
The (in)adequacy of protections for witnesses to parliamentary committee inquiries: recent experience in the NSW Legislative Council

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Abstract Parliamentary committees can be powerful vehicles to oversee government administration, including, on occasion, by bringing to light genuine issues of wrongdoing or impropriety. Balanced against the benefit of transparency is the possible harm that can arise to witnesses who may be reluctantly called into a public and political arena. This was illustrated in the 57th Parliament of New South Wales, which saw the extensive and unprecedented use of committee powers to obtain documents and take evidence in public. This paper takes two inquiries from this period as case studies to explore the use of committee powers and corresponding protections for witnesses. To assess the protections, we use the lens of procedural fairness, a fundamental concept underpinning the legitimacy of many public institutions. We consider the bias rule and the hearing rule, components of procedural fairness in administrative law, and how they can be interpreted in a parliamentary context. We argue that developments such as the speed of online publishing and broadcasting and declining trust in public institutions means there is more imperative than ever for parliaments to ensure that committee powers are exercised in a way that is seen as procedurally fair. While noting the NSW Legislative Council has already gone some way to embedding procedurally fair practices, we find that there is scope for strengthening these, especially around providing reasonable notice of hearings, publishing untested allegations that may cause reputational damage, and protecting privacy and personally sensitive information.

INTRODUCTION

The closing months of the 57th Parliament of New South Wales (2019-2023) saw upper house committees conducting a number of high-profile inquiries into politically sensitive issues. One of these inquiries, into allegations of impropriety surrounding the Hills Shire Council, triggered media reports of a 'state-wide manhunt' for the Premier's

brothers and rumours of one reluctant witness hiding out in a forest in a black ski mask to avoid receiving a summons. The frustrated committee chair said that the committee faced 'unprecedented' challenges in obtaining the evidence of key witnesses, remarking that 'never has a committee been faced with such serious, deliberate and co-ordinated attempts to evade service of a summons'.¹

The committee's difficulties summoning witnesses led the House to refer a review of the *Parliamentary Evidence Act 1901* (NSW) to the Privileges Committee (currently ongoing), with an eye to modernising it so that parliamentary committees can more effectively exercise their powers to summon witnesses. While acknowledging the need for this review, we believe it is necessary to ask whether, if committee powers were strengthened, the concomitant protections for witnesses would remain sufficient. We take the lead from a discussion paper prepared for Privileges Committee review, which recognised the need to consider whether witness protections should be strengthened simultaneously with committee powers.²

The inquiries at the end of the 57th Parliament saw the extensive use of committee powers to obtain documents and take evidence in public. Large numbers of witnesses were called before committees, with hearing transcripts, video recordings, and volumes of published documents attracting significant media attention. Such activities had real-world consequences for some of the individuals involved, causing reputational, professional, social and financial damage.³ These inquiries provoke questions of how parliamentary committees exercise and use their significant powers to compel and publish evidence that may not otherwise reach the public domain, and whether protections for individuals whose interests may be impacted are adequate in the current era.

¹ Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 'Media Release: Report Handed Down in Inquiry into the Hills Shire Council and Property Developers in the Region'. Accessed at: [https://www.parliament.nsw.gov.au/lcdocs/other/18265/Media release - PC7 - Report tabled - Allegations of impropriety against agents of the Hills Shire Council.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/18265/Media%20release%20-%20PC7%20-%20Report%20tabled%20-%20Allegations%20of%20impropriety%20against%20agents%20of%20the%20Hills%20Shire%20Council.pdf).

² Gabrielle Appleby, 'Inquiry into provisions of the Parliamentary Evidence Act 1901: "Fit for Purpose and Modernised"'. Discussion Paper, Parliament of New South Wales, 2024, p. 27.

³ See, eg, Paige Cockburn, 'Former investment NSW boss Amy Brown sacked in wake of John Barilaro job saga'. *ABC News*, 19 September 2022. Accessed at: <https://www.abc.net.au/news/2022-09-19/amy-brown-sacked-from-departmental-secretary-role/101452794>.

Concerns about harm to individuals linked to a parliamentary committee have been around for some time, across many jurisdictions.⁴ In 1988, the Senate passed 11 Privileges Resolutions, which included, for the first time, explicit protections for witnesses to committees.⁵ Despite this, in 1995 Selby-Smith and Corbet noted increasingly 'difficult situations' encountered by public servants before Senate inquiries, and argued for more 'due process' and protections akin to those available in a court.⁶ In their 2013 review of procedural protections for witnesses in parliamentary inquiries, Macknay and Falck argued that, in the information age, with exercise of power subject to more scrutiny than ever, there is a need to incorporate procedural rights into committee rules in order to protect fundamental rights and preserve public trust.⁷

In the decade since Macknay and Falck's paper, there have been developments to codify and enhance procedural protections in New South Wales. At the same time, however, there have also been rapid enhancements in the availability of committee information online, whether through live webcasting of hearings or immediate publication of documents, creating new challenges in how to manage potentially harmful and sensitive information.

This paper takes two recent high-profile, politically charged committee inquiries from the NSW Legislative Council as case studies to explore the use of committee powers and corresponding protections for witnesses. To assess the protections, we use the lens of procedural fairness, a fundamental concept which underpins the legitimacy of many public institutions, including parliament. We consider the bias rule and the hearing rule, components of procedural fairness in administrative law, and how they can be

⁴ The death of Dr David Kelly, who took his own life after questioning before the House of Commons Select Committee on Foreign Affairs, prompted significant reflection in the UK: see Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG*. London: United Kingdom House of Commons, 2004, pp. 301-307. In Australia, the then Attorney-General and Solicitor-General considered the adequacy of protections for witnesses in the Commonwealth Parliament in 1972: see IJ Greenwood and RJ Ellicott, 'Parliamentary Committees: Powers Over and Protection Afforded to Witnesses'. Parliamentary Paper No 168, Parliament of Australia, 1972, pp. 16-30, 73-89.

⁵ Parliament of Australia, Senate, *Journals*, 25 February 1988, pp. 534-536.

⁶ Chris Selby-Smith and David Corbet, 'Parliamentary Committees, Public Servants and Due Process'. *Australian Journal of Public Administration* 54(1) 1995, pp. 19, 21, 38.

⁷ Roger Macknay and Julie Falck, 'Oversight as it Intersects with Parliament'. Conference Paper, Australasian Study of Parliament Group Western Australian Chapter Annual Conference, 4 October 2013, p. 19.

interpreted in a parliamentary context. We also compare practices in other parliaments. Our findings, in which we identify areas where the Legislative Council could strengthen its practice, may be informative to other Australian parliaments. Many face similar tensions between recognising the *opportunities* parliamentary committees carry in bringing to light genuine issues of wrongdoing or impropriety, and the *challenges* of protecting witnesses from harm arising from the public airing of untested allegations.

THE NEW SOUTH WALES LEGISLATIVE COUNCIL COMMITTEE SYSTEM

An active committee system is a hallmark of most modern and effective parliaments. Committees are a key forum through which parliamentarians can engage directly with experts and members of the community on proposed policy or law.⁸ Committees serve multiple functions: they can improve the legislative process through providing an additional avenue of scrutiny; they enable members of parliament to specialise and contribute to policy making; and they assist parliament to hold the government of the day to account through inquiring into matters of public interest.⁹

Much of the Australian literature on committees and their oversight role focuses on the Australian Parliament, particularly the Senate, which, for most of the period since 1994, has had a committee system that is not government-dominated and is able to examine controversial matters.¹⁰ Although less researched, we suggest the NSW Legislative Council offers examples of powerful and active committees that have been willing to

⁸ Sarah Moulds, 'Committees of Influence: The Impact of Parliamentary Committees on Law Making and Rights Protection in Australia'. *AIAL Forum* 97 2019, p. 12.

⁹ Sven T Siefken and Hilmar Rommetvedt, 'Investigating the Role of Parliamentary Committees in the Policy Process', in Sven T Siefken and Hilmar Rommetvedt (eds), *Parliamentary Committees in the Policy Process*. Milton Park: Routledge, 2022, p. 3; Helene Helboe Pedersen, Darren Halpin and Anne Rasmussen, 'Who Gives Evidence to Parliamentary Committees? A Comparative Investigation of Parliamentary Committees and their Constituencies'. *The Journal of Legislative Studies* 23(3) 2015, pp. 408-409; Mark Bennister and Phil Larkin, 'Accountability in Parliament', in Cristina Leston-Bendeira and Louise Thompson (eds), *Exploring Parliament*. Oxford: Oxford University Press, 2018, p. 146; Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees'. *Australasian Parliamentary Review* 21(1) 2006, pp. 17-19; Macknay and Falck, *Oversight as it Intersects with Parliament*, p. 2.

¹⁰ For commentary on the period after the 2004 election when the Senate committee system was revised to reflect a government majority in the Senate, see Stewart Ashe, 'Undermining Senate Scrutiny? Changes to the Senate Committee System'. *Australian Journal of Public Administration* 66(3) 2007.

test boundaries in the exercise of their oversight role. The NSW Legislative Council has an unbroken history of non-government control since 1988. This has no doubt contributed to its willingness, through successive parliaments, to exert and test its powers to hold government to account in ways few state upper houses have, enabling it to evolve into a robust and active house of review.¹¹ Legislative Council committees have been directly responsible for exposing significant issues in public administration and bringing about policy and legislative change, demonstrating their influential role in New South Wales politics.¹²

The active committee system in the Legislative Council is a source of considerable pride to members.¹³ Having grown from a small start of two standing committees in 1988, the committee system in the 57th Parliament had 16 standing committees, at least nine of which were non-government chaired. In addition, no less than 15 select committees were established during the 57th Parliament, many of which inquired and reported into politically controversial topics. Over the period from 2019-2023, these committees conducted 127 inquiries involving 5,242 witnesses.¹⁴

¹¹ See generally, David Blunt, 'Orders for Papers and Parliamentary Committees: An update from the NSW Legislative Council'. Conference Paper, Presiding Officers and Clerks Conference, 10 July 2018; David Blunt, 'Postscripts to an Extraordinary Parliament and a Question for Colleagues'. Conference paper, Presiding Officers and Clerks Conference, July 2023; Gareth Griffith, 'The New South Wales Legislative Council: An Analysis of its Contemporary Performance as a House of Review'. *Australasian Parliamentary Review* 17(1) 2002.

¹² See, eg, Angus Thompson, '\$252 million fund designed to win seats and punish councils, inquiry finds'. *Sydney Morning Herald*, 30 March 2021. Accessed at: <https://www.smh.com.au/national/nsw/252-million-fund-designed-to-win-seats-and-punish-councils-inquiry-finds-20210330-p57f8p.html>; Lucy Cormack and Tom Rabe, 'Manifold unhappy consequences': Damning reports into troubled insurer icare'. *Sydney Morning Herald*, 30 April 2021. Accessed at: <https://www.smh.com.au/politics/nsw/manifold-unhappy-consequences-damning-reports-into-troubled-insurer-icare-20210430-p57nqz.html>; Tamsin Rose and Josh Butler, 'Flood inquiry finds serious failures by agencies and calls for Resilience NSW to be scrapped'. *The Guardian*, 9 August 2022. Accessed at: <https://www.theguardian.com/australia-news/2022/aug/09/flood-inquiry-finds-serious-failures-by-agencies-and-calls-for-resilience-nsw-to-be-scrapped>.

¹³ Legislative Council Select Committee on the Legislative Council Committee System, *The Legislative Council Committee System*. Sydney: Parliament of New South Wales, 2016, p. vi.

¹⁴ Department of the NSW Legislative Council, *Annual Report 2023*. Sydney: Parliament of New South Wales, 2023, p. 47; Department of the NSW Legislative Council, *Annual Report 2022*. Sydney: Parliament of New South Wales, 2022, p. 7.

A key feature of Legislative Council committee inquiries is that most of the evidence is heard in public.¹⁵ In recent years, the Council has significantly stepped up its efforts to publicise and broadcast the work of committees. Committee hearings are routinely webcast live, with recordings made available through a video-on-demand service introduced in 2021, which assists members and the media to re-broadcast footage.¹⁶ The Council has further endorsed dissemination of recordings from public hearings on the Parliament's YouTube channel.¹⁷ Uniquely among Australian parliaments, hearings at offsite regional locations are also generally broadcast and recorded.

The Legislative Council's inquiry-based committees, which are the focus of this paper (compared to more technical committees like the Selection of Bills Committee) cannot operate effectively without the active participation of external witnesses, who bring expertise, direct knowledge, and different perspectives on issues under inquiry. In most cases, especially where committees are scrutinising legislation or policy development, witnesses are interested stakeholders, experts or community representatives who are willing participants keen to put views on the public record.

In some cases, though, Legislative Council committee inquiries draw in reluctant witnesses. This is especially the case where parliamentary committees, exercising their accountability and oversight role, investigate controversial issues such as potential maladministration or impropriety in the exercise of public functions. At the extreme, these include witnesses who are forced to appear with the committee's power to summon (discussed further below). Even where this power is not used, there are witnesses who appear under threat of summons, or through intense political or media pressure. Such 'unwilling' witnesses may suffer reputational damage or other adverse impacts through giving evidence or being named.

¹⁵ Note, however, that there are exceptions where information before a committee is kept private, such as confidential submissions (and other written material), or transcripts from *in camera* hearings.

¹⁶ Legislative Council Procedure Committee, *Broadcast of Proceedings Resolution*. Sydney: Parliament of NSW, 2022, p. 22.

¹⁷ New South Wales Parliament, Legislative Council, *Minutes*, 19 October 2022, pp. 3747-3749. For background, see Legislative Council Procedure Committee, *Broadcast of Proceedings Resolution*.

POWERS OF NSW LEGISLATIVE COUNCIL COMMITTEES

Uniquely among Australian state parliaments, the NSW Parliament has specific legislation giving committees strong powers to compel written and oral evidence. The *Parliamentary Evidence Act 1901* (NSW) grants committees the power to summon any person in New South Wales (except a member of state Parliament) to attend and give evidence.¹⁸ If a person does not attend, in disobedience of the summons, a warrant may be issued to bring them before the relevant committee.¹⁹ The power to summon is used reasonably frequently by Legislative Council committees, but the procedure for refusal to appear has never been used (despite coming close on one occasion).²⁰

The legislated power to summon is unique to New South Wales parliamentary committees. While other jurisdictions retain the possibility of punishing individuals for failing to appear before a committee, none have the proactive powers to summon available in New South Wales for bringing a recalcitrant witness before a committee.²¹ This arguably makes witnesses to New South Wales inquiries especially vulnerable and therefore deserving of strengthened protections.

The *Parliamentary Evidence Act* also contains powers relating to questions. Committees can require witnesses to truthfully answer lawful questions.²² Failure to answer a lawful question may constitute contempt of parliament and carries a punishment of up to one month imprisonment.²³ Wilfully providing a false answer carries a punishment of five years' imprisonment.²⁴ These powers may allow committees to require witnesses to answer questions even where doing so would override common law privileges, such as the privilege against self-incrimination, legal professional privilege or public interest

¹⁸ *Parliamentary Evidence Act 1901* (NSW) s 4.

¹⁹ *Parliamentary Evidence Act 1901* (NSW) ss 7-8.

²⁰ In the Inquiry into the Gentrader transactions (2010-2011), the Legislative Council General Purpose Standing Committee No. 1 resolved to write to the President of the Legislative Council to request that she certify the non-attendance of several witnesses, in disobedience of a summons, to a judge of the Supreme Court. However, the President declined to do so: Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice* (2nd ed). Sydney: The Federation Press, 2021, p. 801.

²¹ Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 32.

²² *Parliamentary Evidence Act 1901* (NSW) ss 11, 13.

²³ *Parliamentary Evidence Act 1901* (NSW) s 11.

²⁴ *Parliamentary Evidence Act 1901* (NSW) s 13.

immunity.²⁵ However, there remains some uncertainty as to the meaning of a 'lawful question'.²⁶

PROTECTIONS FOR WITNESSES TO NSW LEGISLATIVE COUNCIL COMMITTEES

Witnesses appearing before NSW Legislative Council committees derive protections against the exercise of committee powers from a number of sources. The most obvious protection is parliamentary privilege itself, specifically the immunity flowing from Article 9 of the *Bill of Rights 1689*, which protects proceedings of Parliament from being impeached in court proceedings, and which extends to witnesses in parliamentary committee proceedings.²⁷ In New South Wales this is supplemented by section 12(1) of the *Parliamentary Evidence Act 1901*, which provides assurance against legal reprisal for evidence given to a parliamentary committee, under oath or otherwise.²⁸

In 2018, the Legislative Council, noting the lack of statutory requirements for parliamentary committees to provide procedural fairness, introduced a procedural fairness resolution.²⁹ Drawing from established NSW Legislative Council practice, and the Senate Privileges Resolution No. 1,³⁰ it contains the following basic guidelines:

- Witnesses are 'normally' invited to make a written submission before giving oral evidence
- Witnesses are invited to appear at a public hearing, unless the committee decides that a summons is warranted

²⁵ See Frappell and Blunt, *Legislative Council Practice*, pp. 809-813; Beverly Duffy and Sharon Ohnesorge, 'Out of Step? The NSW Parliamentary Evidence Act 1901'. *Public Law Review* 27 2016, pp. 41-45.

²⁶ Frappell and Blunt, *Legislative Council Practice*, p. 808.

²⁷ Frappell and Blunt, *Legislative Council Practice*, pp. 90-91, 94-95, 817.

²⁸ Frappell and Blunt, *Legislative Council Practice*, pp. 94-95, 817.

²⁹ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246. For background, see Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*. Sydney: Parliament of New South Wales, 2018. This resolution has continuing effect.

³⁰ Commonwealth Parliament, Senate, *Journals*, 25 February 1988, p. 534-536. For a description of the Senate's procedural fairness resolution in practice, see Rosemary Laing (ed), *Odgers' Australian Senate Practice (14th ed)*. Canberra: Commonwealth of Australia, 2016, pp. 551-560.

- Witnesses are 'normally' given reasonable notice of a hearing, and are provided the committee's terms of reference, membership, and a copy of the resolution before appearing
- Witnesses may request to give evidence *in camera*, and the committee will consider this request
- Witnesses may, with prior agreement of the committee, attend with a legal adviser or support person, and have reasonable opportunity to consult with a legal adviser during the hearing
- The committee chair will ensure questions put to witnesses are 'relevant to the inquiry'
- Witnesses may object to answering a question, and the committee should consider the request
- Witnesses may be given an opportunity to respond to adverse reflections made about them
- Where evidence is given that places a person at risk of serious harm, a committee will consider expunging that information from the transcript of evidence
- Witnesses may request that documents provided to a committee be kept fully or partially confidential, and the committee will consider the request.
- Witnesses 'will be treated with courtesy at all times'.³¹

The wording of the resolution was carefully chosen to give members different levels of flexibility in applying it, and in some areas, such as dealing with adverse reflections, it is less prescriptive than the Senate resolution.³² Given the resolution was designed to reflect existing practice, it is arguable whether it has given witnesses greater protection. However, as a normative signal (if not an enforceable set of rights), it ensures witnesses and members are more aware of what protections exist.

Committee chairs play an important role in enforcing the procedural fairness resolution. Their function has been described as being analogous to that of the

³¹ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

³² Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, pp. 12-14.

President in the House.³³ The standing orders grant them 'the powers necessary to conduct the committee's proceedings in an orderly and expeditious manner'.³⁴ One of the procedural fairness guidelines explicitly mentions the chair.³⁵ At hearings, chairs will often be called upon to adjudicate points of order and it is not uncommon to see them refer to the procedural fairness resolution in making rulings, demonstrating members' awareness and use of the resolution.

Committees often enact additional protections in inquiries involving vulnerable witness groups, such as those with disability or children and young people.³⁶ Some of these protections could be conceived of as procedural fairness guarantees. However, to date, these have not been codified or published, although there are internal guidelines used by committee staff.

THE CONCEPT OF PROCEDURAL FAIRNESS

In the NSW Legislative Council, like in other jurisdictions, procedural protections for witnesses are described as ones providing 'procedural fairness' to inquiry participants. This concept is most closely linked with administrative law, although it has deeper roots in the concept of 'natural justice', which can be traced variously to Roman law, theology, and Enlightenment philosophy.³⁷ A normative commitment to procedural fairness runs deep in the conventions and philosophies that underpin many public institutions in democratic societies, including parliament.³⁸

Below, we outline the rules of procedural fairness in administrative law. While procedural fairness as a concept is certainly embedded within parliament, the specific rules applicable in administrative law, having been developed for a different context,

³³ Frappell and Blunt, *Legislative Council Practice*, p. 753.

³⁴ New South Wales Legislative Council, *Standing Rules and Orders*. Sydney: Parliament of New South Wales, 2023, p. 77 (Standing Order 218(2)).

³⁵ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

³⁶ Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 24; Frappell and Blunt, *Legislative Council Practice*, pp. 819-820.

³⁷ James Edelman, 'Why do we Have Rules of Procedural Fairness?'. *Australian Journal of Administrative Law* 23 2016, pp. 145-148.

³⁸ Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 22; Edelman, *Rules of Procedural Fairness*, pp. 153-154.

are not. Nonetheless, we consider that they provide concrete and useful benchmarks through which to assess practice. In the final section of this paper, we use two case studies to assess the protections for witnesses to parliamentary committees through the lens of procedural fairness in Australian administrative law.

THE RULES OF PROCEDURAL FAIRNESS IN ADMINISTRATIVE LAW

In administrative law, there is a common law presumption that a decision maker must observe procedural fairness.³⁹ This applies to decisions that affect the rights, interests or legitimate expectations of an individual, where they are affected in a direct and immediate way.⁴⁰ This may include decisions that affect legal rights, proprietary interests, financial interests, reputation, status, personal liberty, preservation of livelihood, and social interests.⁴¹ A 'legitimate expectation' can include a reasonable expectation that a legal right or liberty will be obtained or renewed, or will not be unfairly withdrawn or cancelled.⁴²

There are two basic rules of procedural fairness: the hearing rule and the bias rule. The hearing rule, in essence, requires that a person subject to a decision be given a fair hearing and an opportunity to be heard.⁴³ At a minimum, this will usually include (reasonable) notice that a decision is going to be made, provision of a summary of the case against them, and the opportunity to make submissions to answer that case.⁴⁴ On

³⁹ LexisNexis, *Halsbury's Laws of Australia*. Online: LexisNexis, 2023, [10-12630], [10-12700]; Kristen Rundle, 'The Stakes of Procedural Fairness: Reflections on the Australian Position'. *Australian Journal of Administrative Law* 23 2016, p. 164.

⁴⁰ LexisNexis, *Halsbury's Laws of Australia*, [10-12645].

⁴¹ LexisNexis, *Halsbury's Laws of Australia*, [10-12645].

⁴² LexisNexis, *Halsbury's Laws of Australia*, [10-12655]. Note, however, that in recent years courts have begun to move away from the concept of a 'legitimate expectation' on the basis that it may distract from the central question, which is whether procedural fairness was required or not: Justice Alan Robertson, 'Natural Justice or Procedural Fairness'. *Australian Journal of Administrative Law* 23 2016, pp. 159-161; Rundle, *The Stakes of Procedural Fairness*, p. 170.

⁴³ Sarah Withnall Howe, *Administrative Law* (3rd ed). Chatswood: LexisNexis Australia, 2020, pp. 366, 394; Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 75.

⁴⁴ LexisNexis, *Halsbury's Laws of Australia*, [10-12760], [10-12765], [10-12775]; Robertson, *Natural Justice or Procedural Fairness*, pp. 162-163.

the latter, this can sometimes (but not necessarily) require the opportunity to have an oral hearing; it may also involve the opportunity to be represented by an agent.⁴⁵

The bias rule, simply, requires that the decision be made by an unbiased decision maker. There are two ways to demonstrate that a decision maker is biased – either that they are *actually* biased, or (more commonly) that there is a *reasonable apprehension* of bias.⁴⁶ There are a range of scenarios in which an apprehension of bias could arise; for example, if the decision-maker has previously expressed views on the matter or the parties involved, has a close personal relationship or association with a party to the proceedings, is in the position of accuser or prosecutor, or hears extraneous or one-sided information.⁴⁷

WHY IS PROCEDURAL FAIRNESS IN PARLIAMENTARY COMMITTEES IMPORTANT?

A procedurally fair committee system can protect witness' interests, improve public trust, generate legitimacy, and lead to better outcomes. We expand on these reasons below.

Committee inquiries impact rights, interests and legitimate expectations

As described above, the rules of procedural fairness as articulated in administrative law apply to decisions that affect the rights, interests or legitimate expectations of an individual. While the focus of these rules is on decisions made by the executive arm of government, we argue that actions by parliamentary committees can equally have impactful consequences for individuals. This suggests that more concrete standards and expectations of procedural fairness in the parliamentary context may be warranted for witnesses who face potentially serious consequences for their involvement in committees.

⁴⁵ LexisNexis, *Halsbury's Laws of Australia* [10-12830]; Robertson, *Natural Justice or Procedural Fairness*, p. 163.

⁴⁶ If a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question: LexisNexis, *Halsbury's Laws of Australia*, [10-12885]; Howe, *Administrative Law*, pp. 433-434.

⁴⁷ LexisNexis, *Halsbury's Laws of Australia*, [10-12895], [10-12900], [10-12925], [10-12930], [10-12940]; Howe, *Administrative Law*, pp. 438, 443, 452.

Some Legislative Council committee inquiries, like the ones that we examine in the case studies below, are held in highly contested and adversarial environments. They become 'arenas of political confrontation' in which the primary goals are to attract media attention and highlight failures by political opponents.⁴⁸ Witnesses can face robust questioning, often at length, by committee members. Reports can contain criticisms of witness' character and evidence and make findings adverse to them. Some inquiries are even explicitly focussed on one or two named individuals.⁴⁹

Participants to committee inquiries can experience significant consequences for their involvement.⁵⁰ For example, a witness may face reputational damage, professional implications or social consequences if members use privilege to make harmful allegations about them, or even if the witness gives poor evidence because they are forced to appear at short notice or under threat of summons. Witnesses have also faced harassment or intimidation because of (or in anticipation of) their participation in a committee inquiry, or experienced harm to their mental health.⁵¹

Such impacts are, of course, heightened in the context of the widespread access to committee hearings facilitated by technology, which allow proceedings to be broadcast instantly and widely. Digital media can prolong the reputational impact of an inquiry, with evidence and findings permanently linked to a participant's name by a quick Google search.⁵²

⁴⁸ Laura Chaqués-Bonafont and Luz M Muñoz Márquez, 'Explaining Interest Group Access to Parliamentary Committees'. *West European Politics* 39(6) 2016, p. 1281.

⁴⁹ For example, 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, and Senior Executives and Department Liaison Officers in 2023 (2023) or the inquiry into the Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas (2022).

⁵⁰ Macknay and Falck, *Oversight as it Intersects with Parliament*, pp. 2, 12-13.

⁵¹ Frappell and Blunt, *Legislative Council Practice*, pp. 819-821.

⁵² Committee on the Independent Commission Against Corruption, *Reputational Impact on an Individual Being Adversely Named in the ICAC's Investigations*. Sydney: Parliament of New South Wales, 2021, pp. 5, 21-22.

A procedurally fair committee system can improve public trust and confidence in parliament

Trust in democratic institutions has been declining across the Western world.⁵³ In a recent debate in the Legislative Council, crossbench members described 'an era of mistrust of politicians, when our democracy is being eroded'⁵⁴ and 'a period of heightened mistrust in our politics and our parliaments'.⁵⁵ Intensifying this, no doubt, is the recent publication of several reports about parliamentary culture (including the 'Broderick Report' in New South Wales), which have highlighted poor experiences in parliamentary workplaces including allegations of bullying, sexual harassment and discrimination.⁵⁶

Contributing to such mistrust may be a perception that parliamentarians abuse their powers and mistreat members of the public through the committee process.⁵⁷ Raising the standards by which witnesses are treated can seek to address this.

This is not a new idea. A paper prepared for the Commonwealth Parliament in 1972 observed that a law dealing with the rights of witnesses before committees 'could have the advantage of maintaining an acceptable public image of Parliament' and 'should reveal the Commonwealth Parliament as an institution concerned to protect individuals before it from any possible abuse or excess of power'.⁵⁸ The NSW Legislative Council's Privileges Committee commented in 2018 that procedural fairness for inquiry participants 'serves to uphold the reputation of Parliament by protecting against perceptions of arbitrary use of power'.⁵⁹

⁵³ Christopher Carman, 'The Process is the Reality: Perceptions of Procedural Fairness and Participatory Democracy'. *Political Studies* 58 2010, p. 732; Carolyn Hendriks, Sue Regan and Adrian Kay, 'Participatory Adaptation in Contemporary Parliamentary Committees in Australia'. *Parliamentary Affairs* 72 2019, p. 281.

⁵⁴ Abigail Boyd, New South Wales, *Parliamentary Debates*, Legislative Council, 20 September 2023, p. 51.

⁵⁵ Sue Higginson, New South Wales, *Parliamentary Debates*, Legislative Council, 20 September 2023, p. 53.

⁵⁶ Elizabeth Broderick & Co, *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces 2022*. Sydney: Elizabeth Broderick & Co, 2022. See also Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*. Sydney: Australian Human Rights Commission, 2021.

⁵⁷ Macknay and Falck, *Oversight as it Intersects with Parliament*, p. 5; Duffy and Ohnesorge, *The NSW Parliamentary Evidence Act 1901*, pp. 47-50.

⁵⁸ Greenwood and Ellicott, *Parliamentary Committees*, p. 78.

⁵⁹ Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 21.

Procedural fairness gives legitimacy to outcomes

Providing procedural fairness for witnesses can give legitimacy to the findings and outcomes of parliamentary inquiries. A principal rationale for the existence of procedural fairness in many democratic institutions is to secure public confidence.⁶⁰ The basis for this is that participants are more likely to accept a decision when they believe the process that led to it was fair, and therefore accord legitimacy to its outcomes.⁶¹

In the committee context, this can mean that the public may be more likely to accept the findings and recommendations of inquiries if the participants in them are treated fairly. This has also been acknowledged by the NSW Privileges Committee, which noted in 2018:

*a committee's findings and recommendations are open to question in the public arena if the committee has not accorded a fair hearing to participants or sought to avoid bias.*⁶²

Procedural fairness can improve the quality of committee inquiries

Providing adequate protections for witnesses may improve the breadth and quality of evidence before committees. For one, it may encourage witnesses to participate in inquiries in the first place. All witnesses to upper house inquiries are first invited to appear voluntarily (before committees move to consider coercive means of securing attendance). It is reasonable to suspect that some witnesses, reading media reports of robust and intense questioning at parliamentary committees, may choose to decline for fear of ill treatment.⁶³ An improved public perception of parliament, facilitated by better protections for witnesses, may serve to increase witnesses' willingness to participate. This in turn may lead to a wider mix of evidence, creating compound

⁶⁰ Edelman, *Rules of Procedural Fairness*, p. 148.

⁶¹ Kris Dunn, 'Voice and Trust in Parliamentary Representation'. *Electoral Studies* 31 2012, pp. 395, 403; Carman, *The Process is the Reality*, pp. 736, 747; Moulds, *Committees of Influence*, p. 28; Robertson, *Natural Justice or Procedural Fairness*, p. 162; Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 10.

⁶² Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 10.

⁶³ See, eg, Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 21.

benefits, as the diversity of participants in parliamentary processes can be 'an important indicator of effectiveness and impact'.⁶⁴

Improved witness protections may also lead to better quality evidence being given. For example, witnesses who are given adequate notice of the timing and content of hearings are far more likely to provide well-prepared and accurate evidence. Similarly, 'the best evidence is adduced in a calm and judicial atmosphere where the witness is free of any external pressures'.⁶⁵ This type of atmosphere also has the potential to prompt more deliberative decision making by committee members, because it creates conditions for people to speak more openly, compose more relevant statements or thoughts, consider the perspective of others, and acknowledge other important factors or interests that may be relevant.⁶⁶ Better evidence may, in turn, lead to better reports and better informed recommendations.

ISSUES IN PROCEDURAL FAIRNESS: RECENT EXAMPLES FROM THE NSW LEGISLATIVE COUNCIL

Among the 127 inquiries conducted by NSW Legislative Council committees during the 57th Parliament were several high-profile, politically charged inquiries into allegations of impropriety and maladministration.⁶⁷ In this section we examine 'twin' inquiries that took place in the lead up to the 2023 election, both examining 'allegations of impropriety' involving property developers and 'agents of' local councils.

The compressed timeframes, overtly partisan nature of the allegations and heightened political atmosphere associated with these inquiries means they are not 'typical' examples. They also raise questions about whether parliamentary committees, in the immediate lead up to a state general election, were the most appropriate vehicles to investigate such serious issues. However, despite (or perhaps, because of) the unusual

⁶⁴ Moulds, *Committees of Influence*, p. 18.

⁶⁵ Greenwood and Ellicott, *Parliamentary Committees*, p. 74.

⁶⁶ Robertson, *Natural Justice or Procedural Fairness*, p. 162; Appleby, *Provisions of the Parliamentary Evidence Act 1901*, p. 21.

⁶⁷ High-profile examples from the 57th Parliament include Legislative Council Public Accountability Committee, *Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas (Final Report)*. Sydney: Parliament of NSW, 2023; Legislative Council Public Accountability Committee, *Transport Asset Holding Entity*. Sydney: Parliament of NSW, 2022.

nature of these inquiries, they are worthwhile case studies to examine the effectiveness of protections for witnesses. Both inquiries involved potentially serious allegations of 'impropriety,' and significant use of the Parliament's powers to summon witnesses. They involved individuals outside the Parliament who stood to suffer real-world consequences as a result. The timing and intense focus meant the inquiries tested application of the procedural fairness guideline to deliver a process seen to be 'fair' in the eyes of external participants.

Case Study 1: Inquiry into allegations of impropriety against agents of the City of Canterbury Bankstown Council ('Canterbury Bankstown inquiry')

The Canterbury Bankstown inquiry was referred by the Minister for Local Government, the Hon Wendy Tuckerman MP to the (Liberal National government-chaired) Standing Committee on State Development on 24 November 2022.⁶⁸ It was established to investigate allegations made in Parliament on 20 September 2022 by (then) Labor member for Bankstown, Ms Tania Mihailuk MP, concerning the involvement of the Mayor of Canterbury Bankstown, Mr Khal Asfour, in certain planning matters, and his pre-selection as a Labor candidate for the Legislative Council.⁶⁹ Its terms of reference covered: 'matters in regards to the City of Canterbury Bankstown Council', including 'any matters relating to integrity, processes of Council, employees and elected officials of Council' and 'any other related matter'.⁷⁰

The committee's final report made four findings, relating to Canterbury Bankstown Councillors' relationships with property developers; Mayor Khal Asfour's expenses claims; use of Council resources to assist a Labor candidate; and the time taken to provide documents.⁷¹ It recommended the initial allegations be referred to the Independent Commission for Corruption (ICAC) for investigation.⁷²

⁶⁸ Legislative Council Standing Committee on State Development, *Allegations of impropriety against Agents of the City of Canterbury Bankstown Council*. Sydney: Parliament of NSW, 2023.

⁶⁹ Tania Mihailuk, New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 2022, pp. 9143-9144.

⁷⁰ Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council*, p. iv.

⁷¹ Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council*, p. viii.

⁷² Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council*, p. ix.

Having reviewed the committee's report, ICAC advised that the allegations did not warrant further investigation.⁷³ Nevertheless, Mr Asfour withdrew his candidacy for the NSW Legislative Council and resigned as Mayor of Canterbury Bankstown in May 2023.⁷⁴

Procedural fairness issues raised by witnesses

Correspondence from the Canterbury Bankstown Council's legal representatives to the committee shows a number of areas where external stakeholders considered the committee procedures fell short of their procedural fairness expectations. Issues they raised included:

- The broad terms of reference and absence of detail provided upfront of any particulars or allegations that the committee would be looking into⁷⁵
- Short notice of hearing dates and failure to give particulars of allegations to be addressed, meaning witnesses would not have the opportunity to prepare⁷⁶
- The onerous nature of the broad scope and timeframe of documents requested by the committee, including the expense to council of complying with that request, and unreasonably short timeframes to comply⁷⁷
- Disclosure to the media of unpublished correspondence from council representatives to the committee, and lack of guarantee of confidentiality in respect of documents produced⁷⁸
- The conduct of hearings, including committee members apparently having access to information about specific allegations not shared in advance with witnesses, witnesses being criticised for seeking to take questions on notice, and 'gratuitous' discourteous comments about witnesses.⁷⁹

⁷³ Correspondence from the Hon Paul Lakatos SC to the Hon Aileen MacDonald OAM MLC, 12 July 2023. Accessed at: [https://www.parliament.nsw.gov.au/lcdocs/other/18328/Letter from the Hon Paul Lakatos SC Commissioner, ICAC.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/18328/Letter%20from%20the%20Hon%20Paul%20Lakatos%20SC%20Commissioner,%20ICAC.pdf)

⁷⁴ Anthony Segart and Jordan Baker, 'Time is right': Embattled Khal Asfour to quit as Canterbury-Bankstown Mayor'. *Sydney Morning Herald*, 8 May 2023. Accessed at: <https://www.smh.com.au/national/embattled-khal-asfour-to-quit-as-canterbury-bankstown-mayor-20230508-p5d6p4.html>

⁷⁵ Compiled correspondence between the Hon Aileen MacDonald MLC and the City of Canterbury Bankstown Council, 2 December 2022 to 24 February 2023. Accessed at: [https://www.parliament.nsw.gov.au/lcdocs/other/18170/City of Canterbury Bankstown Correspondence Bundle.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/18170/City%20of%20Canterbury%20Bankstown%20Correspondence%20Bundle.pdf) pp. 3, 11, 28-31, 35-36.

⁷⁶ *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council*, pp. 28-31.

⁷⁷ *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council*, p. 4.

⁷⁸ *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council*, pp. 17, 25-27.

⁷⁹ *Compiled correspondence MacDonald and the City of Canterbury Bankstown Council*, pp. 28-31.

Case study 2: Inquiry into allegations of impropriety against agents of the Hills Shire Council and property developers in the region ('The Hills inquiry')

The Hills inquiry was self-referred by Labor members of the (cross-bench chaired) Portfolio Committee No. 7 on 8 December 2022, after an unsuccessful attempt to include the matters in the terms of reference for the Canterbury Bankstown inquiry.⁸⁰ It was set up to investigate allegations made in Parliament on 23 June 2022 by Mr Ray Williams MP, Liberal Member for Castle Hill, concerning possible links between members of the Liberal State Executive and a property developer, and the replacement of Liberal members of the Hills Shire Council before the December 2021 local government elections.⁸¹ Its terms of reference were to inquire and report on matters in regards to the Hills Shire Council and property developers in the region, in particular: any matters relating to integrity, processes of Council, employees and elected officials of Council; the matters raised by the Member for Castle Hill in a speech to Parliament on 23 June 2022; the role and influence of property developers and their interactions with councillors and MPs in the region, and; 'any other related matter'.⁸²

The inquiry attracted significant media attention for its (ultimately unsuccessful) efforts to summon key witnesses linked to the allegations.⁸³ The report, tabled on the last day of the 57th Parliament, made several adverse findings about the non-cooperation of several witnesses who evaded service of summons. It recommended the original allegations be referred to ICAC for investigation. It also recommended a review of the *Parliamentary Evidence Act 1901*.⁸⁴

ICAC was reported to be investigating the allegations,⁸⁵ however made no official statement to that effect. After the committee's report was published, and ICAC was reported to be

⁸⁰ Legislative Council Portfolio Committee No. 7, *Allegations of Impropriety against Agents of the Hills Shire Council and Property Developers in the Region*. Sydney: Parliament of NSW, 2023, p. v; Legislative Council Standing Committee on State Development, *City of Canterbury Bankstown Council*, pp. 15-16.

⁸¹ Ray Williams, New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 June 2022, pp. 9118-9119.

⁸² Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, p. v.

⁸³ For a summary, see Vanessa O'Loan, 'The Power to Compel the Attendance of Witnesses and the Giving of Evidence before Committees – Lessons from the NSW Legislative Council'. *Australasian Parliamentary Review* 38(2) 2023, pp. 178-181.

⁸⁴ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. ix-x.

⁸⁵ For example, Tamsin Rose, 'NSW Labor will hold off on Hills Shire council inquiry at request of Icac'. *The Guardian*, 17 April 2023. Accessed at: <https://www.theguardian.com/australia-news/2023/apr/17/hills-shire-council-icac-nsw-labor-inquiry>; Alexandra Smith, 'ICAC asks for special surveillance powers as it investigates Toplace'. *Sydney Morning Herald*, 23 August 2023. Accessed at: <https://www.smh.com.au/politics/nsw/icac-asks->

investigating, one adversely-named witness took leave as a Hills Shire Councillor for four months.⁸⁶ In mid-2023, NSW Police issued a warrant for the arrest of a property developer of interest to the inquiry, for reasons not directly linked to the inquiry.⁸⁷ On 20 September 2023, the Legislative Council referred the provisions of the *Parliamentary Evidence Act 1901* for review by the Privileges Committee, with a view to ensuring it is fit for purpose and modernised, including in relation to the summoning of witnesses.⁸⁸

Procedural fairness issues raised by witnesses

The committee published a significant volume of correspondence from reluctant 'witnesses' (who were seeking to avoid being summoned) and other stakeholders. Procedural fairness concerns raised in this correspondence include:

- Short notice of invitation to appear at hearings making attendance unfeasible, or leaving witnesses unable to get legal advice⁸⁹
- Stress caused to witnesses and alleged harassment of third parties by process servers engaged to serve summonses on proposed witnesses⁹⁰
- Publication by the committee of an anonymous document containing adverse reflections on individuals⁹¹
- Complaints about publication of personal information and requests for privacy and redaction of personal details to avoid unwelcome media interest⁹²
- Accusations that the committee was partisan and politically motivated, timed just before an election and that bias meant witnesses would not receive procedural

for-special-surveillance-powers-as-it-investigates-toplace-20230823-p5dyxn.html. See also the Hon Ron Hoenig MP, 'Minister for Local Government Response to Report of Portfolio Committee No. 7 – Planning and Environment Allegations of impropriety against agents of the Hills Shire Council and property developers in the region'. Accessed at: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2908/Government response - Hills Shire Council.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2908/Government%20response%20-%20Hills%20Shire%20Council.pdf).

⁸⁶ Michael McGowan, 'Councillor takes four months leave amid ICAC probe into Hills Shire'. *Sydney Morning Herald*, 19 April 2023. Accessed at: <https://www.smh.com.au/politics/nsw/councillor-takes-four-months-leave-amid-icac-probe-into-hills-shire-20230418-p5d1ds.html>.

⁸⁷ Tamsin Rose, 'Arrest warrant issued for controversial Sydney property developer Jean Nassif'. *The Guardian*, 9 June 2024. Accessed at: <https://www.theguardian.com/australia-news/2023/jun/09/arrest-warrant-issued-for-controversial-sydney-property-developer-jean-nassif>.

⁸⁸ New South Wales Parliament, Legislative Council, *Minutes*, 20 September 2023, pp. 510-511.

⁸⁹ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 116-117, 126, 165.

⁹⁰ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 115, 134-135, 137-18, 158.

⁹¹ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 116, 122, 165-166.

⁹² Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 115, 121, 124, 153.

fairness⁹³

- Some committee members having a potential conflict of interest, having been members of the Liberal Party State Executive and voted on preselection decisions relevant to the inquiry.⁹⁴

As can be seen in the case study descriptions, many of the criticisms made by stakeholders of the committee proceedings could be informed by expectations of procedural fairness principles that apply in other contexts, such as in court proceedings. In the following section, we examine how some of the key criteria of procedural fairness as understood in administrative law (in particular the 'hearing' and 'bias' rules) are applied in the context of parliamentary committees, and how relevant those administrative law principles may be in the parliamentary context.

'REASONABLE NOTICE' TO WITNESSES: ARE CURRENT PRACTICE ADEQUATE?

Witnesses in both the Canterbury Bankstown and The Hills inquiries expressed concerns about short notice and lack of detail given in advance of a hearing, creating difficulties for them to obtain legal advice or prepare to appear. As outlined above, the 'hearing rule' in an administrative law context would require that a person about whom a decision is going to be made would be given reasonable notice, a summary of the case against them, and the opportunity to make submissions to answer that case. However, the degree to which the decision maker must give notice – and the extent to which they must outline particulars of the allegations – depends on the facts and the circumstances of each case.⁹⁵

Elements of the 'hearing rule' are incorporated into the NSW Legislative Council's procedural fairness resolution, which, as well as providing that a witness will 'normally' be given the opportunity to make a submission, requires that: 'A witness will normally be given reasonable notice of their hearing and will be provided with the inquiry terms of reference, a list of committee members and a copy of these procedures'.⁹⁶

⁹³ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 150, 153, 157, 158, 161, 165.

⁹⁴ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, p. 173.

⁹⁵ Howe, *Administrative Law*, pp. 400-401.

⁹⁶ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

The resolution is silent as to what constitutes 'reasonable notice' in terms of timeframe, and there is no minimum notice period as a standard practice. While most committees do aim to give witnesses as much notice as possible, it is not unusual in a fast-paced, politically charged environment for witnesses to be given less than a week's notice of a hearing, or for hearing times to change at short notice. In circumstances where witnesses are being asked to answer or speak to serious allegations, the expectation that witnesses will appear at short notice can produce situations that are difficult for witnesses. While recognising that there is value in parliamentary committees being able to obtain evidence promptly in some circumstances, and that what is seen as 'reasonable' notice may be highly contextual, setting a clear expectation around minimum notice to witnesses could help alleviate some circumstances where the timeframes set by committees are seen as unfair.

In addition to short notice of hearings, some witnesses in both the Canterbury Bankstown and The Hills inquiries raised concerns about the lack of specific information prior to the hearing on what exactly they would be required to give evidence about, or whether there were specific allegations concerning them. Where the hearing rule would require a witness to be provided with a summary of a case against them, the NSW Legislative Council's procedural fairness resolution simply requires that a witness be provided with the inquiry terms of reference and a copy of the procedural fairness resolution. It is silent on any requirement to provide witnesses with a specific outline of allegations or evidence concerning them before a hearing.⁹⁷

As seen in both case study inquiries, terms of reference can be very broad and give witnesses little assistance in preparing for a hearing. In the Canterbury Bankstown inquiry, when legal representatives raised concerns about the broad scope of the inquiry's terms of reference, and insufficient information on what witnesses would be questioned about, the committee chair responded by stating that committee members were able to ask 'lawful questions that fall within the terms of reference'.⁹⁸ This response appears to have been simultaneously correct, in terms of the Parliament's procedural fairness requirements, and unsatisfactory for the witnesses.

⁹⁷ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

⁹⁸ *Compiled correspondence between the Hon Aileen MacDonald MLC and the City of Canterbury Bankstown Council*, pp. 12, 33.

Similar issues were raised by witnesses invited to appear before The Hills inquiry: there was no onus on the committee to articulate its reasons for inviting a witness, yet several witnesses, in declining to appear, responded that they knew nothing of the matters in question that could assist the committee.⁹⁹ The practice around summoning witnesses under the *Parliamentary Evidence Act 1901* meant committees could proceed to summon witnesses where the witness had declined an invitation, without having to provide specific information on what they would be questioned on, or whether they were the subject of a particular allegation.

We note the New Zealand Parliament's Standing Orders set out much more specific requirements for select committees, in that they are required to provide witnesses due to appear before them with any material containing allegations that may damage their reputation.¹⁰⁰ We suggest this is an area where the NSW Legislative Council could consider strengthening its practice, in the interest of procedural fairness.

APPREHENDED OR ACTUAL BIAS: SHOULD COMMITTEES HAVE SPECIFIC PROCEDURES?

Both The Hills and Canterbury Bankstown inquiries involved explicitly party-political allegations, and it is not altogether surprising that accusations of bias were raised about the committees, which by their nature have members aligned with political parties. The Hills inquiry in particular saw concerns of both apprehended and actual bias raised: first, there were witnesses who attacked the 'partisan' nature of the committee, claiming that it was not going to provide procedural fairness as a result of having a Labor-Greens majority. Second, allegations were aired both by a member of the Legislative Council, and in an anonymous document, that the Liberal members on the committee had conflicts of interest, as they had been members of the Liberal Party

⁹⁹ See, eg, Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, p. 130.

¹⁰⁰ New Zealand House of Representatives, *Standing Orders of the House of Representatives*. Wellington: Parliament of New Zealand, 2023, pp. 66-67 (Standing Order 241). See also Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees*. Wellington: New Zealand House of Representatives, 2010, pp. 16, 28-29.

State Executive when it made decisions that were central to the allegations being investigated.¹⁰¹

The NSW Legislative Council's procedural fairness guidelines have nothing akin to the 'bias' rule seen in administrative law. It could be argued that, as a microcosm of a democratically elected house, with elected members explicitly representing political interests, the 'bias rule' is not a necessary or practical element of procedural fairness for this context. There is some regard to preventing actual bias in the Standing Orders, which provide that no member who has a 'direct pecuniary interest' may take part in a committee inquiry.¹⁰² The members' Code of Conduct requires members to 'take reasonable steps to draw attention to any conflicts between their private interests and the public interest in any proceeding of the House or its committees.'¹⁰³ However, management of non-pecuniary conflicts of interest (perceived or real) are left to individual members, with no prescribed role, for example, for the committee chair, to make determinations on whether conflicts are adequately managed.¹⁰⁴

In The Hills inquiry, several Liberal committee members made declarations of their involvement with the Liberal State Executive and certain individuals of interest early in the inquiry.¹⁰⁵ Nevertheless, Labor committee members raised a possible conflict of interest as an issue at the committee's first public hearing, seeking advice from the committee chair about options for the committee in relation to the participation of those members.¹⁰⁶ As the inquiry developed, and after seeking the Clerk's advice, the

¹⁰¹ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 173, 272-274.

¹⁰² New South Wales Legislative Council, *Standing Rules and Orders*, p. 77 (Standing Order 217(10)).

¹⁰³ New South Wales Parliament, Legislative Council, *Minutes*, 24 March 2020, pp. 865-868.

¹⁰⁴ While Standing Order 217(10) prevents members taking part in an inquiry where that member has a pecuniary interest, there is variability in whether members have been removed or stood aside from inquiries over other possible conflicts of interest: see Frappell and Blunt, *Legislative Council Practice*, pp. 746-749. See also Correspondence from Committee Clerk to Legislative Council Portfolio Committee No. 7 – Planning and Environment, 16 February 2023. Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/other/18202/Email - Advice from Committee Clerk, recieved 16 February 2023.pdf>.

¹⁰⁵ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, p. 31; Hon Chris Rath MLC, Evidence to Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, p. 2; Hon Aileen MacDonald MLC, Evidence to Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, p. 2.

¹⁰⁶ Hon John Graham MLC, Evidence to Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, pp. 2-3; Hon Penny Sharpe MLC, Evidence to Legislative Council

two Liberal members recused themselves from certain public hearings, and later from any further involvement in the inquiry, meaning they were not present when the committee's final report was considered.¹⁰⁷

In this particular inquiry, strongly put accusations from some proposed witnesses of a lack of 'procedural fairness' due to bias could well be put down to political motives or to an unwillingness to be publicly questioned on serious allegations. However, we suggest that having clearer processes to deal with claims of apprehended bias could assist committees examining matters of alleged impropriety to demonstrate that they take this aspect of procedural fairness seriously and should be seen as legitimate bodies to undertake serious inquiries. These would need to be nuanced for the political context of parliament where members will as a matter of course have party political affiliation or known views on particular issues.

There are examples elsewhere of parliamentary committees having processes to deal with apprehended bias. Notably, the New Zealand Parliament's Standing Orders provides that a complaint of apparent bias may be made by a person appearing or about to appear before a committee whose reputation may be seriously damaged.¹⁰⁸ The committee chair would then decide on whether that member would be excluded.¹⁰⁹

PUBLICATION OF INFORMATION THAT COULD DAMAGE A REPUTATION – ADVERSE MENTION PROCEDURES

As seen in our case study inquiries, parliamentary committees investigating allegations of impropriety frequently receive evidence that may damage a person's reputation. Possible reputational damage to witnesses is considered in the procedural fairness resolution. This provides that where evidence is about to be given that may 'seriously

Portfolio Committee No. 7 – Planning and Environment, Parliament of New South Wales, 15 February 2023, pp. 2-3.

¹⁰⁷ Legislative Council Portfolio Committee No. 7, *Hills Shire Council*, pp. 43, 49, 52.

¹⁰⁸ New Zealand House of Representatives, *Standing Orders*, p. 65 (Standing Order 237). See Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees*, pp. 16-17, 28.

¹⁰⁹ New Zealand House of Representatives, *Standing Orders*, p. 65 (Standing Order 237(3)). Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees*, pp. 16-17, 28.

damage the reputation of a person or body', the committee 'may consider' hearing the evidence *in camera*.¹¹⁰ Where evidence has been given in public that may 'seriously damage the reputation of a person or body', the committee 'may consider' keeping some or all of it confidential, and/or 'may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.'¹¹¹ It is up to committees themselves to decide which of these procedures is used, with the advice in *NSW Legislative Council Practice* being that: 'a committee needs to balance the potential harm caused by adverse reflections, the importance of the evidence to the inquiry and the public interest in committees conducting their proceedings as far as practicable in public'.¹¹²

Members of the NSW Parliament are alive to the possibility of harm to individuals arising from being publicly named in connection with allegations of impropriety, as seen in a recent committee inquiry into the reputational impact on individuals of being adversely named in ICAC investigations.¹¹³ That report showed members carefully considering how reputational damage could be a side effect of public hearings, and the need to balance ICAC's powers to combat corruption with protections for innocent individuals.¹¹⁴

Our case studies show Legislative Council committees grappling with decisions of whether material containing adverse references should be kept confidential, versus choosing to publish and allowing named individuals the opportunity to respond. It may be seen that parliamentary committees tend to favour taking evidence in public, rather than the more cautionary approach of keeping evidence confidential until a response can be sought, the allegation tested against other evidence, and a considered finding made. There is a procedural fairness reason why this would be the case, in that there are times when *not* publishing evidence that informs the committee's deliberations

¹¹⁰ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

¹¹¹ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

¹¹² Frappell and Blunt, *Legislative Council Practice*, p. 822.

¹¹³ Committee on the Independent Commission Against Corruption, *Reputational Impact on an Individual Being Adversely Named*.

¹¹⁴ Committee on the Independent Commission Against Corruption, *Reputational Impact on an Individual Being Adversely Named*, pp. 1-3.

could be seen as procedurally unfair to witnesses.¹¹⁵ It is also a reflection of the importance given to transparency in exploring issues of public interest. Nevertheless, publication of untested adverse reflections that are unfounded can cause reputational damage to individuals who have done nothing wrong, and who have no recourse to the law of defamation due to privilege.

We note that, while Legislative Council committees do seek to meet the requirements of the procedural fairness resolution, the resolution itself is less prescriptive than in some other parliaments. The wording of the resolution was deliberately made more flexible than that of the Senate's Privilege Resolution No. 1, for example.¹¹⁶ Standing Orders of the New Zealand Parliament contain much more detail on handling of evidence containing allegations, including an explicit Standing Order relating to 'irrelevant or unjustified allegations'.¹¹⁷ We suggest that strengthening procedures to prevent unfounded allegations being aired publicly before the subject has time to respond would be worth considering, both to enhance the protection of witnesses, and also to enhance the reputation of the committee process itself.

PUBLICATION OF SENSITIVE INFORMATION: PRIVACY AND CONFIDENTIALITY REQUESTS

Handling information that contains personal details or sensitive information about individuals is another issue that can arise in committee inquiries, as it has in relation to the exercise of the Legislative Council's extensive use of orders for government papers. The Legislative Council has grappled in recent years with large volumes of documents containing personal information being received under Standing Order 52, and the implications of electronic publication of such information.¹¹⁸ A 2022 Procedure

¹¹⁵ This has been observed by witnesses in recent inquiries, see for example: Mr Mark Steele SC, Evidence to Legislative Council Portfolio Committee No. 4 – Regional NSW, Parliament of New South Wales, 18 July 2024, pp. 21-23; Mr Peter V'Landys, Evidence to Legislative Council Select Committee on the Proposal to Develop the Rosehill Racecourse, Parliament of New South Wales, 9 August 2024, pp. 48-50.

¹¹⁶ Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants*, p. 12.

¹¹⁷ New Zealand House of Representatives, *Standing Orders*, pp. 65-67 (Standing Orders 238-242). See Office of the Clerk of the House of Representatives, *Natural Justice Before Select Committees*, pp. 14-16, 28-30.

¹¹⁸ A Procedure Committee inquiry in 2022 heard from government that there have been occasions where parliament's publication of documents had resulted in disclosure of sensitive personal information that was

Committee inquiry resulted in amended standing orders to create a new process to manage papers that contain personal information.¹¹⁹

For committees, there are standard committee procedures to redact personal information such as emails or phone numbers before publication. There are also provisions in the procedural fairness resolution for witnesses to request both documentary and oral evidence to be kept confidential by a committee.¹²⁰ However, it is ultimately up to a committee, having considered any confidentiality requests, to decide whether it will publish evidence received or not. Parliament is not bound by public sector privacy legislation, and committees can, and sometimes do, publish sensitive information without the consent of those concerned.¹²¹

A number of privacy issues were raised in our case study inquiries. Correspondence to The Hills inquiry contains several complaints from (proposed) witnesses of alleged privacy breaches as potentially sensitive personal information was contained in documents published by the committee. The Canterbury Bankstown inquiry received a large volume of administrative documents which posed a challenge to publish with personal information redacted. Even with standard redaction of personal contact details, there are occasions when publication of an organisation's internal documents has been criticised for breaching privacy, for example, publishing names of junior staff or details of private conversations that are not pertinent to the inquiry.¹²²

As noted, Parliament is not bound by privacy legislation, and there can be both public interest and procedural fairness reasons for favouring publication of evidence. That said, in an age of significant and increasing public concern about privacy, and the potential for misuse of personal information published online, we suggest that practices around protection of private personal and sensitive information is one area

'contrary to privacy principles and the public interest'. Legislative Council Procedure Committee, *Operation of Standing Order 52*. Sydney: Parliament of New South Wales, 2022, p. 13.

¹¹⁹ Legislative Council Procedure Committee, *Operation of Standing Order 52*, pp. 13-14. The new procedure is found in New South Wales Legislative Council, *Standing Rules and Orders*, pp. 17-18 (Standing Order 52(7)).

¹²⁰ New South Wales Parliament, Legislative Council, *Minutes*, 25 October 2018, pp. 3244-3246.

¹²¹ For example, Legislative Council Public Accountability and Works Committee, *Appointment of Mr John Barilaro as Senior Trade and Investment Commissioner to the Americas (Interim Report)*. Sydney: Parliament of NSW, 2023, pp. 59, 71, 75. See *Privacy and Personal Information Act 1998* (NSW) s 3(1) (definition of 'public sector agency').

¹²² See, eg, Correspondence from Ms Louise Capon to Mr David Shoebridge MLC, 14 February 2022. Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/other/16974/Letter from KPMG to the Chair.pdf>.

that many parliamentary committees could well pay some attention to, in order to prevent unintended harm to individuals.

CONCLUSION

The interplay between the powers of committees and the protections for witnesses who participate in them is an ongoing source of tension in Parliaments across Australia. Committees must balance the use of powers to hold robust inquiries in the public interest with the need to build and maintain public trust in the legitimacy of those same committees, which could be undermined through manifestly unfair treatment of individuals in an overtly political process. This tension is clearly demonstrated in the NSW Legislative Council, which sees participation of thousands of people in its committees each year and which has uniquely strong coercive powers to ensure witness attendance.

The two case studies in this paper exemplify this tension. Our analysis finds that the existing protections and practice for inquiry participants could be strengthened, to accord with ideas of 'natural justice', and to better align with practices in other arenas. In reaching this conclusion, we draw on the rules of procedural fairness in the administrative law context. We do not argue that these should be adopted wholesale in New South Wales. To effectively play their oversight role, parliaments need to be able to examine controversial issues, and have the flexibility to set their own standards. However, we *do* argue that the Legislative Council should, guided by procedural fairness expectations, continue to review and strengthen its protections for witnesses to prevent unfair harm to individuals and build legitimacy in the public eye.

Areas we suggest could be strengthened include the requirement to provide reasonable notice of hearings, in terms of both time frame and issues to be canvassed, and processes to deal with apprehended bias of members. In addition, we suggest that greater attention to protection against reputational damage through publication of untested allegations, and protection of privacy and personally sensitive information may be warranted, given the rapid dissemination of information made possible through live streaming and online publication.

Any such changes must come from within the NSW Legislative Council itself. The unique nature of the parliamentary context means that external bodies, like independent experts, oversight panels, or even parliamentary staff, lack the power to change the functions of upper house committees. We suggest there are good reasons for the Council to revisit its protections for witnesses. The committee system is a source of pride for upper house members, who in a recent debate spoke of the value that

committees bring in providing an opportunity to hear directly from citizens, to shape the laws of the State, and to do deep interrogation in the name of accountability.¹²³ Members are also aware of current trends of mistrusting public institutions such as parliament and are keen to build that trust back. Ensuring committees use their powers in a way that is seen to be fair, including being seen to meet standards of procedural fairness, is one way they could earn that trust.

While this paper has focused on the NSW Parliament, we suggest the issues are not unique to New South Wales. At a time of rising mistrust in public institutions, and when information published online can be accessed instantaneously and used maliciously, the need for parliaments to ensure protections for citizens who encounter them is greater than ever.

¹²³ Penny Sharpe, New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 2023, p. 124; Sue Higginson, New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 2023, p. 127.