

Submission
No 2

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

Name: Professor Anne Twomey

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Professor Emerita Anne Twomey

12 October 2023

Ms Abigail Boyd MLC
Committee Chair
Public Accountability and Works Committee
NSW Legislative Council
Parliament of New South Wales,
6 Macquarie St, Sydney, NSW 2000

Dear Ms Boyd,

Please accept this submission for your inquiry into the *Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023* (NSW).

The effect of this Bill would be to amend the *Parliamentary Evidence Act 1901* (NSW) to authorise one House or a committee of that House to summon a Minister who is a Member of the other House, to attend and give evidence before it. This would be contrary to the long-standing privileges of the Houses and the relationship between them.

Background

A Member of Parliament is responsible to the House of which he or she is a member. That House may discipline the Member and may order him or her to attend in his or her place and be examined. The other House, however, has no jurisdiction or power over parliamentarians that are not members of that House.

This is reflected in the existing law, as enacted over a century ago. Currently, s 4 of the *Parliamentary Evidence Act 1901* (NSW) provides for persons ‘not being a Member of the Council or Assembly’ to be summoned to attend and give evidence before either House or a parliamentary committee. Section 5 then provides for the attendance of a Member of the Council or Assembly to give evidence before either House or a Committee, which is to be procured in conformity, as far as practicable, with the procedure observed by the British House of Commons.

According to pp 402-3 of the 10th edition of *Erskine May*, which was the edition applicable in 1901, a House could order one of its own Members to attend and be examined by one of its committees. But if a committee of either House desired the attendance of a member of the *other* House, the first House had to send a message to the other to request that House to give leave to the Member or peer in question to attend before the committee. If the Member or peer consented, then the House would ordinarily give its consent.

This practice continues, but has been streamlined, in modern times. According to the most recent (online) 25th edition of *Erskine May*, Members of the House of Commons, including Ministers, may not be formally summoned to attend as witnesses before select

committees. Their attendance can be requested, and if they refuse, then the committee ought to acquaint the House. Only the House can order one of its Members to attend a select committee. *Erskine May* then states at para 38.34:

As with Members of the House of Commons, Members of the House of Lords, including Ministers, may not be formally summoned to attend. Under Lords Standing Order No 23 (Lords attendance at Commons Select Committees), any Lords Member requested by a committee of the Commons to attend as a witness before it or before any sub-committee appointed by it, is given leave to attend if they think fit. No messages are exchanged. Under Standing Order No 138, the House of Commons has given a general leave to attend to any Member requested to attend as a witness before a Lords committee or its sub-committees, if the Member thinks fit.

In New South Wales, the relevant procedures are set out in the Standing Orders of the Legislative Assembly. Standing Order 327 provides that if the House or a committee, upon request wishes to examine a Member or officer of the Council, a message shall be sent requesting the Council to grant leave. Standing Order 328 provides that if the Council, or one of its committees, wishes to examine a Member of the Assembly, the House may authorise the Member to attend if the Member agrees. The same approach is taken in Standing Order 208(e) of the Legislative Council. It has been described as a ‘courtesy’ (see Russell D Grove (ed), *New South Wales Legislative Assembly Practice, Procedure and Privilege* (1st ed, 2007) 296), but it is more than that, as it evidences recognition and respect for the privileges of the Houses and their respective Members.

Examples of the Legislative Council giving leave for its Members to appear before parliamentary committees in 1997 and 1999 are included in the *Annotated Standing Orders of the New South Wales Legislative Council* at p 691 and examples of ministers of the Legislative Assembly voluntarily appearing before a Legislative Council in 2011 and 2015 are provided in *New South Wales Legislative Council Practice* (2nd ed) at p 802. Both works refer to the practice of Legislative Council committees of inviting ministers of both Houses to appear voluntarily at budget estimates inquiries.

Analysis

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 (see *Arena v Nader* (1997) 71 ALJR 1604, 1605; and (1997) 42 NSWLR 427, 434).

While Parliament has the power to do so, I doubt whether in this case it would be wise. It would upend centuries of practice, undermine historic privileges and increase the likelihood of partisan attacks rather than considered scrutiny. The temptation for ‘show-trials’ of Ministers for partisan advantage would be politically irresistible. This would be exacerbated by the application of s 11 of the *Parliamentary Evidence Act 1901*, which provides that if a witness refuses to answer any lawful question during examination, he or she shall be ‘deemed guilty of a contempt of Parliament and may be

forthwith committed for such offence to the custody of the usher of the black rod or the serjeant-at-arms, and, if the House so order, to gaol...’

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

Yours sincerely,

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* This submission is a personal view. It does not constitute legal advice and does not represent the views of the University or Gilbert + Tobin Lawyers.