

Our ref: PuLC:RMs310726

31 July 2026

Mr Alex Greenwich MP
Chair, Standing Committee on Parliamentary Privilege and Ethics
Legislative Assembly
Parliament House
SYDNEY NSW 2001

By e-mail: ethics.committee@parliament.nsw.gov.au

Dear Chair,

PARLIAMENTARY EVIDENCE AMENDMENT (ATTENDANCE OF WITNESSES) BILL 2026 (NSW)

The Law Society of New South Wales is grateful for the opportunity to make a submission to the inquiry of the Standing Committee on Parliamentary Privilege and Ethics (**Standing Committee**) into the *Parliamentary Evidence Amendment (Attendance of Witnesses) Bill 2026* (NSW) (**Bill**).

In the decision of *Cullen v President of Legislative Council of New South Wales*¹ (**Cullen**), the New South Wales Court of Appeal (Bell CJ, Leeming and Free JJA) held sections 7 to 9 of the *Parliamentary Evidence Act 1901* (NSW) (**Parliamentary Evidence Act**) to be constitutionally invalid as they contravened the limitation on state legislative power identified in *Kable v Director of Public Prosecutions*² by substantially impairing the institutional integrity of the Supreme Court of New South Wales. The matter of *Cullen* is currently on appeal before the High Court of Australia.

This submission in no way seeks to anticipate the outcome of the High Court decision. The comments below are directed in a general sense to the important oversight and scrutiny functions of Parliament and its committees in our democratic system. Further, we provide brief comments on some of the concerns raised by the Legislation Review Committee in relation to the Bill.³

The importance of ensuring the attendance of witnesses before Parliament and its committees

The Court of Appeal in *Cullen* did not suggest that Parliament should not have coercive powers to issue warrants for the apprehension of a person who refuses to comply with a summons to appear before the Legislative Council, Legislative Assembly or relevant committee. It was the interposition of the Supreme Court in the NSW process for dealing with non-attendance which rendered sections 7 to 9 of the *Parliamentary Evidence Act* invalid. The Court of Appeal noted the availability of alternative approaches, including those in other Australian states, supported a finding of invalidity.⁴

¹ *Cullen v President of Legislative Council of New South Wales* [2025] NSWCA 278.

² *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

³ New South Wales Parliament, Legislation Review Committee, Legislation Review Digest No 41 of 58 (Digest No 41/58, 10 February 2026), 18-20.

⁴ *Cullen*, above n 1 at [44].

The practical result of the *Cullen* decision, as set out by the Court of Appeal at [71] is as follows:

The result is that there is, at present, no valid coercive power to compel attendance before a chamber or committee of the New South Wales Parliament, save for that conferred on the Chairman or Vice-Chairman of the Parliamentary Standing Committee on Public Works by s 22(2) of the *Public Works and Procurement Act 1912* (NSW).

As a general principle, the Law Society considers that it is desirable to ensure the attendance of witnesses to give evidence when required. Parliament and its committees help to shape our democratic culture through their various functions, including the scrutiny and oversight of legislation, government administration and expenditure and other matters in the public interest. Importantly, they are a means by which to hold the executive government to account.

The ability to compel witnesses to appear before Parliament and its committees is an effective way to facilitate such scrutiny and oversight. The mere existence of these powers, even if they have not been used to date, serves to encourage the attendance of potentially otherwise recalcitrant witnesses.⁵ To assist NSW Parliament and its committees to carry out their functions, we therefore consider it appropriate to consider ways to enforce attendance by witnesses. As noted below, however, it is important that any approach is proportionate and contains appropriate safeguards.

Comments on the Bill

The Bill provides at proposed sections 7 to 8 that the President of the Legislative Council or Speaker of the Legislative Assembly may directly issue a warrant for the apprehension of a person who has failed to give evidence before the Legislative Council, the Legislative Assembly or a parliamentary committee. By removing the interposition of the Supreme Court in the process, the Bill would thereby overcome the reasons for invalidity of ss 7 to 9 set out in *Cullen*.

We note, however, that the Legislation Review Committee raises valid concerns with this process in terms of the fundamental right to liberty and freedom from arbitrary detention.⁶ In particular, we are concerned that the Bill does not sufficiently limit the amount of time during which a person may be detained. We acknowledge that this does not differ from the situation pre-*Cullen*, but note the commentary of the Court of Appeal in *Cullen* at [7] as follows:

The time period during which the President's orders may cause the continuing detention of the person is in fact limited only by the duration of the particular Parliament. The *Parliamentary Evidence Act* proceeds on the basis that *all* of that detention is authorised by the warrant which the judge originally issued, even though what subsequently occurs is unknown and unknowable and might extend weeks or months or years.

The issuing of a warrant for the purpose of bringing a person before the relevant House of Parliament, or a committee, is a serious restriction on liberty. The fact that the powers of the Presiding Officers are drafted broadly, and without any provision for review of their decisions, also means that they have almost complete discretion as to the circumstances in which to apprehend and detain a person, so long as they are satisfied of the person's failure to attend, and that the non-attendance is without just cause or reasonable excuse.⁷

⁵ It was noted in *Cullen* (above n 1) at [19] that "no application had ever been made for a warrant under s 8. That is consistent with statements in S Frappell and D Blunt (eds), *New South Wales Legislative Council Practice* (Federation Press, 2nd ed, 2021) p 801 and S Want and J Moore, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018) p 686."

⁶ Legislation Review Committee (above n 3), 18.

⁷ *Parliamentary Evidence Amendment (Attendance of Witnesses) Bill 2026* (NSW), cl 7(3).

We encourage the Standing Committee to take evidence and consider in greater detail the way in which Parliament could ensure, as far as possible, the attendance of witnesses without vesting such broad discretion in the Presiding Officers. Consideration should be given to a broader review and updating of the Parliamentary Evidence Act which could include appropriate safeguards to limit those powers, or whether a significant fine could serve the same purpose without engaging the human rights concerns identified above.

In this respect, and having regard to the Bill's introduction and passage through the Legislative Council, we note the submission of Professor Emerita Anne Twomey to the Standing Committee's 2025 Inquiry into "Implications for exclusive cognisance raised by the Legislative Council Select Committee on the Relationship Between the Dural Caravan Incident and the Passage of Relevant Bills through the Legislative Council". In that submission, Professor Emerita Twomey highlighted the inappropriateness of one House of Parliament using public servants and ministerial advisers effectively as proxies for a responsible Minister who is a member of the other House.⁸

Thank you for the opportunity to respond. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ronan MacSweeney', with a stylized flourish at the end.

Ronan MacSweeney
President

⁸ Anne Twomey, Submission No 2 to New South Wales Parliament, Standing Committee on Parliamentary Privilege and Ethics, Implications for Exclusive Cognisance Raised by the Legislative Council Select Committee on the Relationship Between the Dural Caravan Incident and the Passage of Relevant Bills Through the Legislative Council, 12 August 2025.