions, also enclosing an email he provided to CAANZ, for the inquiry into the NSW Government's use and management of consulting services
- 9 October 2023 – Email from Mr Robert McDonald, Clerk, Legislative Council, Parliament of Victoria, to the Chair, declining the committee's invitation to give evidence, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 9 October 2023 – Email from Ms Stephanie Hesford, Deputy Clerk, House of Assembly, Parliament of Tasmania, on behalf of the Clerk, to the secretariat, declining the committee's invitation to give evidence, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 10 October 2023 – Email from Ms Gemma Namey, Principal Legal Officer, Legal Branch, The Cabinet Office, advising that the Cabinet Office has declined to attend the public hearing, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 10 October 2023 – Email from Ms Jan Primrose, Deputy Secretary, Australian Services Union NSW & ACT (Services) Branch, to the secretariat, requesting the ASU's answers to questions on notice provided on 4 October be kept confidential, for the inquiry into the NSW Government's use and management of consulting services
- 11 October 2023 – Email from Mr Mitch Dudley, Manager, Parliamentary Services, Transport for NSW, to the secretariat, outlining a proposed scope and timeframe for answering supplementary questions 1 and 11 from the 5 September public hearing, for the inquiry into the NSW Government's use and management of consulting services
- 16 October 2023 – Email from the office of the Clerk of the Legislative Council, Western Australia, to the secretariat, advising that the Clerk, Mr Sam Hastings, is not available to participate in the committee's inquiry, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023
- 19 October 2023 – Email from Mr John Evans, former Clerk of the Parliaments, forwarding a submission and advising he is not available to give evidence at the hearing, for the inquiry into the Parliamentary Evidence Amendment (Ministerial Responsibility) Bill 2023.

Sent

- 4 October 2023 – Email from the secretariat to Mr Gerald Jaworski, advising that his submission had been published with redactions, and providing information on the Legislative Council's procedural fairness resolution, for the inquiry into the NSW Government's use and management of consulting services
- 11 October 2023 – Email from the secretariat to Mr Mitch Dudley, Manager, Parliamentary Services, Transport for NSW, agreeing to the proposed scope and timeframe for answering supplementary questions from the 5 September public hearing, for the inquiry into the NSW Government's use and management of consulting services.

Resolved, on the motion of Mr Primrose: That the committee authorise:

- the publication of the letter from Ms Ali Nelson-Watt, Infrastructure NSW, received on 4 October 2023, providing clarifications to evidence given at the public hearing on 5 September, for the inquiry into the NSW Government's use and management of consulting services
- the insertion of footnotes at the relevant points in the transcript of 5 September noting that correspondence clarifying the evidence had been received and providing a hyperlink to the published correspondence.

4. Inquiry into the NSW Government's use and management of consulting services

4.1 Answers to questions on notice and supplementary questions

The following answers to questions on notice were published under the resolution establishing the committee:

- TCorp, received 19 September 2023
- KPMG, received 4 October 2023
- Hunter Water (including Attachment A – public version), received 4 October 2023
- Infrastructure NSW, received 4 October 2023
- Sydney Metro, received 4 October 2023
- Transport for NSW, received 4 October 2023
- Transport Asset Holding Entity (TAHE) NSW (answers to questions on notice), received 4 October 2023
- Transport Asset Holding Entity (TAHE) NSW (answers to supplementary questions), received 4 October 2023

4.2 Confidential answers to questions on notice

Resolved, on the motion of Mr Latham: That the committee keep confidential the following documents as per the request of the authors:

- the unredacted version of 'Attachment A' to answers to questions on notice from Hunter Water, received 4 October 2023
- answers to questions on notice from the Australian Services Union, received 4 October 2023.

5. Inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill

5.1 Public submissions

The following submissions were published under the resolution establishing the committee: Submissions no. 1-4.

5.2 Public hearing via videoconference

The witnesses were admitted via videoconference.

The committee proceeded to take evidence in public.

The Chair made an opening statement regarding the broadcasting of proceedings, virtual hearing etiquette and other matters.

The following witnesses were sworn and examined:

- Mr David Blunt AM, Clerk of the Legislative Assembly and Clerk of the Parliaments
- Professor Gabrielle Appleby, UNSW Law and Justice.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 10.32 am.

Mr Buttigieg left the meeting.

Mr Latham left the meeting.

6. Inquiry into appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner

6.1 Answers to questions on notice and supplementary questions

The following answers to questions on notice, supplementary questions and additional information were published under the resolution appointing the committee:

- Answers to questions on notice, Mr Chris Lamb, Deputy Commissioner, Public Service Commission, received on 22 September 2023
- Answers to questions on notice and additional information, Dr Marianne Broadbent, NGS Global, received on 23 September 2023
- Answers to supplementary questions, Ms Kate Boyd, The Cabinet Office, received on 27 September 2023
- Answers to supplementary questions, Mr Peter Duncan, Former Acting Secretary, Premier's Department received on 28 September 2023
- Answers to supplementary questions, Mr Scott Gartrell, Chief of Staff, Office of the Minister for Transport received on 28 September 2023
- Answers to supplementary questions and additional information, Ms Emma Watts, NSW Cross Border Assistant Commissioner, received on 29 September 2023
- Answers to questions on notice and supplementary questions, Mr James McTavish, Cross Border Commissioner, received on 29 September 2023
- Answers to questions on notice and supplementary questions, Mr Steve Orr, A/Secretary, Department of Regional NSW and Ms Julie-Anne Tooth, Chief People Officer, Department of Regional NSW, received on 29 September 2023
- Answers to supplementary questions and additional information, Mr Josh Murray, Secretary, Transport for NSW, received on 3 October 2023
- Answers to questions on notice, Mr Josh Murray, Secretary, Transport for NSW, received on 10 October 2023.

Resolved, on the motion of Mr Tudehope: That the committee authorise the publication of the answers to questions on notice and attachment to answers with the exception of the identifying information as per the request of the author and recommendation of the secretariat:

- Answers to questions on notice, Ms Emma Watts, NSW Cross Border Assistant Commissioner, received on 29 September 2023
- Attachment to answers, Mr James McTavish, NSW Cross Border Commissioner, received on 29 September 2023.

6.2 Publication status of the Clerk's advice

The committee noted that the Clerk's advice, dated 5 September 2023, regarding options the committee could pursue following Minister Jo Haylen's correspondence declining the committee's invitation to attend a hearing on Thursday 31 August 2023, was published as part of the Clerk's submission to the inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill.

6.3 Witness list for public hearing on 17 November

The committee noted that the witness list for the committee's potential public hearing on 17 November would be resolved by email.

7. Adjournment

The committee adjourned at 10.36 am until Friday 17 November (public hearing, appointments inquiry)

Peta Leemen
Committee Clerk

Draft minutes no. 17

Thursday, 23 November 2023

Public Accountability and Works Committee

Macquarie Room, Parliament House, Sydney, 1.34 pm.

1. Members present

Ms Boyd, Chair

Mr Farlow, Deputy Chair

Mr Buttigieg (from 1.39 pm)

Dr Kaine

Mr Primrose

Mr Tudehope (*substituting for Mrs Taylor*)**2. Apologies**

Mr Latham

3. Previous minutes

Resolved, on the motion of Mr Farlow: That draft minutes no. 16 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 20 October 2023 – Email from Mr Daniel Rindfleish, Government Relations Advisor, Sydney Water, to the secretariat, requesting that the unredacted versions of question on notice 3 and supplementary question 1 from Sydney Water be kept confidential, for the inquiry into the NSW Government's management and use of consultants
- 20 October 2023 – Email from Ms Gloria Hill, Manager, Strategic Coordination, EnergyCo, to the secretariat, requesting a further extension of time to lodge answers to questions on notice from the hearing on 6 September 2023, for the inquiry into the NSW Government's management and use of consultants
- 22 October 2023 – Email from Ms Jan Primrose, Deputy Secretary, Australian Services Union NSW & ACT (Services) Branch, to the secretariat, providing answers to questions on notice, requesting that pp. 8 to 14 be kept confidential, and providing an update to evidence previously provided, for the inquiry into the NSW Government's management and use of consultants
- 24 October 2023 – Email from Ms Jan Primrose, Deputy Secretary, Australian Services Union NSW & ACT (Services) Branch, to the secretariat, thanking the committee for the consideration of their concerns, for the inquiry into the NSW Government's management and use of consultants
- 25 October 2023 – Email from Mr Gerald Jaworski, to the secretariat, providing further comments on CA ANZ, for the inquiry into the NSW Government's management and use of consultants
- 26 October 2023 – Letter from Mr Peter Perdikos, Executive Director Commercial, Procurement & Transformation, Corporate Services, Transport for NSW, to the Chair, requesting clarification of what the committee still requires in regard to supplementary question 1, given the substantial work for TfNSW staff to provide requesting information on engagements below \$150,000, for the inquiry into the NSW Government's management and use of consultants.
- 21 November 2023 – Letter from Mr Richard Gwilym, Managing Partner, Scyne Advisory to the secretariat, providing an update on the operations of Scyne Advisory as an independent business, for the inquiry into the NSW Government's management and use of consultants.

Sent

- 1 November 2023 – Email from the secretariat to Mr Mitch Dudley, Transport for NSW, regarding a revised scope and timeframe for answering supplementary question 1, for the inquiry into the NSW Government's management and use of consultants.

5. Inquiry into the Parliamentary Evidence (Ministerial Accountability) Bill 2023

5.1 Answers to questions on notice

The following answers to questions on notice were published under the resolution appointing the committee:

- answers to questions on notice from Mr David Blunt AM, Clerk of the Parliaments, received 8 November 2023.

5.2 Publication of correspondence from appointments inquiry

Resolved, on the motion of Mr Farlow: That the committee authorise publication of the email from the office of the Hon Jo Haylen MP, Minister for Transport, declining to appear at a hearing for the inquiry into the appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner, received on 30 August 2023.

5.3 Consideration of Chair's draft report

The Chair submitted her draft report entitled '*Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023*' which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Tudehope: That:

- The draft report be the report of the committee and that the committee present the report to the House;
- The transcript of evidence, submissions, answers to questions on notice, and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished transcripts of evidence, submissions, and answers to questions on notice relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- Upon tabling, all unpublished correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee and subject to the redaction of identifying and/or sensitive information;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- The secretariat table the report at 3pm Monday 27 November.

6. Inquiry into the NSW Government's use and management of consultants

6.1 Answers to questions on notice and supplementary questions

The following answers to questions on notice were published under the resolution establishing the committee:

- Sydney Water, received 20 October 2023
- Energy Co, received 25 October 2023
- Transport for NSW (additional answers to supplementary questions), received 26 October 2023
- Transport for NSW (further additional answer to supplementary question), received 20 November 2023.

6.2 Confidential and partially confidential answers to questions on notice

Resolved, on the motion of Mr Farlow: That the committee keep confidential the unredacted versions of answers to question on notice 3 and supplementary question 1 from Sydney Water, received 20 October 2023, as per the author's request.

Resolved, on the motion of Mr Farlow: That the committee:

- keep confidential pages 8 to 14 of the answers to questions on notice from the Australian Services Union, received on 22 October 2022, at the request of the author; and
- authorise publication of the remainder of the document.

Resolved, on the motion of Mr Primrose: That the:

- answers to questions on notice and supplementary questions from Mr Brendan Lyon, received on 19 October 2023, be published, with the exception of the transcript of conversation at pages 44-47, which is to be kept confidential until the committee is able to reconsider publication in light of advice from the Clerk
- Chair write to KPMG to provide them with an opportunity to respond to the potential adverse mention (as highlighted on page 10) included in the answers to questions on notice and supplementary questions from Mr Brendan Lyon
- committee seek advice from the Clerk regarding the impact and appropriateness of publishing a transcript of a recorded conversation, including any obligations the committee may have in reporting a potential offence.

7. Inquiry into the appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner, and Senior Executives and Department Liaison Officers in 2023

7.1 Amendment to Terms of Reference

The committee noted the following terms of reference, as amended, by the House on 22 November 2023:

1. That the Public Accountability and Works Committee inquire into and report on the appointments of Josh Murray to the position of Secretary of Transport for NSW and Emma Watts as NSW Cross-Border Assistant Commissioner, and Senior Executives and Department Liaison Officers in 2023, and in particular:

- (a) the circumstances leading up to the appointments
- (b) the process undertaken to make the appointments
- (c) the probity and integrity measures that were undertaken as part of the appointments
- (d) the principles, public expectations and requirements for appointments to the public service by Ministers
- (e) the process for the appointment of senior officers generally
- (f) the appointment, actions, duties and responsibilities of Department Liaison Officers seconded to ministerial offices
- (g) the creation of transition offices in the Government
- (h) other matters related to senior executive appointments at Transport for NSW, and
- (i) any other related matters.

2. That the committee report by 20 May 2024.

7.2 Hearing dates

Resolved, on the motion of Mr Primrose: That the secretariat canvass member availability, in consultation with the Chair, for two hearing dates in February/March 2024.

8. Adjournment

The committee adjourned at 1.51 pm until 5 February 2024 (public hearing for consultants inquiry)

Peta Leemen

Committee Clerk

