

Standing Committee on Law and Justice

Inquiry into the eligibility of members of Parliament to serve on juries

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Terms of reference

That the Standing Committee on Law and Justice inquire into and report on the eligibility of members of Parliament who do not hold Ministerial portfolios to serve on juries, and in particular:

1. Whether there exists an immunity (or privilege) that attaches at common law to members of Parliament that prevents them being compelled to attend other courts in response to a summons for jury service
2. The extent of any such immunity (or privilege), in particular whether the rights that arise apply in periods when Parliament is not sitting
3. The appropriateness of any such immunity (or privilege)
4. Whether any such immunity should be abolished, altered or more precisely defined
5. Whether the existing provisions in the *Jury Act 1977* that make members of Parliament ineligible for jury service are necessary in light of any such immunity/privilege and, if so, whether they are appropriate
6. Whether the existing provisions in the *Jury Act 1977* that make members of Parliament ineligible for jury service should be repealed or amended.¹

¹ *LC Minutes* (22/06/2010) 1936, Item 13.

Committee membership

The Hon Christine Robertson MLC	Australian Labor Party	<i>(Chair)</i>
The Hon David Clarke MLC	Liberal Party	<i>(Deputy Chair)</i>
The Hon John Ajaka MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
Mr David Shoebridge MLC*	The Greens	
The Hon Lynda Voltz MLC	Australian Labor Party	

*** Note on Committee membership**

Mr David Shoebridge MLC replaced Ms Sylvia Hale MLC as a member of the Committee on 9 September 2010. Ms Hale had been a valued member of the Committee since 29 May 2007.

Secretariat

Ms Rachel Callinan, Director
 Ms Teresa McMichael, Principal Council Officer
 Ms Shu-fang Wei, Council Officer Assistant

Table of contents

	Chair's foreword	viii
	Summary of recommendations	ix
Chapter 1	Introduction	1
	Inquiry terms of reference	1
	Conduct of the inquiry	1
	Terminology	1
Chapter 2	Should members of Parliament be exempt from serving on juries?	3
	Background	3
	Current exemption of members of Parliament from jury service	4
	Common law immunity	5
	Statutory exemption	9
	Should the statutory exemption be repealed?	11
	Separation of powers doctrine	11
	Committee comment	15
	Member's duty to the House and to their constituents	15
	Committee comment	18
	Potential bias or conflicts of interest	18
	Committee comment	19
	Consistency with other jurisdictions	20
	Committee comment	21
	Actual benefit to juries	22
	Committee comment	23
	Members would likely be excused anyway	23
	Committee comment	24
	Status of common law immunity	24
	Committee comment	26
	Educational benefit to members	26
	Committee comment	26
	Other concerns	27
	Committee comment	27
	Conclusion	28
Appendix 1	Submissions	29
Appendix 2	Examples of the British Parliament asserting its privileges in relation to jury service	30

Appendix 3 Minutes

32

Chair's foreword

Members of Parliament are currently exempt from jury service. There are two legal bases for this exemption: an immunity arising from common law, and an exclusion prescribed by statute.

This Inquiry resulted from a review of the jury selection system under the *Jury Act 1977* by the NSW Law Reform Commission, where the Commission recommended that the New South Wales Parliament consider whether the statutory exclusion and common law immunity of its members from jury service should be preserved.

Many compelling reasons were raised during the Inquiry as to why members of Parliament should be exempt from jury service, with nearly all submission makers arguing strongly that the exemption be maintained.

One of the key reasons cited for maintaining the exemption is the doctrine of the separation of powers. The independence and impartiality of each arm of government is fundamental to the New South Wales system of government. Allowing individuals who make laws to then adjudicate on those laws would be a breach of that doctrine. This applies to *all* members of Parliament, not just Ministers, as all members are involved in the promotion and passage of legislation affecting the criminal law.

Another key reason why members of Parliament should be exempt from jury service is their duty to the House and to their constituents. The Committee members do not consider our occupation to be more important than any other, however we acknowledge that there is an ancient principle that the House has the first right to its members, which is essential to the functioning of Parliament. We also acknowledge the right of citizens to be represented in Parliament by their elected members, and the importance of members being available for their constituents. Members are elected representatives and should not be taken out of this role to sit on a jury.

Numerous other persuasive and valid arguments for maintaining the statutory exemption were raised during the Inquiry, such as the potential for bias (whether real or perceived), consistency with other Australian jurisdictions, the limited benefit of adding members to the jury pool and uncertainty surrounding the status of the common law immunity. As such, the Committee supports the ongoing statutory ineligibility of members from jury service.

I thank my Committee colleagues for their contributions to this Inquiry. I also thank the Committee secretariat for their professional support.



Hon Christine Robertson MLC
Committee Chair

Summary of recommendations

Recommendation 1

28

That the statutory ineligibility of members of Parliament from jury service in the *Jury Act 1977* be maintained.

Chapter 1 Introduction

Inquiry terms of reference

- 1.1 The terms of reference for the Inquiry were referred to the Committee on 10 June 2010 by the NSW Attorney General and Minister for Justice, the Hon John Hatzistergos MLC, and are reproduced on page iv.
- 1.2 The terms of reference required the Committee to examine the eligibility of members of Parliament who do not hold Ministerial portfolios to serve on juries, including the existence and extent of any common law immunity that prevents members from serving as jurors, the appropriateness of any such immunity, and the appropriateness of the statutory exemption in the *Jury Act 1977* that renders members ineligible for jury service.

Conduct of the inquiry

- 1.3 The Committee advertised a call for submissions in *The Sydney Morning Herald* and *The Daily Telegraph* on 23 June 2010. A media release announcing the Inquiry and the call for submissions was sent to all media outlets in New South Wales. The Committee also wrote to a large number of relevant stakeholder organisations and individuals inviting them to participate in the inquiry process. The closing date for submissions was 6 August 2010.
- 1.4 The Committee received 22 submissions. Submissions were received from a range of interested people and organisations, including current and former members of the New South Wales Parliament, Clerks of Parliaments (both within Australia and in the United Kingdom), the Office of the Director of Public Prosecutions, the Public Defenders Office, the Chief Magistrate of the Local Court of NSW, and legal bodies.
- 1.5 A list of submissions is contained in Appendix 1. The submissions are available on the Committee's website: www.parliament.nsw.gov.au/lawandjustice.

Terminology

- 1.6 The terms 'exemption' and 'immunity' have been used interchangeably in submissions and in this report to broadly describe the exclusion of members of Parliament from jury service.
- 1.7 Two more specific terms are also used in this report: 'ineligibility' and 'exemption as of right'. Persons who are 'ineligible' for jury service cannot serve as a juror, even if they desire to. Persons who are 'exempt as of right' on the other hand may choose whether they serve or not.

Chapter 2 Should members of Parliament be exempt from serving on juries?

Members of the New South Wales Parliament are currently exempt from jury service. There are two legal bases for this exemption: an immunity arising from common law, and an exclusion prescribed by statute.

This chapter considers whether the statutory exclusion should be repealed, and the status and extent of the common law immunity should this occur.

Background

- 2.1** In New South Wales, juries may be used in criminal proceedings for indictable offences in the Supreme or District Courts,² the Coroner's Court,³ and in some civil trials.⁴
- 2.2** The *Jury Act 1977* (NSW) excludes a number of people from serving as jurors. Under the Act, such persons are classified as either 'disqualified' or 'ineligible' for jury service. Persons excluded due to criminal history are disqualified, while persons excluded for other reasons, such as occupation or incapacity, are ineligible.⁵ Ineligible occupations include members or officers of the Executive Council, members of the Legislative Council or Legislative Assembly, and officers and other staff of both Houses of Parliament.⁶
- 2.3** In September 2007, the NSW Law Reform Commission released a report on the operation and effectiveness of the jury selection system under the *Jury Act 1977*. The Commission made 74 recommendations, a number of which were aimed at broadening the pool of potential jurors to ensure that juries are sufficiently representative of the community, and sharing the burden of jury service equitably.⁷
- 2.4** Three of the Law Reform Commission's recommendations related specifically to the New South Wales Parliament:
- Recommendation 11: Members or officers of the Executive Council should be excluded from jury service
 - Recommendation 12: Parliament should give consideration to the question of the extent and preservation of the statutory exclusion and common law immunity of its members in relation to jury service
 - Recommendation 13: Officers and other staff of either or both of the Houses of Parliament should be eligible for jury service.⁸

² *Criminal Procedure Act 1986* (NSW), s 131.

³ *Coroners Act 1980* (NSW), s 18.

⁴ Juries are only used in civil actions where they are required in the interests of justice: *Supreme Court Act 1970* (NSW), s 85; *District Court Act 1973* (NSW), s 76A. See also *Defamation Act 2005* (NSW), s 21.

⁵ NSW Law Reform Commission, *Jury Selection*, Report No 117, September 2007, p 20.

⁶ *Jury Act 1977* (NSW), Sch 2.

⁷ NSW Law Reform Commission, Report No 117, pp xii-xxiv.

⁸ NSW Law Reform Commission, Report No 117, p xiv.

- 2.5 The Commission also proposed (in Recommendation 2) that the heading of 'exclusion from jury service' be adopted in preference to the separate headings of ineligibility and disqualification, given that ineligibility and disqualification have the same consequences i.e. an inability to serve as a juror.⁹
- 2.6 Since the release of the Law Reform Commission's report, a series of legislative amendments have been passed in New South Wales to implement the Commission's recommendations. The most recent of these is the *Jury Amendment Act 2010* (NSW) (the commencement of which is yet to be proclaimed).¹⁰
- 2.7 Once proclaimed, the *Jury Amendment Act* will implement a number of the Commission's recommendations, including Recommendations 2 (concerning the heading of 'exclusion from jury service') and 13 (eligibility of parliamentary officers and staff). The Act also supports Recommendation 11 by preserving the existing exclusion of members of the Executive Council from jury service.¹¹
- 2.8 In regard to Parliament giving consideration to the question of the extent and preservation of the statutory exclusion and common law immunity of its members in relation to jury service (Recommendation 12), the Law Reform Commission expressed that its preferred position was for the statutory ineligibility of members of Parliament from jury service to be repealed, while retaining the immunity for Ministers of the Crown. The Commission recognised that in doing so the common law immunity may remain, and considered that the Parliament was best placed to determine the preservation of this immunity.¹²
- 2.9 As noted in the second reading speech to the Jury Amendment Bill 2010, this Inquiry progresses Recommendation 12.¹³ In the meantime, the *Jury Amendment Act 2010* (once proclaimed) will maintain the existing exclusion of members of the Legislative Council or Legislative Assembly from jury service.¹⁴

Current exemption of members of Parliament from jury service

- 2.10 As mentioned, there are two legal bases for the exemption of members from jury service: the first arising from common law; the second provided in statute.

⁹ NSW Law Reform Commission, Report No 117, pp 30-31. Another consequence of both categories was the potential for prosecution for failing to disclose, or providing false or misleading information, to the Sheriff regarding any applicable ground of disqualification or ineligibility.

¹⁰ With the exception of Schs 1[17] and 2[2] (except to the extent that it inserts a note to cl 5(4) of the Jury Regulation 2004) and [3] of the *Jury Amendment Act 2010*, which commenced on 1 August 2010.

¹¹ *Jury Amendment Act 2010*, Sch 1, s 5(1)(d).

¹² NSW Law Reform Commission, Report No 117, p 70.

¹³ *LC Minutes* (22/6/2010) 22.

¹⁴ *Jury Amendment Act 2010*, Sch 1, s 5(1)(e).

Common law immunity

- 2.11** The common law immunity of members from jury service is one of the ancient parliamentary privileges developed over centuries in the British Parliament.¹⁵ As noted in *Lovelock and Evans' New South Wales Legislative Council Practice*, parliamentary privilege refers to two aspects of the law as it relates to parliament: the immunities of the House, and the powers of the House to protect its processes.¹⁶ These special rights, powers and immunities are enjoyed collectively by the Houses of Parliament, and individually by their members (although not for their personal benefit), and are necessary for the effective performance of parliamentary functions.¹⁷
- 2.12** Exemption from jury service is one of three immunities enjoyed by members of Parliament in relation to legal proceedings (the other two being immunity from arrest in civil cases, and exemption from compulsory attendance in a court or tribunal).¹⁸ The rationale behind these immunities is based on Parliament's 'paramount claim to the services of its members.'¹⁹ As expressed in *Odgers' Australian Senate Practice*: '[T]he Houses should have first right to the services of their members, witnesses and officers, and ... those services should not be impeded by the requirements of legal proceedings before a court.'²⁰
- 2.13** The submissions from the Clerk of the Parliaments and Clerk of the NSW Legislative Council, Ms Lynn Lovelock, and the Speaker of the NSW Legislative Assembly, the Hon Richard Torbay MP, cited several cases which provided examples of the British Parliament asserting its privileges in relation to jury service from as far back as 1597. A detailed account of these cases is available in Appendix 2.
- 2.14** One of the cases, from 1826, arose when a member of the House of Commons, Mr Holford, informed the House that he had been fined for not attending jury service, despite requesting to be excused because the Parliament was sitting. In its response, the House agreed with a report by the Committee of Privileges on the matter, which found that it is 'amongst the most ancient and undoubted privileges of parliament, that no member shall be withdrawn from his attendance on his duty in parliament to attend any other court.'²¹
- 2.15** Another case, from 1861, arose when a member of the House of Lords (Lord Enfield) was summoned as a juror. In regard to that case, the Lord Chief Justice stated:

... his Lordship ought not to have been summoned as a juror, as members of Parliament were not bound to serve in any other court than that in which they had been returned to serve – namely, the High Court of Parliament, which was the highest Court of the realm.²²

¹⁵ NSW Law Reform Commission, Report No 117, p 67.

¹⁶ Lovelock L & Evans J, *New South Wales Legislative Council Practice*, Sydney, The Federation Press, 2008, p 47.

¹⁷ Submission 20, Hon Richard Torbay MP, Speaker, NSW Legislative Assembly, p 2; Griffith G, 'Parliamentary Privilege: Major Developments and Current Issues', Background Paper No 1/07, NSW Parliamentary Library, April 2007, p 1.

¹⁸ Carney G, *Members of Parliament: Law and Ethics*, Sydney, Prospect Media Pty Ltd, 2000, p 195.

¹⁹ Campbell E, *Parliamentary Privilege*, Sydney, The Federation Press, 2003, p 145.

²⁰ Evans, H (ed) *Odgers' Australian Senate Practice* (10th ed) Department of Senate Canberra, 2001, p 53.

²¹ *Parliamentary Debates* (UK), 1826 vol. 15, col. 570.

²² *The Times*, 8 February 1861.

- 2.16** According to *Erskine May's Parliamentary Practice*, the House has a right 'to treat as a breach of its privileges any refusal to excuse a Member who is summoned as a juror from attending or serving; or any attempt to punish him for not attending or for refusing to attend as a juror.'²³ *May* concludes: '[I]t would appear that the mere summoning of a Member to serve on a jury would constitute a breach of privilege'.²⁴
- 2.17** In her submission, the Clerk of the NSW Legislative Council commented that these cases demonstrate that the original immunity of members of Parliament from jury service was clearly intended to attach to sittings of Parliament and committee meetings, and during adjournments of the House.²⁵ Whether the immunity extends to periods outside of sittings is, however, uncertain – as will be discussed later in this chapter.
- Receipt of common law immunity in New South Wales***
- 2.18** There is some uncertainty regarding the receipt into New South Wales of the ancient common law immunity exempting members from jury service. However, the weight of opinion is that the common law immunity does exist in New South Wales.
- 2.19** The cause for the uncertainty stems from the fact that the New South Wales Parliament is the only parliament in Australia, other than Tasmania, which has not defined its powers and privileges by reference to the British House of Commons at a particular date or by specific statute.²⁶ Instead, the privileges of the New South Wales Parliament are found 'in the whole body of the common law and a few provisions within other legislation.'²⁷
- 2.20** The fundamental principle, established by a series of Privy Council cases in the 1800s, is that the New South Wales Parliament only inherited the powers and immunities that are 'reasonably necessary' for the proper exercise of its functions that it was intended to execute.²⁸ The Speaker of the NSW Legislative Assembly advised that these powers and privileges are not static, and not confined to what was necessary at the time of the Parliament's establishment, but that they are taken to be whatever is 'reasonable' under present-day conditions.²⁹
- 2.21** In its report on jury selection, the NSW Law Reform Commission noted that the question of whether the immunity of members from jury service is 'reasonably necessary' for the proper exercise of the New South Wales Parliament's functions 'has been the subject of some controversy.'³⁰ However, the Commission acknowledged that 'the weight of opinion appears to be in support of the continued existence of the immunity from jury service.'³¹

²³ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 18th Edition, edited by Sir Barnett Cocks, Butterworths, United Kingdom, 1971, p 100.

²⁴ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 18th Edition, edited by Sir Barnett Cocks, Butterworths, United Kingdom, 1971, p 100.

²⁵ Submission 14, Ms Lynn Lovelock, Clerk of the Parliaments, Legislative Council, NSW Parliament, p 4.

²⁶ Lovelock L & Evans J (ed), *NSW Legislative Council Practice*, Sydney, The Federation Press, 2007, p 47.

²⁷ NSW Parliament, Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p 15.

²⁸ Submission 14, p 5.

²⁹ Submission 20, p 3.

³⁰ NSW Law Reform Commission, Report No 117, p 67.

³¹ NSW Law Reform Commission, Report No 117, p 67.

- 2.22** The Clerk of the NSW Legislative Council acknowledged that there is no judicial authority on this point, however stated that 'it is more than likely that such an immunity would be considered reasonably necessary, based on the need of the Houses to maintain the attendance and service of their members.'³²
- 2.23** The Speaker of the NSW Legislative Assembly advised that the immunity of members from jury service was considered by the Joint Select Committee on Parliamentary Privilege in a 1985 report on *Parliamentary Privilege in New South Wales*, which deemed the immunity to be one of 'fifteen general categories of powers, privileges and immunities attaching to Parliament.'³³
- 2.24** This view was supported by the Hon Ron Dyer, former member of the NSW Legislative Council,³⁴ and the Parramatta Community Justice Clinic (PCJC). The PCJC asserted that the common law immunity of members of the New South Wales Parliament is 'deeply embedded in our history and in the workings and understanding of the system as we know it',³⁵ declaring: '[T]he common law on this occasion, as it stands, has served us well. There should, therefore, be no contention as to the application of the common law immunity.'³⁶

Period in which the common law immunity applies

- 2.25** The Committee was advised that there are doubts regarding the period in which the common law immunity applies.
- 2.26** As mentioned in paragraph 2.17, the Clerk of the NSW Legislative Council noted that the ancient immunity from jury service developed in the British Parliament clearly intended to attach to sittings, committee meetings and adjournments³⁷ of the House. With regard to Committee business, the Clerk stated: '[i]t may also be reasonably assumed that parliamentary business incorporates committee business, including hearings, site visits, deliberative meetings and the like.'³⁸
- 2.27** The Speaker of the NSW Legislative Assembly observed that this reflects the rationale that the House has priority over the service of its members to enable it to function.³⁹ The Speaker further advised that the ancient immunity applied to a short period either side of House sittings or committee meetings, to allow time for members to travel between Westminster and home.⁴⁰
- 2.28** However, the extent to which the immunity applies outside of House sittings or committee activities is unclear. The Committee was informed that there is no modern authority to clarify the issue. Due to all Australian jurisdictions having a blanket statutory exemption for members

³² Submission 14, p 5.

³³ Submission 20, p 4; NSW Parliament, Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p 14. One case concerning the existence of the common law immunity from jury service arose in the NSW Legislative Assembly in 1881, as noted in Submission 14, p 5.

³⁴ Submission 10, Hon Ron Dyer, former member, p 2.

³⁵ Submission 18, Parramatta Community Justice Clinic, p 2.

³⁶ Submission 18, p 2.

³⁷ i.e. suspension of parliamentary proceedings to another time or place.

³⁸ Submission 14, p 11.

³⁹ Submission 20, p 4.

⁴⁰ Submission 20, p 2.

from jury duty, the extent of the common law immunity has not been tested in Australian courts.⁴¹

- 2.29** One view is that members, if otherwise qualified to serve as jurors, are liable to serve when the Parliament is not sitting.⁴² This view was acknowledged by the PCJC, which noted the rationale that the common law immunity was developed so that 'no Member shall be withdrawn from his attendance on his duty in Parliament to attend any other court'.⁴³
- 2.30** However, the PCJC noted that it can equally be argued that members of Parliament should be exempt from jury service even when Parliament is not sitting, based on the broader rationale that the purpose of the immunity is to 'avoid any hindrance to MPs in carrying out their parliamentary obligation'.⁴⁴
- 2.31** This was supported by the Hon Ron Dyer, who suggested that the immunity of members from jury service should apply outside of sitting periods, because during periods of adjournment members' duties continue by way of constituency work and service on parliamentary committees.⁴⁵
- 2.32** Several other inquiry participants also supported the application of the immunity outside of sitting periods, such as the Speaker of the Victorian Legislative Assembly, the Hon Jenny Lindell MP, who noted that 'absence from the electorate on non-sitting days for the purpose of jury duty may compromise a Member's ability to consult with constituents and/or participate in negotiations on issues relevant to the electorate'.⁴⁶
- 2.33** Similarly, a former member of the NSW Legislative Assembly, Mr Eddie Britt, stated that members are elected 'in expectation that they will be available for their constituents full time when not in Parliament'.⁴⁷
- 2.34** The duty of members to their House and to their constituents was also raised as an argument in favour of preserving the statutory exclusion, and will be discussed in detail later in this chapter.
- 2.35** The Clerk of the NSW Legislative Council noted that although not directly comparable, some guidance may be taken from section 16 of the *Parliamentary Privileges Act 1987* (Cth), which defines proceedings in parliament to include: 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.⁴⁸
- 2.36** Looking to the statutory immunity for guidance, it is noted that the *Jury Act 1977* (NSW) provides a blanket exemption to members from jury service, irrespective of the sittings of the

⁴¹ Submission 14, p 11.

⁴² Campbell E, *Parliamentary Privilege in Australia*, Melbourne University Press, 1965, p 72.

⁴³ Submission 18, p 2.

⁴⁴ Submission 18, p 3.

⁴⁵ Submission 10, p 2.

⁴⁶ Submission 15, Hon Jenny Lindell MP, Speaker, Vic Legislative Assembly, pp 1-2.

⁴⁷ Submission 4, Mr Eddie Britt, former member, p 1.

⁴⁸ Submission 14, p 12.

House. The Committee was advised that relevant jury legislation in other Australian jurisdictions also provide blanket exemptions.⁴⁹

- 2.37** For example, the *Jury Exemption Act 1965* (Cth) provides statutory immunity from jury service for members and Senators of the Australian Parliament. The Commonwealth provisions operate permanently and are not limited by any time factor.⁵⁰ The Clerk of the Australian Senate, Ms Rosemary Laing, commented that while it could be possible to limit the time the immunity applies, in practice it may not work:

While it might be possible in theory to limit the application of the immunity to, say, five days either side of a meeting of a House or a committee, this is likely to be unworkable in practice, certainly as far as the Senate is concerned. Records show that, apart from a period over Christmas and New Year, Senate committees meet somewhere in Australia on most days on which the Senate itself is not sitting. While there are fewer meetings during a prorogation, all Senate committees are empowered to meet following a prorogation and many have done so.⁵¹

- 2.38** The difficulty of limiting the application of the immunity was reiterated by the Speaker of the NSW Legislative Assembly, who stated: 'In practical terms, there may be few periods where the Parliament and its committees are not transacting business'.⁵²

- 2.39** A further point, raised by the Clerk of the NSW Legislative Council, relates to the uncertainty surrounding the timing of parliamentary business:

Even if members are not engaged in parliamentary business at a particular time that would preclude them from serving on a jury, the possibility nevertheless exists that urgent parliamentary business may still arise, in which case the House would remain entitled to the first call on members' attendance and service.⁵³

- 2.40** The Clerk of the Legislative Council observed that the House can be recalled early to deal with urgent legislation, or committees may need to meet at short notice to discuss urgent matters arising. The Clerk iterated that the House (and its committees) has the first call on its members, and stated that if members were serving on juries at the time, 'it is possible that the court processes could be severely disrupted as a result of the member's absence'.⁵⁴

Statutory exemption

- 2.41** Legislation pertaining to juries was first enacted in New South Wales in the 19th century with the passage of the *Juries for Civil Issues Act 1829*,⁵⁵ which was followed by the *Jurors and Juries Consolidation Act 1847*,⁵⁶ the *Jury Act 1901*, and finally, the *Jury Act 1977*.⁵⁷

⁴⁹ Submission 20, p 5.

⁵⁰ Submission 7, Ms Rosemary Laing, Clerk of the Senate, p 2.

⁵¹ Submission 7, p 2.

⁵² Submission 20, p 5.

⁵³ Submission 14, p 13.

⁵⁴ Submission 14, p 14.

⁵⁵ 10 George IV No 8.

⁵⁶ 11 Victoria No 20.

⁵⁷ Submission 14, p 6.

- 2.42** Even though a strong case existed that the common law immunity against jury duty was inherited by the New South Wales Parliament, the immunity was nonetheless codified in each of those statutes.⁵⁸ Under the current *Jury Act 1977*, members of the Legislative Council or Legislative Assembly are ineligible for jury service.⁵⁹
- 2.43** The Clerk of the Senate informed the Committee that the immunity has been entrenched in statute across Australia, stating:

It is my understanding that the exemption of members of Parliament from jury service in all Australian jurisdictions is based on statutory law. Statutory law has therefore superseded the common law in all Australian jurisdictions.⁶⁰

- 2.44** The effect of the enactment of the statutes on the status of the common law immunity will be considered later in this chapter.

Immunity for former members

- 2.45** The Committee was advised that once commenced, the *Jury Amendment Act 2010* will extend the immunity from jury service to include former members of the New South Wales Parliament for three years after they leave office.⁶¹
- 2.46** The Inquiry terms of reference only require the Committee to examine the immunity from jury service for current members of Parliament. However, several submissions noted that the immunity also exists for former members in other Australian jurisdictions.⁶²
- 2.47** For example, the Committee was informed that the statutory exemption in Victoria and Western Australia extends to former members for five years after they leave Parliament.⁶³ The Clerk of the NSW Legislative Council advised that the exemption was extended to former members in these jurisdictions 'on the basis that a member of Parliament's political influence may exist or be seen to exist beyond his or her term in office.'⁶⁴
- 2.48** The Hon Wal Fife KSS, a former member of the NSW Legislative Council, argued that former Ministers should be permanently exempt from jury service due to their ministerial duties, stating:

My duties as a Minister in several of these portfolios, in my view, would rule me out from jury service for life. For example, as Minister for Business and Consumer Affairs, I was largely responsible for the preparation and introduction of the

⁵⁸ Submission 14, p 5.

⁵⁹ *Jury Act 1977* (NSW), Sch 1, s (5)(1)(e). Once the *Jury Amendment Act 2010* is proclaimed, this terminology will change so that members of the Legislative Council or Legislative Assembly will be 'excluded' from jury service.

⁶⁰ Submission 7, p 1.

⁶¹ Submission 20, p 6.

⁶² Submissions 9, The Hon Barry House MLC, President, Western Australian Legislative Council; Submission 10, 14 and 20.

⁶³ Submission 14, p 16. n.b. the period of immunity in Victoria was ten years, however on 22 June 2010 the Victorian Attorney General announced a number of reforms to increase the pool of potential jurors in Victoria, which included reducing the period of immunity for former members to five years.

⁶⁴ Submission 14, p 16.

1979 telephone intercept legislation which has often been referred to as "watershed" legislation.⁶⁵

- 2.49 The application of the exemption to former members was not supported by the Hon Ron Dyer, who expressed the view that 'retired Members could be expected to make useful jurors, based on their experience of public life.'⁶⁶

Should the statutory exemption be repealed?

- 2.50 Item 6 of the Inquiry terms of reference asks the Committee to examine whether the statutory exemption of members from jury service in the *Jury Act 1977* should be repealed or amended.
- 2.51 A number of issues were raised by inquiry participants regarding this suggestion. These will be considered below.

Separation of powers doctrine

- 2.52 One of the fundamental reasons for the immunity of members of Parliament from jury service raised by inquiry participants⁶⁷ is the doctrine of the separation of powers. The doctrine refers to the separation of the executive, legislative and judicial branches of government. The purpose of the doctrine is to maintain the independence and impartiality of each arm of government.⁶⁸
- 2.53 The Clerk of the NSW Legislative Council advised that although the doctrine is not formally expressed in the *Constitution Act 1902* (NSW) (as it is in the Commonwealth Constitution), 'it is nevertheless central to an understanding of the system of responsible government in New South Wales.'⁶⁹ The Clerk described the separation of the judiciary from the executive and legislature as 'axiomatic' in the NSW system of government.⁷⁰
- 2.54 This view was supported by the PCJC, which commented: '[a]lthough it is true that in the strict sense, separation of powers does not exist at the state level, in terms of an entrenched rule, the notion of the doctrine should still be adhered to'.⁷¹
- 2.55 This position has also been supported in other jurisdictions. For example, the Victorian Parliament's Law Reform Committee considered removing the immunity of members from jury service in an inquiry into jury service in 1996, however decided against it due to the 'overriding principle'⁷² of the need to maintain the separation of powers between the arms of government. The Committee went even further and recommended that members of

⁶⁵ Submission 17, The Hon Wal Fife KSS, former member, p 1.

⁶⁶ Submission 10, p 3.

⁶⁷ Submissions 1, 3, 5, 6, 14, 15, 20 and 22.

⁶⁸ Submission 14, p 6.

⁶⁹ Submission 14, p 6.

⁷⁰ Submission 14, p 6.

⁷¹ Submission 18, p 5.

⁷² Parliament of Victoria, Law Reform Committee, Jury service in Victoria, Final Report, Vol. 1, December 1996, p 74.

Parliament should be categorised as ineligible from jury service, rather than just exempt as of right.⁷³

- 2.56** Similarly, in a 1980 examination of jury service, the Law Reform Commission of Western Australia also recommended that the exemption of members of Parliament be strengthened by rendering members ineligible for jury service rather than exempt as of right.⁷⁴ The Commission stated that it was 'inappropriate that a person who is involved in the making of laws should be able to serve on a jury which may be called upon to decide whether there has been a breach of any such law'.⁷⁵ The Commission recently reaffirmed its support for this view in 2009 in a Discussion Paper on the selection, eligibility and exemption of jurors.⁷⁶
- 2.57** The notion of individuals who make laws being permitted to adjudicate on those laws was cited as a key concern by several inquiry participants. For example, the Public Defenders argued:
- ... Members of Parliament who make the laws which the Courts must apply, must not also sit in effect, as judges. Were members of the Parliament to sit on juries they would be both making and applying the law. It would cause a substantial breach in a fundamental principle underpinning our system of law and justice, that is, the separation of powers doctrine.⁷⁷
- 2.58** Likewise, the PCJC stated:
- The doctrine of separation of powers is one which goes to the heart of the Australian legal system and there are concerns that by allowing MP's who make the laws, to then sit on juries, and thus, have a say in the outcome of a case where those laws are being applied, there is a breach of that doctrine.⁷⁸
- 2.59** However, in its report on jury selection the NSW Law Reform Commission argued that the doctrine of separation of powers does not provide any 'logical basis' for the exclusion of members from jury service 'because jurors serve in a private capacity'.⁷⁹
- 2.60** The Law Reform Commission's view was rejected by Mr Graeme Henson, Chief Magistrate of the NSW Local Court, who pointed out that other individuals involved in the criminal justice system, such as police officers and prosecutors, remain ineligible for jury service (based on the need to avoid the appearance of bias), and that their ineligibility 'has long been recognised as appropriate, notwithstanding that otherwise individuals falling within that class would likewise serve as jurors in a private capacity'.⁸⁰

⁷³ Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report, Vol 1, December 1996, p 100. This recommendation was subsequently implemented in the *Juries Act 2000* (Vic), which provides that members of the Victorian Parliament are ineligible to serve on juries.

⁷⁴ Law Reform Commission of Western Australia, *Exemption from Jury Service*, Report, Project No 71, June 1980, p 13.

⁷⁵ Law Reform Commission of Western Australia, Report, Project No 71, p 13.

⁷⁶ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper, Project No 99, September 2009, p 73. The *Juries Act 1957* (WA) was amended in 2010 to redefine the exemption of persons closely connected to the justice system as an ineligibility.

⁷⁷ Submission 1, Public Defenders, p 1.

⁷⁸ Submission 18, p 5.

⁷⁹ NSWLRC, Report 117 (2007) *Jury Selection* at [4.26].

⁸⁰ Submission 6, Mr Graeme Henson, Chief Magistrate, p 2.

- 2.61** The Law Reform Commission also concluded that the doctrine of separation of powers 'has no basis historically, since the common law immunity derives from the Parliament's historical status as a court'.⁸¹
- 2.62** This argument was rejected by the Clerk of the NSW Legislative Council, who noted that the Commission did not cite any authority to support its statement, and asserted that the ancient common law immunity from jury service was instead 'almost certainly the struggle for sovereignty by the English Parliament'.⁸²
- 2.63** Further, the NSW Law Reform Commission made a significant distinction between members of Parliament and Ministers, and expressed support for the ongoing ineligibility of Ministers from jury service while in office. The reasons cited by the Commission for this were:
- the direct involvement of Ministers in the promotion and passage of legislation affecting the criminal law
 - the responsibility of Ministers for the enforcement or administration of laws of the State, and
 - the need for Ministers to attend regular meetings of the Executive Council.⁸³
- 2.64** The Commission's distinction was based on the assumption that backbench members of Parliament have no direct involvement in the promotion or passage of legislation affecting criminal law. This was not accepted by either the Clerk of the NSW Legislative Council or the Speaker of the NSW Legislative Assembly, with the Speaker declaring the distinction to be neither valid nor persuasive.⁸⁴
- 2.65** The Speaker of the Legislative Assembly pointed out that all members of Parliament may potentially be involved in debate on legislation affecting criminal law, and that all members are ultimately required to vote on the legislation. The Speaker noted that members may also be involved in proposed legislation by virtue of their membership of internal party committees or parliamentary committees, such as the Legislation Review Committee. Further, he advised that Parliamentary Secretaries in the Legislative Assembly can also play an active role in introducing legislation, as they are permitted to act on behalf of Ministers in certain respects and may 'give notice of, introduce and have carriage of Government business'.⁸⁵

⁸¹ NSW Law Reform Commission, Report No 117, p 69.

⁸² Submission 14, p 8.

⁸³ NSW Law Reform Commission, Report No 117, p 66.

⁸⁴ Submission 20, p 8.

⁸⁵ Submission 20, p 8.

2.66 The Clerk of the Legislative Council agreed with the NSW Law Reform Commission's reasons as to why members of the Executive should be ineligible from jury service. The Clerk further argued that the same reasoning applies to members of the Legislature:

Members of the Executive (ie ministers) should not be involved in the processes of the judiciary while having executive authority to *introduce* legislation for the administration and enforcement of the law.

However, the same principle also applies to the other arm of the government: the Legislature. Members of the Legislature equally should not be involved in the processes of the judiciary while having legislative authority to *pass* legislation for the administration and enforcement of the law. In doing so, backbench members of Parliament are called upon to engage in debate about the merits of legislative proposals concerning the criminal law.⁸⁶

2.67 The Clerk of the Legislative Council further highlighted that backbench members of Parliament may also be involved in the promotion and passage of criminal legislation by way of private members' bills.⁸⁷

2.68 Another aspect of the separation of powers doctrine raised during the Inquiry is the need to maintain the independence and integrity of, and public confidence in, the criminal justice process.

2.69 This point was raised by Chief Magistrate Henson, who commented on the need to have juries that are independent from 'any actual or apprehended influence from the legislative arm of government', which he emphasised 'all MPs are a part [of], including those who do not hold executive Ministerial portfolios'.⁸⁸

2.70 Chief Magistrate Henson argued that by allowing individuals involved in a legislative role to serve as jurors (thereby undertaking a role within the judicial arm of government which is directly involved in the outcome of court proceedings), there runs a risk of undermining public confidence in the integrity of the criminal justice system and its freedom from political influence.⁸⁹

2.71 A similar view was espoused by the Speaker of the NSW Legislative Assembly, who contended that removing the exemption of members of Parliament from jury service may undermine the separation of powers doctrine by weakening the principle that 'the criminal justice system is free from all forms of political influence and involvement'.⁹⁰

⁸⁶ Submission 14, pp 7-8.

⁸⁷ Submission 14, p 8.

⁸⁸ Submission 6, p 2.

⁸⁹ Submission 6, p 2.

⁹⁰ Submission 20, p 8.

2.72 On the same note, the PCJC maintained that allowing members to serve on juries would 'impede on the independence and impartiality required by jurors, by infringing on the doctrine of separation of powers and opening the doors for politics in the jury room.'⁹¹ The PCJC suggested that this could have a detrimental impact on the public perception of the criminal justice system, and stated:

[An] appearance of impartiality is necessary in order to gain public confidence in the criminal justice system and even if these MPs were able to set aside their occupational and political motives and opinions and serve in a 'private capacity', there is still a high chance of public perception in the system being tainted ... Conflict does not have to exist, it is enough that there is a possibility that the public may perceive that there is.⁹²

Committee comment

2.73 The Committee believes that the doctrine of the separation of powers is an important reason to maintain the statutory exemption of members from juries. While the doctrine is not formally expressed in statute in New South Wales, it is nonetheless fundamental to the state's system of government.

2.74 We agree that allowing individuals who make laws to then adjudicate on those laws would be a fundamental breach of the doctrine. This separation is essential for maintaining the independence and impartiality of each arm of government.

2.75 The Committee notes the NSW Law Reform Commission's distinction between members of the Legislature and members of the Executive Council; however, along with the Clerk of the NSW Legislative Council and the Speaker of the NSW Legislative Assembly, we firmly reject that proposition. All members of Parliament are involved in the promotion and passage of legislation affecting the criminal law, not just Ministers. Further, we point out that the Parliament makes the laws, not the Executive.

2.76 The Committee also recognises the importance of maintaining the independence and integrity of the criminal justice process, and public confidence in the system. We note the suggestion that public confidence can be affected by a mere perception that a political or other external influence exists, and agree that such perceptions may arise should the exemption be repealed.

Member's duty to the House and to their constituents

2.77 As mentioned earlier, members' primary duties are to the House and to their constituents.

2.78 Parliament's paramount claim to the services of its members as a rationale for excluding members of Parliament from jury service was acknowledged by a number of inquiry participants,⁹³ such as the Clerk of the Australian Senate, who stated:

The rationale for these immunities is the principle that a member's first duty is to the House of which he or she is a member and that the House has the first call on the services of its members.⁹⁴

⁹¹ Submission 18, p 1.

⁹² Submission 18, p 5.

⁹³ Submissions 3, 6, 7, 8, 9, 14 and 20.

- 2.79** Similarly, the Speaker of the South Australian House of Assembly, the Hon Lyn Breuer MP, noted the 'long standing parliamentary tradition that a Member's first duty is to the Parliament', declaring that: 'jury service is inconsistent with a Member's over-riding obligation to attend the sittings of the House in which they are a Member.'⁹⁵
- 2.80** The Speaker of the Queensland Legislative Assembly, the Hon John Mickel MP, advised that the immunity ensures that parliamentary proceedings are not hindered by the absence of its members,⁹⁶ while the President of the Western Australian Legislative Council, Mr Barry House MLC, said: 'The primacy of the Parliament, and its right to the attendance of its Members for parliamentary business, is fundamental to the law of parliamentary privilege.'⁹⁷
- 2.81** The Speaker of the Victorian Legislative Assembly advised that section 40(2) of the *Constitution Act 1975* (Vic) provides that '[a]ll questions arising in the Assembly shall be decided by a majority of members present', noting that:
- The forced absence of a Member has the potential to distort the numbers in the chamber impeding the true representation of elected Members and bringing disrepute to the Democracy of the Parliament.⁹⁸
- 2.82** The Clerk of the NSW Legislative Council advised that while pairing can be arranged for absent members, this option is not available for members of the cross bench:
- ... in the modern age of parties and strong party discipline, the numbers in the Legislative Council are finely balanced, and the absence of one member has the potential to alter a decision of the House. It is true that Labor and the Coalition generally arrange to provide pairs for absent members, but that is not the case for crossbench members.⁹⁹
- 2.83** The Clerk commented that the same issue can arise in committees of the House, on which the numbers are finely balanced,¹⁰⁰ and that further – even when pairs are available – citizens are entitled to have their views represented in Parliament by their elected members.¹⁰¹
- 2.84** The issue of members' duties to their constituents was also highlighted by the Hon Ron Dyer:
- Members of Parliament are ... the elected representatives of the people and nothing should be allowed to derogate from the duties that flow from that, such as, sitting and voting in Parliament, attending and deliberating in parliamentary committees and making representations on behalf of constituents.¹⁰²

⁹⁴ Submission 7, p 1.

⁹⁵ Submission 8, Hon Lyn Breuer MP, Speaker, South Australian House of Assembly, p 1.

⁹⁶ Submission 3, Hon John Mickel MP, Speaker, Legislative Assembly of Queensland, p 1.

⁹⁷ Submission 9, p 1.

⁹⁸ Submission 15, p 2.

⁹⁹ Submission 14, p 9.

¹⁰⁰ Submission 14, p 9.

¹⁰¹ Submission 14, p 9.

¹⁰² Submission 10, p 2.

2.85 Similarly, the Speaker of the NSW Legislative Assembly expressed that citizens expect their elected representatives to be 'unimpeded in their ability to represent their interests and be present during debates on legislation and local issues of concern to them'.¹⁰³ The Speaker asserted:

Having been elected to represent their constituency, the civic duty involved in undertaking jury service should not become a higher priority than a Member's duty as an elected representative.¹⁰⁴

2.86 In the same vein, the Speaker of the Victorian Legislative Assembly remarked:

I am sure there is consensus in the premise that a Member's prime responsibility is to the performance of their public duty and relates to his/her obligation to represent the electorate to which they have been elected. That involves the opportunity to speak in the Chamber on any question before the House, or raise a point of order or propose a motion or amendment etc ... Absence from the chamber would effectively compromise their ability to fulfil this duty.¹⁰⁵

2.87 A former member of the NSW Legislative Council, Ms Marie Bignold, also expressed a similar view, commenting to the Committee that:

The great responsibility of members of parliament to participate in the legislative process and to represent local electorates should cultivate a vocational attitude of consuming passion for that role, which should be emphasised and enhanced by conscientious commitment and appreciation of that responsibility. These high ideals would suffer at both the theoretical and practical levels if parliamentarians were liable to jury service.¹⁰⁶

2.88 Another concern, raised by the PCJC, is about decreased community accessibility to members if they were required to serve on juries:

... the vocation of a Parliamentarian is not of the sort which ceases to require attention when Parliament is in recess. Our particular concern is regarding community accessibility. The local community elect their member of Parliament to represent them and expect that they are available to be contacted in order to voice grievances, concerns or opinions or perform any other duties that such a position entails, at any time outside those where Parliament is sitting or the member is engaged in work or travel in relation to their Parliamentary obligations. They do not expect that their elected representative will be unavailable as a result of jury service.¹⁰⁷

2.89 *Odgers* acknowledges that members of Parliament are seldom called upon to serve on juries, however maintains that there is 'good ground' for retaining the immunity, namely: '[T]he Houses should have first right to the services of their members, witnesses and officers, and ... those services should not be impeded by the requirements of legal proceedings before a court.'¹⁰⁸

¹⁰³ Submission 20, p 4.

¹⁰⁴ Submission 20, p 9.

¹⁰⁵ Submission 15, p 1.

¹⁰⁶ Submission 5, Ms Marie Bignold, former member, p 1.

¹⁰⁷ Submission 18, p 3.

¹⁰⁸ Evans, H (ed) *Odgers' Australian Senate Practice* (10th ed) Department of Senate Canberra, 2001, p 57.

Committee comment

- 2.90** The Committee understands that there are many people in occupations that may have difficulty serving on juries. We do not consider our occupation to be more important than any other. However, we acknowledge the long-standing principle, developed over centuries, that the House has the first right to its members. This principle is essential to enable parliaments to function.
- 2.91** We also acknowledge the very important arguments put forward by inquiry participants regarding the right of citizens to be represented in Parliament by their elected members. The latter point in particular is a compelling reason for maintaining the immunity of members from jury service. Members are elected representatives and should not be taken out of this role to sit on a jury – particularly for long trials.

Potential bias or conflicts of interest

- 2.92** Inquiry participants argued that a further reason for retaining the immunity is the potential for bias (whether real or perceived), conflicts of interest, or pressure on members to reach a particular verdict, if members of Parliament served as jurors.
- 2.93** For example, Mr Neville Newell, former member of the NSW Legislative Assembly, suggested that members may be subjected to public pressures and scrutiny that could influence their decision in a trial.¹⁰⁹
- 2.94** Similar concerns were conveyed to the NSW Law Reform Commission during its review of jury selection, where the suggestion was made that 'some members in high profile cases that attract media attention could be subjected to intense pressure, to the detriment of their political careers and duties.'¹¹⁰
- 2.95** The PCJC highlighted that judges are granted tenure in order to ensure their security and impartiality when deciding against government agenda, and noted that juries, which consist of 'lay people', are also 'devoid of such pressures'.¹¹¹ The PCJC suggested that members of Parliament may feel pressured to reach a verdict that is consistent with the policies of their party affiliation:
- MPs, in contrast, have political affiliations which may impact upon their decisions. Even if the facts of the case before them are such that they would normally decide differently, they may feel pressured to find in a way that is most consistent with the policies of that affiliation, whether it be due to pressure from the party or in order to maintain public confidence.¹¹²
- 2.96** Mr Newell also suggested that some members might see a trial as 'an opportunity to gain favour with an electorate'.¹¹³

¹⁰⁹ Submission 13, Mr Neville Newell, former member, p 1.

¹¹⁰ NSW Law Reform Commission, Report No 117, pp 69-70.

¹¹¹ Submission 18, p 4.

¹¹² Submission 18, p 4.

¹¹³ Submission 13, p 1.

2.97 Another concern, raised by the Hon Jane Aagaard, Chair, Standing Committee on Legal and Constitutional Affairs, Northern Territory Legislative Assembly, is the 'conflict of interest' that could result if members of Parliament served on juries.¹¹⁴ This concern was also raised by the Speaker of the NSW Legislative Assembly¹¹⁵ and the Director of Public Prosecutions (DPP), Mr Nicholas Cowdery AM QC, with the DPP suggesting that this could especially be a problem in rural areas:

In rural courts particularly, a local Member of Parliament summonsed to serve on a jury would in all likelihood be sitting on a matter where one of his constituents is the accused person. That gives rise to a real or perceived conflict of roles. For instance, Members of Parliament from time to time make representations about criminal cases to the Attorney General or the ODPP [Office of the Director of Public Prosecutions] on behalf of their constituents, be they victims or accused persons.¹¹⁶

2.98 The potential effect of members serving on the juries of their constituents was outlined by Mrs Dawn Fardell MP, member of the NSW Legislative Assembly:

Members of a local community, who have issues with Governments and the Bureaucracy, turn to their local MP, expecting them to help sort out the issue and make representations on their behalf. It could be viewed as a betrayal of that trust and confidence if the Member of Parliament is then required to serve on a jury, publicly passing judgment on their constituents.¹¹⁷

Committee comment

2.99 The Committee acknowledges the concerns regarding potential bias or pressure on members to reach a certain verdict if they were required to participate on juries, although we do not support the suggestion that a member might see a trial as an opportunity to gain favour with the electorate.

2.100 The Committee has confidence that members would act impartially on juries. However, we acknowledge that even a perceived bias would be detrimental to the integrity of the trial (and more broadly, the criminal justice system).

2.101 The Committee notes the potential issues that may arise if members are called upon to serve as a juror for a trial of one of their constituents. This issue would not be confined to rural areas, but would be an issue across the state. While members of the NSW Legislative Assembly serve local electorates, the electorate for members of the NSW Legislative Council is the whole of New South Wales.

2.102 In addition to the potential for external influences on members, the Committee has concerns about members on juries having unintended *internal* influence on fellow jurors. It is possible that some jurors could be swayed by a member of Parliament's opinion due to their standing, which would naturally be an undesired effect.

¹¹⁴ Submission 22, Hon Jane Aagaard, Chair, Standing Committee on Legal and Constitutional Affairs, Northern Territory Legislative Assembly, p 1.

¹¹⁵ Submission 20, p 9.

¹¹⁶ Submission 16, Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, p 1.

¹¹⁷ Submission 2, Mrs Dawn Fardell MP, NSW Legislative Assembly, p 1.

Consistency with other jurisdictions

- 2.103** The Committee heard that another reason for retaining the statutory immunity of members from jury duty is the fact that all other jurisdictions in Australia have maintained the statutory exemption.
- 2.104** In this regard, the Clerk of the NSW Legislative Council noted that by maintaining the statutory immunity, New South Wales would remain consistent with other Australian jurisdictions.¹¹⁸ Likewise, Chief Magistrate Henson remarked:
- ... every Australian jurisdiction currently provides that MPs are ineligible or exempt from serving on juries. In view of the move in recent years towards national uniform laws in relation to various aspects of judicial proceedings, it would be somewhat incongruous for NSW to adopt a position markedly different from other jurisdictions.¹¹⁹
- 2.105** Similarly, the PCJC commented that it would be a 'somewhat perplexing notion for this immunity to apply at the Commonwealth level and in every other State in Australia, yet be excluded in NSW due to [a] lack of defining legislation.'¹²⁰
- 2.106** The Committee was informed that members of Parliament are also excluded from jury service in Canada and New Zealand.¹²¹
- 2.107** The British Parliament is the only parliament in the Westminster system that has removed the statutory exemption of members from jury service. The Lord Speaker of the House of Lords, the Rt Hon the Baroness Haymen, advised that under the *Juries Act 1974* (UK),¹²² members of the British Parliament were exempt as of right from jury service. However, this right was abolished in April 2004 by the *Criminal Justice Act 2003* (UK).¹²³
- 2.108** Members of the UK Parliament are now required to attend jury service, unless they apply for excusal and can show 'good reason' as to why their application should be granted.¹²⁴ The guidelines for the Central Jury Summoning Bureau have also been updated to provide that where a member seeks excusal from jury service on the grounds of parliamentary duties, he or she should be offered deferral in the first instance. Further, where a member considers it to be inappropriate to do jury service in his or her constituency, they should be permitted to do it elsewhere.¹²⁵
- 2.109** These changes were the result of a 1999-2001 review into the criminal courts of England and Wales by Lord Justice Auld (the 'Auld Review'), which recommended that 'no-one should be excusable from jury service as of right, only on showing good reason for excusal'.¹²⁶

¹¹⁸ Submission 14, p 16.

¹¹⁹ Submission 6, p 2.

¹²⁰ Submission 18, p 2.

¹²¹ Submission 14, p 16.

¹²² Prior to the *Juries Act 1974*, members were statutorily exempt from jury service under the *Juries Act 1870* (UK).

¹²³ Submission 12, Rt Hon Baroness Hayman, Lord Speaker, House of Lords, p 1.

¹²⁴ Submission 12, p 1.

¹²⁵ Submission 20, p 7.

¹²⁶ Auld R E, *Review of the Criminal Courts of England and Wales*, September 2001, p 151.

2.110 Justice Auld considered that it is 'extremely difficult to draw a line between those whose work is and is not so crucial that it would be against the public interest to compel them to serve as jurors'.¹²⁷ In regard to the excusal as of right of individuals in certain occupational categories, he stated:

I consider that there may be a good reason for excusing them where it is vital that they are available to perform their important duties over the period covered by the summons. But I see no reason why that should entitle them to excusal as of right simply by virtue of their position.¹²⁸

2.111 In regard to the Auld Review, the Clerk of the NSW Legislative Council noted that the Review did not consider the doctrine of separation of powers or the House's right to the attendance and service of its members.¹²⁹ The Clerk further noted that these issues were barely considered by the British Parliament during the debate on the Criminal Justice Bill 2003:

There was little discussion of how removing the exemption from jury service would affect members of Parliament, and no discussion of how the bill would affect the privilege of members. The parliamentary debate focused on broader fundamental reforms to the jury system in the United Kingdom.¹³⁰

2.112 The lack of detailed examination by the Auld Review of the issues specific to the exclusion of members from juries was also raised by Chief Magistrate Henson:

Indeed, when the common law immunity was discussed in the Auld Review of the criminal courts of England and Wales, the position of MPs was not separately addressed but considered within a broader group of professionals who, due to other special and personal duties to the State, had typically been afforded a right or privilege of exemption from jury service for public interest reasons.¹³¹

2.113 As noted by the Speaker of the NSW Legislative Assembly, there does not appear to have been any comprehensive assessment undertaken of the legislative changes in the UK to date.¹³²

Committee comment

2.114 The Committee is of the view that it would be undesirable for the New South Wales Parliament to be the only parliament in Australia to repeal the statutory exemption of members from jury service, particularly given that other Australian jurisdictions which have recently considered the exemption have upheld it.

2.115 The Committee notes that the British Parliament has repealed the statutory exemption for its members. We further note the comments of inquiry participants regarding the lack of detailed consideration by the British Parliament regarding the doctrine of separation of powers, or the

¹²⁷ Auld R E, *Review of the Criminal Courts of England and Wales*, September 2001, p 151.

¹²⁸ Auld R E, *Review of the Criminal Courts of England and Wales*, September 2001, p 150.

¹²⁹ Submission 14, p 15.

¹³⁰ Submission 14, p 15.

¹³¹ Submission 6, p 1.

¹³² Submission 20, p 7.

House's right to the attendance and service of its members when it repealed the exemption. We are therefore not persuaded to follow in the steps of the British Parliament.

Actual benefit to juries

- 2.116** The Chairperson of the Jury Task Force, Justice T Buddin, informed the Committee that in a previous submission to the NSW Law Reform Commission, the Task Force expressed the view that the ineligibility of members of Parliament to serve on juries could no longer be justified. The Task Force's rationale for this was based on the principle that the categories of exemption included in the former *Juries Act 1977* should be reduced to ensure that juries were more representative of the general community.¹³³
- 2.117** However, other inquiry participants argued strongly that the actual benefit to the jury system of including members of Parliament to the pool of available jurors would be minimal.
- 2.118** One reason for this is the small number of members in New South Wales. The Speaker of the NSW Legislative Assembly commented that as there is only a 'relatively small number' of members of Parliament (including Ministers), 'the practical impact of the proposed change would be negligible'.¹³⁴
- 2.119** The Clerk of the NSW Legislative Council noted that the Council has 42 members (36 of whom are backbench members), while the Assembly has just over twice that number of backbenchers.¹³⁵ The Clerk stated:

The marginal benefit to the court system of adding approximately 110 backbench members of Parliament to the pool of available jurors, on the face of it does not appear sufficient to outweigh the very real principled and practical objections to the withdrawal of the statutory ineligibility under the *Jury Act 1977* of those members to serve as jurors.¹³⁶

- 2.120** This view received support from the DPP, who told the Committee:

I am generally in favour of extending the pool of available jurors to include as many eligible citizens as possible, but given that the relatively small number of sitting Members of Parliament would not greatly expand the jury pool, I am persuaded against that option by a number of valid reasons for continuing to exclude sitting members from jury service.¹³⁷

- 2.121** Another argument as to why the actual benefit of members on juries would be minimal, submitted by the Speaker of the Victorian Legislative Assembly, is that members of Parliament come from a broad background of occupations, 'many of which would and could [already] be represented in the jury system'.¹³⁸

¹³³ Submission 11, Justice T Buddin, Chairperson, Jury Task Force, p 1.

¹³⁴ Submission 20, p 8.

¹³⁵ Submission 14, p 9.

¹³⁶ Submission 14, p 9.

¹³⁷ Submission 16, p 1.

¹³⁸ Submission 15, p 2.

Committee comment

- 2.122** The Committee agrees that the actual benefit to the pool of potential jurors by including members of Parliament would be minimal, due to the small number of members in New South Wales. Further, while we recognise that juries should be representational of the community, we agree that the occupational backgrounds that members would bring to juries are more than likely already represented in the jury pool.
- 2.123** In addition, while we are confident that members of Parliament would act impartially on juries, we are concerned that members are somewhat 'over-exposed' to life, and as such, may not necessarily bring a dispassionate view to a jury.

Members would likely be excused anyway

- 2.124** Another point raised by submission makers is that even if the statutory exemption of members of Parliament from jury service were repealed, they would likely be excused from jury service anyway.
- 2.125** This was recognised by the NSW Law Reform Commission when it expressed the view that the statutory ineligibility of members from juries should be repealed. The Commission noted that if members were eligible to serve on juries, they could always apply to be excused from jury service, particularly if the trial is a high profile trial.¹³⁹ Additionally, the Commission stated:

In individual cases where a Member of Parliament has made public pronouncements in relation to the criminal law, or in relation to a course of criminal activity, which may give rise to an apprehension of bias he or she could be stood aside, excused for cause or even challenged for cause.¹⁴⁰

- 2.126** Chief Magistrate Henson also acknowledged that members would likely be excused from jury service, and therefore questioned the point of repealing the statutory ineligibility:

Aside from policy concerns, one also wonders what practical utility a change to the legislation to make MPs eligible to serve on juries would have. It can reasonably be anticipated that parties to proceedings may object to the selection of an MP as a juror or that MPs themselves may seek to be excused due to their duties of office.¹⁴¹

- 2.127** The DPP suggested that members would 'almost inevitably' apply to be excused due to the demands of their work as Parliamentarians, or if they were a member of a party that introduced particular criminal legislation,¹⁴² concluding 'there is significant risk that including Parliamentarians on the jury roll would lead to the time of the Member and of the court being unnecessarily wasted.'¹⁴³

¹³⁹ NSW Law Reform Commission, Report No 117, p 70.

¹⁴⁰ NSW Law Reform Commission, Report No 117, p 70.

¹⁴¹ Submission 6, p 3.

¹⁴² Submission 16, p 1.

¹⁴³ Submission 16, p 1.

- 2.128** The PCJC expressed similar concerns about wasting the court's time by including members on the jury roll, stating:

In any case, it is likely that even with the ineligibility repealed, most MP's would not be chosen after such questioning, or that they would seek exemption at the outset, rendering the whole operation not only costly and time consuming but also a futile exercise.¹⁴⁴

- 2.129** However, the Clerk of the NSW Legislative Council suggested that the excusal of members from jury service may not be so straightforward. The Clerk advised that while the *Jury Amendment Act 2010* sets out a range of reasons as to why individuals would have 'good cause' to be exempted or excused from jury service, '[i]t is not immediately clear that any of these would apply to members of Parliament seeking excusal on the grounds of parliamentary duties.'¹⁴⁵ The Clerk recommended that if the statutory ineligibility of members serving on juries were to be repealed, more specific court processes would need to be put in place for members to apply for exclusion/exemption or deferral of their jury service.¹⁴⁶

Committee comment

- 2.130** The Committee acknowledges that if members became eligible to serve on juries, they may likely be excused from jury service, either on their own application or by the objection of the parties to the proceedings. We agree that this may lead to the time of the member and the court being unnecessarily wasted.

Status of common law immunity

- 2.131** Concerns were raised during the Inquiry regarding uncertainty surrounding the status of the common law immunity if the statutory exemption were to be repealed. It was suggested that this uncertainty was another reason for retaining the statutory exclusion. For example, the Speaker of the NSW Legislative Assembly stated:

The statutory exemption gives certainty for Members of Parliament in respect of their eligibility to serve on juries, which is expressly stated and beyond doubt. The common law immunity is open to interpretation and there may be some doubt as to the extent of its application.¹⁴⁷

- 2.132** The NSW Law Reform Commission suggested that, assuming the common law immunity of members from jury service has not, by implication, been repealed by the *Jury Act 1977*, the common law immunity would once again take effect. The Commission recommended that the New South Wales Parliament give consideration as to whether the common law immunity should be preserved.¹⁴⁸

¹⁴⁴ Submission 18, p 5.

¹⁴⁵ Submission 14, pp 14-15. The Clerk noted that these provisions are yet to commence.

¹⁴⁶ Submission 14, p 14. See pp 14-15 of the submission for detailed suggestions as to how this could be achieved.

¹⁴⁷ Submission 20, p 8.

¹⁴⁸ NSW Law Reform Commission, Report No 117, pp 70-71.

2.133 In regard to this, the Clerk of the NSW Legislative Council advised that it could be argued that the common law immunity would be revived if the statutory exemption were repealed, based on the fundamental principle that 'the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.'¹⁴⁹ The Clerk emphasised that parliamentary privilege cannot be altered by implication.¹⁵⁰

2.134 At the same time, however, the Clerk acknowledged that there is a possibility that the common law immunity was extinguished in New South Wales by the *Jury Act 1977* (NSW), with the following reference from the UK:

In Britain, legal advice received by the Clerk of the House of Commons, Dr Malcolm Jack, following the passage of the *Criminal Justice Act 2003* (UK), which repealed the statutory exemption of members of Parliament in Britain from jury duty, indicated that the common law immunity had been extinguished at the point of codification of the common law immunity into statute. As a result, the common law immunity did not revive on the repeal of the statutory immunity.¹⁵¹

2.135 The Hon Mr Dyer argued that the uncertainty surrounding the status of the common law immunity was a further reason as to why the statutory immunity should remain:

It is far more sound in my view to have a clear statutory provision exempting Members of Parliament from jury service. To revert to a reliance on the common law would invite uncertainty and a lack of clarity.¹⁵²

2.136 The Clerk of the NSW Legislative Council suggested that if the statutory exemption were repealed, the Parliament could make clear its intention regarding the status of the common law immunity.¹⁵³

2.137 The Speaker of the NSW Legislative Assembly took a slightly different view and suggested that if the statutory immunity were removed, the NSW Parliament should first codify its privileges.¹⁵⁴ The Speaker commented:

If the Parliament's privileges have not been enshrined in legislation and the statutory exemption in the *Jury Act* is repealed then the eligibility of a Member to serve on a jury will be governed by the traditional common law immunity, the application of which may be unclear. In this situation, there may be some uncertainty about the extent to which courts in Australia would recognise the immunities and relevant precedents that attach to the United Kingdom Parliament.¹⁵⁵

¹⁴⁹ Submission 14, p 10.

¹⁵⁰ Submission 14, p 10.

¹⁵¹ Submission 14, p 10.

¹⁵² Submission 10, p 3.

¹⁵³ Submission 14, p 11.

¹⁵⁴ Submission 20, p 9. As noted in paragraph 2.19, the New South Wales and Tasmanian Parliaments are the only parliaments in Australia which have not codified their privileges.

¹⁵⁵ Submission 20, p 9.

Committee comment

- 2.138** The Committee notes that the status of the common law immunity of members from jury service is uncertain, as a result of the enactment of the statutory exemption. We note the Clerk of the NSW Legislative Council's recommendation that if the statutory exemption is repealed, the Parliament should make clear its intentions regarding the status of the common law immunity.

Educational benefit to members

- 2.139** Ms Elisabeth Kirkby, a former member of the NSW Legislative Council, argued that members of Parliament *should* serve on juries, in order to gain a better understanding of the criminal justice system. Ms Kirkby stated:

I am firmly of the belief that all Members of Parliament should have the opportunity to understand the detail of the law, the range of penalties imposed on those who break the law, and what opportunities there are for rehabilitation if they receive a custodial sentence. Members of Parliament should make it their business to understand the problems faced by the least privileged members of society, particularly those who are brought before the Court.¹⁵⁶

- 2.140** Ms Kirkby commented that there are gross inequities within society, and argued that jury service would assist members to gain a greater insight into the 'impoverished members of society', as well as into the needs and problems of accused persons, prison and parole officers, and welfare services.¹⁵⁷

- 2.141** Ms Kirkby expressed the view that tougher crime legislation has resulted in an increase in the state's prison population, and contended that 'the majority of prisoners are not hardened criminals, but people from disadvantaged backgrounds, [with] many fundamentally illiterate ... [and many] mentally disturbed.'¹⁵⁸ Ms Kirkby declared:

It is for this reason that I believe that it would be valuable if Members of Parliament were given the opportunities to serve on juries. When legislation that introduces tougher penalties, denies bail, or does not fully recognise the mental state of the offender is debated, members of all political parties have little knowledge of the socio-economic background of a potential offender, the person they might see in the dock if they were a member of a jury.¹⁵⁹

Committee comment

- 2.142** The Committee agrees that it is important for members to understand the criminal justice system. However, we believe that members do have an understanding of the system, and that they are exposed to it through the course of their parliamentary work.

¹⁵⁶ Submission 19, Ms Elisabeth Kirkby, former member, p 2.

¹⁵⁷ Submission 19, p 2.

¹⁵⁸ Submission 19, p 1.

¹⁵⁹ Submission 19, p 1.

2.143 We therefore do not agree that serving on juries is necessary for members to understand the criminal justice system.

Other concerns

2.144 Other concerns were also raised during the Inquiry, including the potential publicity that a member of Parliament serving on a jury could attract.

2.145 For example, the Clerk of the NSW Legislative Council suggested that media attention could lead to public discussion of the jury's verdict, and undermine public confidence in the integrity of the court system.¹⁶⁰

2.146 The Hon Mr Mickel expressed similar concerns that that the presence of members on juries may attract media commentary.¹⁶¹

2.147 However the NSW Law Reform Commission, in its report on jury selection, argued that concerns about the media fail to take into account 'the prohibition on, and substantial penalties for, publishing, broadcasting or otherwise disclosing "any information which is likely to lead to the identification of a juror or former juror in a particular trial or inquest"'.¹⁶²

2.148 Another concern, raised by the PCJC, relates to the fundamental human right to a fair trial. Article 14(1) of the International Covenant on Civil and Political Rights provides that in regard to criminal trials, 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The PCJC questioned whether juries containing members of Parliament would constitute an 'independent and impartial tribunal', citing a number of reasons, including the separation of powers, closeness to the administration of the law, and potential politicising of the jury.¹⁶³

Committee comment

2.149 The Committee notes the concerns raised regarding the potential effect of media attention on trials that a member serving on a jury could attract, and acknowledges the NSW Law Reform Commission's response regarding media prohibitions on identifying jurors.

2.150 We further note the concern raised by the PCJC regarding the international human right to a fair trial by an independent and impartial tribunal, and agree that this could potentially be an issue if members of Parliament served on juries.

¹⁶⁰ Submission 14, p 7.

¹⁶¹ Submission 3, p 1.

¹⁶² NSW Law Reform Commission, Report No 117, pp 69-70.

¹⁶³ Submission 18, p 4.

Conclusion

- 2.151** There are many compelling reasons as to why members of Parliament should be exempt from jury service. We note that nearly all submission makers argued strongly that the exemption should be maintained – including the Clerk of the NSW Legislative Council, the Speaker of the NSW Legislative Assembly, and current members of the NSW Parliament: the Hon Amanda Fazio MLC and Mrs Dawn Fardell MP.
- 2.152** One of the fundamental reasons is the doctrine of the separation of powers. It is essential that the independence and impartiality of each arm of government be maintained. This cannot be achieved if individuals who make laws are then permitted to adjudicate on those laws. This applies to *all* members of Parliament, not just Ministers, as all members are involved in the promotion and passage of legislation affecting the criminal law. Further, the Committee believes that members of Parliament already contribute significantly to the legal system in their capacity as legislators and representatives.
- 2.153** Another fundamental reason why members of Parliament should be exempt from jury service is their duty to the House and to their constituents. The Committee reiterates that as members we do not consider our occupation to be more important than any other, however we acknowledge the ancient principle that the House has the first right to its members, which is essential to the functioning of Parliament. We also acknowledge the right of citizens to be represented in Parliament by their elected members, and the importance of members being available for their constituents. Members are elected representatives and should not be taken out of this role to sit on a jury.
- 2.154** There are also numerous other persuasive and valid arguments for maintaining the statutory exemption, such as the potential for bias (whether real or perceived), consistency with other jurisdictions, the limited benefit of adding members to the jury pool, and the uncertainty surrounding the status of the common law immunity.
- 2.155** The Committee therefore supports the ongoing statutory ineligibility of members from jury service.

Recommendation 1

That the statutory ineligibility of members of Parliament from jury service in the *Jury Act 1977* be maintained.

Appendix 1 Submissions

No	Author
1	Mr Andrew Haesler SC (Public Defenders)
2	The Hon Dawn Fardell MP (NSW Legislative Assembly)
3	The Hon John Mickel MP (Queensland Legislative Assembly)
4	Mr Eddie Britt (former member of NSW Legislative Assembly)
5	The Hon Marie Bignold (former member of NSW Legislative Council)
6	Mr Graeme Henson (Local Courts NSW)
7	Ms Rosemary Laing (Australian Senate)
8	The Hon Lyn Breuer MP (South Australian House of Assembly)
9	The Hon Barry House (Western Australian Legislative Council)
10	The Hon Ronald Dyer (former member of NSW Legislative Council)
11	The Hon Justice T L Buddin (Jury Task Force, Judges' Chambers, Supreme Court)
12	The Rt Hon the Baroness Hayman (House of Lords, British Parliament)
13	Mr Neville Newell (former member of NSW Legislative Assembly)
14	Ms Lynn Lovelock (NSW Legislative Council)
15	The Hon Jenny Lindell MP (Victorian Legislative Assembly)
16	Mr Nicholas Cowdery AM QC (Office of the Director of Public Prosecutions)
17	The Hon Wal Fife KSS (former member of Legislative Assembly)
18	Mr Paul Rogers (Parramatta Community Justice Clinic)
19	The Hon Elisabeth Kirkby (former member of Legislative Council)
20	The Hon Richard Torbay MP (NSW Legislative Assembly)
21	The Hon Amanda Fazio MLC (NSW Legislative Council)
22	The Hon Jane Aagaard MLA (Northern Territory Legislative Assembly)

Appendix 2 Examples of the British Parliament asserting its privileges in relation to jury service

[*Excerpt from Submission 14, Ms Lynn Lovelock, Clerk of the Parliaments and Clerk of the NSW Legislative Council, pp 3-5.*]

The development of the ancient privilege against jury service in Britain

The ancient privilege of exemption of members of Parliament from jury service developed in the British Parliament over several centuries. Its development was based on the inherent right of Houses of the British Parliament to maintain the attendance and service of their members.

Hatsell cites a case from 1597 in which Sir John Tracie, a member of the House of Commons, was summoned to attend jury service when the House was sitting. Upon the House being informed that Sir John was attending jury service, the Serjeant was sent with the Mace to call Sir John to attend the House, after which Sir John left the jury and attended the House. It is noted in *Hatsell* that the leading principle in this case was that ‘no summons to any other Court ought to be admitted to interfere with the Member’s attendance on his more important duty in the High Court of Parliament’.¹⁶⁴

Another case arose on 20 February 1826, in which Mr Holford, a member of the House of Commons, advised the House that he had been fined for not attending jury service despite his request to be excused because Parliament was sitting. In the ensuing debate, two other members of Parliament, Mr Davenport and Mr Ellice, stated that they had also been fined for not complying with a summons to attend jury service. There was debate about whether as a matter of privilege members of Parliament were exempt from attending jury service when Parliament was sitting, particularly as the act for the regulation of juries was silent on the issue. Mr Peel, the Home Secretary, advised that ‘he had not made any special exemption of members of parliament in the late bill for regulating juries, because he thought the question already established ... it was not conceived that there was any necessity for mentioning what it was supposed had been already so well understood’.¹⁶⁵ The matter was referred to the Committee of Privileges to remove any doubt on the issue.

The following day the House proceeded to consider the report from the Committee of Privileges. At the commencement of debate, Mr Bennett sought guidance from the Speaker because he was required to attend a meeting of a committee of the House on the next day, and he had also been summoned to attend jury service. The Speaker advised that ‘... he had himself no doubt of the course which he should pursue, were he placed under the circumstances alluded to. His answer would be, that, conceiving his duty in that House was his first obligation, he should perform it ... omitting all others which could clash therewith’.¹⁶⁶ The House thereafter agreed to the report from the Committee of Privileges, which found that it is ‘amongst the most ancient and undoubted privileges of parliament, that no member shall be withdrawn from his attendance on his duty in parliament to attend any other court’.¹⁶⁷

¹⁶⁴ *Hatsell, Precedents of Proceedings in the House of Commons*, 1818, vol 1, p 112.

¹⁶⁵ *Parliamentary Debates* (UK), 1826 vol 14, col 570.

¹⁶⁶ *Ibid*, col 643.

¹⁶⁷ *Ibid*.

A further case arose on 12 June 1829 when Mr Macleod advised the House that he had declined to comply with a jury summons, and asked the Speaker to write to the court to request that he not be fined for non-attendance. The Speaker responded that ‘... nothing tended more to lower the privileges of that House than to bring into question matters which were indisputable’.¹⁶⁸ The Speaker noted that Mr Macleod had been summoned to attend jury service during an adjournment, and further stated that:

... it was clear that members of that House were not liable to be called upon to serve on juries during the sitting of parliament. The next point to be considered was, whether an adjournment of the House was to be looked upon as a sitting, as far as the question of privilege was concerned; and he believed it was admitted by every member that it was so considered. He would put it to the hon. member, then, whether he would raise a doubt upon a point, which was indisputable.¹⁶⁹

A further instance was reported in *The Times* on 8 February 1861. A member of Parliament, Mr Edwin James, had, on behalf of another member of Parliament, Lord Enfield, attended the Court of Common Pleas to complain to the Lord Chief Justice that Lord Enfield had been summoned to attend as a juror in the court. The Lord Chief Justice stated that ‘... his Lordship ought not to have been summoned as a juror, as members of Parliament were not bound to serve in any other court than that in which they had been returned to serve – namely, the High Court of Parliament, which was the highest Court of the realm’.¹⁷⁰ Lord Enfield subsequently ‘... thanked the Lord Chief Justice for so clearly expressing the undoubted privilege of members of Parliament’.¹⁷¹

¹⁶⁸ *Parliamentary Debates* (UK), 1829 vol 21, col 1770.

¹⁶⁹ *Ibid*, 1771.

¹⁷⁰ *The Times*, 8 February 1861.

¹⁷¹ *Ibid*.

Appendix 3 Minutes

Minutes No 44

Friday 11 June 2010

Room 814/815, Parliament House, Sydney at 9.30 am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Ajaka

Mr Donnelly

Ms Voltz

2. Apologies

Ms Hale

3. ***

4. Deliberative meeting

4.1 ***

4.2 ***

4.3 Inquiry into the eligibility of members of Parliament to serve on juries

The Chair tabled correspondence received from the Attorney General on 10 June 2010 referring the following terms of reference for an inquiry into the eligibility of Members of Parliament who do not hold Ministerial portfolios to serve on juries:

That the Standing Committee on Law and Justice inquire into and report on the eligibility of Members of Parliament who do not hold Ministerial portfolios to serve on juries, and in particular:

1. Whether there exists an immunity (or privilege) that attaches at common law to Members of Parliament that prevents them being compelled to attend other courts in response to a summons for jury service
2. The extent of any such immunity (or privilege), in particular whether the rights that arise apply in periods when Parliament is not sitting
3. The appropriateness of any such immunity (or privilege)
4. Whether any such immunity should be abolished, altered or more precisely defined
5. Whether the existing provisions in the *Jury Act 1977* that make Members of Parliament ineligible for jury service are necessary in light of any such immunity/privilege and, if so, whether they are appropriate
6. Whether the existing provisions in the *Jury Act 1977* that make Members of Parliament ineligible for jury service should be repealed or amended.

Adoption of terms of reference

Resolved, on the motion of Ms Voltz: That the Committee adopt the terms of reference.

Reporting terms of reference to the House

Resolved, on the motion of Ms Voltz: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House that it has adopted the terms of reference received from the Attorney General for an inquiry into the eligibility of members of Parliament to serve on juries.

Time line for inquiry

Resolved, on the motion of Mr Donnelly: That the Committee note the indicative timeline prepared by the Secretariat in consultation with the Chair:

Fri 11 June 2010	Terms of reference adopted
Tues 22 June 2010	House informed, Inquiry announced via press release
Wed 23 June 2010	Inquiry and call for submissions advertised
Wed 23 June 2010	Stakeholder letters sent
Fri 6 Aug 2010	Closing date for submissions
September 2010	Hearings
Nov/Dec 2010	Report deliberative and tabling

Press release

Resolved, on the motion of Mr Donnelly: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW on Tuesday 22 June 2010.

Advertising inquiry and call for submissions

Resolved, on the motion of Mr Donnelly: That the Inquiry and the call for submissions be advertised in *The Sydney Morning Herald* and *The Daily Telegraph* and any other appropriate publications as determined by the Secretariat.

Invitations to stakeholders to make a submission

Resolved, on the motion of Mr Donnelly: That the Committee write to stakeholders identified by the Secretariat in consultation with the Committee informing them of the Inquiry and inviting them to make a submission.

Hearings

Resolved, on the motion of Ms Voltz: That the Committee set aside 20 and 24 September 2010 for hearings.

Report deliberative

Resolved, on the motion of Ms Voltz: That the Committee set aside Monday 22 November 2010 to deliberate the Chair's draft report for the inquiry.

5. Adjournment

The Committee adjourned at 4.30 pm *sine die*.

Rachel Callinan

Clerk to the Committee

Minutes No 47

Monday 19 July 2010

Christine Robertson's Office, Parliament House, Sydney at 4.05 pm

1. Members present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly

2. Apologies

Mr Ajaka

Ms Hale
Ms Voltz

3. ***

4. ***

5. **Inquiry into the eligibility of members of Parliament to serve on juries**

5.1 Submissions

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission received to date (Nos 7-11).

6. **Adjournment**

The Committee adjourned at 4.10 pm until Wednesday 11 August 2010 at 9.30 am.

Rachel Callinan
Clerk to the Committee

Minutes No 48

Wednesday 11 August 2010

Jubilee Room, Parliament House, Sydney at 9.30 am

1. **Members present**

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Voltz
Ms Hale (from 9.45 am)

2. ***

3. **Deliberative meeting**

3.1 Minutes

Resolved, on the motion of Mr Donnelly: That Draft Minutes No 47 be confirmed.

3.2 ***

3.3 Inquiry into the eligibility of members of Parliament to serve on juries

3.3.1 Correspondence

The Committee noted the following item of correspondence received:

- 5 July 2010 – From Hon Justice RO Blanch, Chief Judge, District Court of NSW, advising that the Court will not be making a submission.

3.3.2 Submissions

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission Nos 8 to 21.

3.4 ***

4. ***

5. **Adjournment**

The Committee adjourned at 4.05 pm until Thursday 12 August 2010 at 10.45 am.

Rachel Callinan
Clerk to the Committee

Minutes No 49

Thursday 12 August 2010

Jubilee Room, Parliament House, Sydney at 10.45 am

1. **Members present**

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Ms Voltz
Ms Hale

2. ***

3. **Deliberative meeting**

3.1 Inquiry into the eligibility of members of Parliament to serve on juries

Resolved, on the motion of Mr Donnelly: That the Committee meet in early September, on a date to be confirmed by the Secretariat in consultation with the Committee, to consider the submissions and issues raised by the terms of reference for this Inquiry, with a view to determining whether to hold a public hearing.

4. **Adjournment**

The Committee adjourned at 3.30 pm until Friday 13 August 2010 at 11.20 am.

Rachel Callinan
Clerk to the Committee

Minutes No 51

Monday 20 September 2010

Room 1102, Parliament House, Sydney at 10.00 am

1. **Members present**

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Ajaka
Mr Donnelly
Mr Shoebridge
Ms Voltz

2. ***

3. ***

4. **Minutes**

Resolved, on the motion of Mr Donnelly: That Draft Minutes Nos 46, 48, 49 and 50 be confirmed.

5. ***

6. ***

7. **Inquiry into the eligibility of members of Parliament to serve on juries**

7.1 **Publication of submissions**

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of Submission No 22.

7.2 **Correspondence**

The Committee noted the following item of correspondence received:

- 13 August 2010 – From Ms Lana Nadj, A/Executive Member, Criminal Law Committee, The Law Society of NSW, advising that the Criminal Law Committee has no comment on this particular inquiry.

7.3 **Consideration of issues arising from the terms of reference**

The Committee noted the briefing paper prepared by the Secretariat in consultation with the Chair.

The Committee considered the issues arising from the terms of reference and whether to hold a public hearing.

Discussion ensued.

Resolved, on the motion of Ms Voltz: That preparation of the Chair's draft report for this Inquiry proceed, without holding public hearings as previously resolved.

8. **Adjournment**

The Committee adjourned at 10.50 am until Monday 25 October 2010 at 9.30 am, Room 1102.

Rachel Callinan

Clerk to the Committee

Minutes No 52

Monday 25 October 2010

Room 1102, Parliament House, Sydney at 9.35 am

1. **Members present**

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Ms Voltz

2. **Minutes**

Resolved, on the motion of Mr Donnelly: That Draft Minutes No 51 be confirmed.

3. ***

4. Inquiry into the eligibility of members of Parliament to serve on juries

4.1 Correspondence

The Committee noted the following items of correspondence received:

- 23 September 2010 – From Hon Kaye Griffin MLC, Chair, Privileges Committee, Legislative Council, to Chair, endorsing Submission no 14 made by the Clerk of Legislative Council, on the basis of separation of powers doctrine and the Parliament's right to the attendance and service of its members.

4.2 Publication of correspondence

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of the correspondence received from the Privileges Committee.

5. ***

6. ***

7. Adjournment

The Committee adjourned at 10.20 am until Friday 29 October 2010 at 9.30 am, Room 1102.

Rachel Callinan

Clerk to the Committee

Draft Minutes No 55

Monday 22 November 2010

Room 1102, Parliament House, Sydney, at 9.30 am

1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Ajaka

Mr Donnelly

Ms Voltz

2. Apologies

Mr Shoebridge

3. Minutes

Resolved, on the motion of Ms Voltz: That Draft Minutes No 54 be confirmed.

4. Inquiry into the eligibility of members of Parliament to serve on juries

4.1 Chair's draft report

The Chair's tabled her draft report entitled *Inquiry into the eligibility of members of Parliament to serve on juries*, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Voltz: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Ms Voltz: That Recommendation 1 be adopted.

Resolved, on the motion of Mr Ajaka: That Chapter 2 be adopted.

Resolved, on the motion of Ms Voltz: That the draft report be the report of the Committee.

Resolved, on the motion of Mr Clarke: That the Committee Secretariat correct any typographical and grammatical errors prior to tabling.

Resolved, on the motion of Mr Donnelly: That, according to Standing Order 230, the Committee present the report to the House, together with submissions, minutes of proceedings and correspondence relating to the Inquiry.

5. Adjournment

The Committee adjourned at 9.35 am *sine die*.

Rachel Callinan

Clerk to the Committee