

Submission
No 20

**INQUIRY INTO THE ELIGIBILITY OF MEMBERS OF
PARLIAMENT TO SERVE ON JURIES**

Organisation: NSW Legislative Assembly
Name: The Hon Richard Torbay MP
Position: Speaker
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5 August 2010

The Hon Christine Robertson MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Robertson *Christine*

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

I refer to your correspondence dated 23 June 2010 inviting submissions to the current inquiry being conducted by the NSW Legislative Council's Standing Committee on Law and Justice into the eligibility of Members of Parliament to serve on jurors.

Please find attached a submission made in my capacity as Speaker of the Legislative Assembly. I would like to thank the Committee for the opportunity to contribute to this important inquiry.

I note from your letter, dated 23 June 2010, that all Members of Parliament have been invited to make written submissions to the inquiry and that some former Members of Parliament also have contributed submissions. Submissions from Members offer valuable insights into the impact the removal of the statutory exemption may have on Members of Parliament and their ability to carry out their role as Members. I would respectfully urge the Committee to give considerable weight to the views expressed by current and former Members of Parliament on this issue.

Please contact the Clerk of the Legislative Assembly, Mr Russell Grove, if you have any questions concerning the attached submission or other matters relating to the inquiry.

Yours sincerely

Hon Richard Torbay MP
Speaker

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

Submission by the Hon Richard Torbay MP
Speaker, NSW Legislative Assembly

Introduction

The NSW Legislative Assembly welcomes the opportunity to contribute to the Legislative Council Standing Committee's inquiry into the eligibility of Members of Parliament to serve on juries. The Assembly notes the inquiry arises from a recommendation from the 2007 NSW Law Reform Commission report entitled *Jury selection*.¹ The NSW Law Reform Commission recommended that Parliament 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.²

This submission examines each of the terms of reference and is organised into two parts:

Part One – addresses terms of reference 1-4 and discusses the existence and extent of the immunity that attaches at common law to Members in relation to jury service. It also assesses the appropriateness of this immunity and whether it requires clearer definition.

Part Two – addresses terms of reference 5 and 6 and examines the provisions of the *Jury Act 1977*, which provide a statutory exemption from jury service for Members, and assesses the appropriateness of these provisions in light of the common law immunity.

The Assembly notes that the terms of reference refer only to Members who do not hold Ministerial portfolios. A discussion on the merits of this distinction is detailed below.

Part One

In its report *Jury selection* the NSW Law Reform Commission identified that 'in common law jurisdictions, the question of eligibility or otherwise of Members of Parliament is generally governed by two distinct sources of law.'³ Firstly by a common law immunity that prevents Members from being compelled to attend other courts, and secondly by statute that operates to make Members ineligible for jury service.

The common law immunity is one of the special rights, powers and immunities collectively known as parliamentary privilege, which has its foundations in English constitutional history⁴ and has been defined as follows:

¹ Mr Barry Collier, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 3 June 2010 at p 23 680; the Hon Michael Veitch, New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 22 June 2010 at p 24 361.

² NSW Law Reform Commission, *Jury selection*, Report 117, Sydney, NSW Law Reform Commission, 2007, Recommendation 12.

³ New South Wales Law Reform Commission, *Jury selection*, Report 117, Sydney, NSW Law Reform Commission, 2007 at [4.17]. See also Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000 at p 167.

⁴ Carney, G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000 at p 159.

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.⁵

These special rights, powers and immunities are usually categorised as those possessed collectively by the Houses of Parliament and those enjoyed by Members individually (but not for their personal benefit).⁶ One of the immunities enjoyed by Members individually is an exemption from jury service, which is generally grouped with other immunities and exemptions Members have in respect of legal proceedings.⁷ These immunities and exemptions include:

- an immunity from arrest in civil cases;
- an exemption from compulsory attendance in a court or tribunal.

The rationale for the exemptions in respect of legal proceedings is based upon Parliament's 'paramount claim to the services of its members.'⁸ *Erskine May's Parliamentary Practice* refers to two nineteenth century cases in which the United Kingdom Parliament asserted its privileges in relation to jury service by Members:

Holford's case – On 20 February 1826, Mr Holford complained that he had been fined for non-attendance as a juror by the Court of Exchequer, his excuse that he was attending the service of Parliament not being admitted; and Mr Ellice, another member, stated that he had also been fined for non-attendance in the same court. The House, on receiving the report of a Committee of Privileges resolved, *nem. con.*, that it is "amongst the more 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."

Viscount Enfield's case – In the case of Viscount Enfield, 6 February 1861, Chief Justice Erle stated that, "his Lordship ought not to have been summoned as a juror, as Members were not bound to serve in any other court than that in which they had been returned to serve, viz. the High Court of Parliament."⁹

However, the period in which the immunity at common law applies is not completely clear. It has been observed that it only operates during the period the House is actually sitting or a committee is meeting and a short period either side of that.¹⁰ The short period was to allow time for Members to travel to Westminster and then return home.¹¹ According to *Erskine May*:

⁵ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir William McKay, LexisNexis, United Kingdom, 2004 at p75 as cited in Griffith, G, *Parliamentary Privilege: Major Developments and Current Issues*, Background Paper No 1/07, NSW Parliamentary Library, 2007 at p 3.

⁶ Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000 at p 159; Griffith, G, *Parliamentary Privilege: Major Developments and Current Issues*, Background Paper No 1/07, NSW Parliamentary Library, 2007 at p 3.

⁷ Campbell E, *Parliamentary Privilege*, The Federation Press, Sydney, 2003 at p 144; Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000 at p 160.

⁸ Campbell, E, *Parliamentary Privilege*, The Federation Press, Sydney, 2003 at p145.

⁹ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 18th Edition, edited by Sir Barnett Cocks, Butterworths, United Kingdom, 1971 at pp 99-100. *Nem. con* meaning 'with none speaking against'.

¹⁰ Campbell, E, *Parliamentary Privilege*, The Federation Press, Sydney, 2003 at p 145.

¹¹ Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000 at p 195.

Exemption, held good during an adjournment, was not ordinarily claimed by Members after a prorogation; and there was no distinct authority for its existence at that time; but by the *Juries Act*, 1870, peers and members of Parliament, and the officers of both Houses, are included among the persons exempted from serving on juries, without reference to the sitting of Parliament.¹²

The same source proposed that despite the provisions of the subsequent *Juries Act 1922*, which made individuals eligible despite previous exemptions, this 'did not affect the right of the House 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 serve as a juror'. At the time *Erskine May* noted that it 'would appear that the mere summoning of a member to serve on a jury would constitute a breach of privilege.'¹³

Parliamentary privilege in NSW

In New South Wales there is no statute that defines the powers and privileges of the NSW Parliament. In most other Australian jurisdictions the privileges of Parliament are either defined by statute or determined by reference to the privileges of the House of Commons at a particular date.¹⁴ As has been noted by Parliament, 'the privileges of the New South Wales Parliament are to be found in the whole body of the common law and a few provisions within other legislation.'¹⁵

The fundamental principle, established over successive cases, is that the powers and privileges of the NSW Parliament are those that are reasonably 'necessary for the existence of such a body and for the proper exercise of the functions which it is intended to execute.'¹⁶ These powers and privileges may not be viewed as static and confined to what was necessary at the time of the establishment of the Parliament but are, '...what is 'reasonable' under present-day conditions and modern habits of thought to reserve the existences and proper exercise of the functions of [Parliament] as it now exists (emphasis added).'¹⁷

Thus any assessment of the existence and extent of immunity at common law for Members of the NSW Parliament in relation to jury service must be determined in this context.

¹² *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.

¹³ *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.

¹⁴ *NSW Legislative Council Practice*, edited by Lynn Lovelock and John Evans, The Federation Press, Sydney, 2008 at p 47; Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 at p 15.

¹⁵ Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 at p 15. The report notes the opinion of the then Solicitor General Ms Mary Gaudron, that the NSW Parliament's privileges fell under four headings: "1) Such powers and privileges as are implied by reason of necessity; 2) Such privileges as were imported by the adoption of The Bill of Rights (1688); 3) Such privilege as is conferred by the Defamation Act 1974 (since replaced by the Defamation Act 2005); 4) Such privilege as is conferred by other legislation, e.g., Parliamentary Evidence Act 1901 and the Public Works Act 1912." See p 16. NSW Legislative Assembly, *Practice, Procedure and Privilege*, edited by Russell D Grove, Sydney, 2007 at pp 287-288; Griffith, G, *Parliamentary Privilege: Major Developments and Current Issues*, Background Paper No 1/07, NSW Parliamentary Library, 2007 at p 9.

¹⁶ *Kielly v Carson* (1842) 4 Moo PC 63 at 88 as cited in Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 at p 6; Griffith, G, *Parliamentary Privilege: Major Developments and Current Issues*, Background Paper No 1/07, NSW Parliamentary Library, 2007 at p 9.

¹⁷ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 402 as cited in Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 at p 7.

Existence and extent of the immunity

The Legislative Assembly considers that Parliament has a superior claim to the attendance of its Members who must be able to discharge their duties in that capacity. The electors would 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.

The Joint Select Committee upon Parliamentary Privilege in its report, *Parliamentary Privilege in New South Wales*, noted that the immunity of Members from the obligation to serve on juries was one of 'fifteen general categories of powers, privileges and immunities attaching to Parliament.'¹⁸

The Hon J R Dowd QC (former Attorney General) commenting in a subsequent 1990 Discussion Paper, *Parliamentary Privilege in New South Wales* explained:

A threshold question which needs to be considered is whether it is appropriate in 1990 to adopt by specific enactment the extensive powers and privileges of the House of Commons of nearly one hundred and fifty years ago, many of which powers and privileges evolved by virtue of long usage and prescription relating to that Parliament's ancient judicial function and many of which have since been abrogated or amended by the House of Commons or by the British Parliament in the intervening period.

...

Some of those powers identified are unquestionably recognised as still being necessary for the proper exercise of Parliamentary functions viz., the power to regulate proceedings by Standing orders, to suspend disorderly members and **immunity from jury service**. (emphasis added)¹⁹

The main question that arises in relation to the common law immunity concerns the extent to which it applies i.e. whether a blanket immunity applies, or is the immunity only applicable around the sittings of the House. The interpretation has been taken that the immunity applies whilst the House is sitting and in some jurisdictions for a short period either side – this reflects the rationale behind the exemption that the House should have priority over the service of its Members to enable it to function.

The courts can be a source of clarification of the extent to which NSW Parliaments powers and privileges exist. As noted by the Joint Select Committee in its 1985 report:

Although the principles are stated with sufficient generality to ensure the proper functioning of Parliament, their general formulation is such that, in the absence of more specific provision, the Courts will be the final arbiters of what powers and privileges vest in the Parliament of New South Wales.²⁰

However, this particular immunity has not been the subject of judicial interpretation in New South Wales. Consequently, the actual extent of the immunity in this jurisdiction remains unclear.

¹⁸ Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 at p 14.

¹⁹ The Hon J R A Dowd QC, *Parliamentary Privilege in New South Wales*, Discussion Paper, Legislation and Policy Division, NSW Attorney General's Department, Sydney, 1990 at p 12.

²⁰ Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 at p 7

In view of this situation, regard may be had to legislation and judgments in other jurisdictions for guidance when interpreting the extent to which the immunity applies. The Joint Select Committee noted that:

One would need to examine carefully the justification, if any, for the kinds of privileges that are asserted by the House of Commons and by legislative institutions that have adopted common privileges in toto. Likewise one would have to examine carefully the justification for the kinds of privileges set out in the statutes that have been enacted in some other jurisdictions within the Commonwealth of Nations.²¹

Significantly, all of the statutory exemptions found in the relevant jury legislation of other jurisdictions within Australia are blanket exemptions that apply for Members, irrespective of the sittings of the House.

Appropriateness of the immunity and whether it needs to be further defined

The Legislative Assembly considers that a House of the Parliament should be able to assert a superior claim to the attendance of its Members, at least whilst the House (or its committees) is sitting and transacting business. In practical terms, there may be few periods where the Parliament and its committees are not transacting business, as has been noted by the Clerk of the Senate in her submission to the inquiry.

Codification of all the privileges of the NSW Parliament, not just the immunity from jury service, would be beneficial and the Legislative Assembly has previously recommended that this should occur. In 1985, the Joint Select Committee upon Parliamentary Privilege in its report *Parliamentary Privilege in New South Wales* recommended that 'the Constitution Act be amended to place beyond doubt that the powers, privileges and immunities of the House of the New South Wales Parliament are those of the House of Commons as at 1856.'²² In reporting to each House, the Joint Select Committee referred to attempts that had been made since 1878 to enact legislation that would define the privileges of the New South Wales Parliament.²³

Most recently, the Standing Committee on Parliamentary Privileges and Ethics recommended:

Recommendation 3:

That the Government be requested to introduce legislation similar to s16 of the Parliamentary Privileges Act (Commonwealth) to confirm the protection of Article 9 of the Bill of Rights.²⁴

²¹ Report of the Joint Select Committee upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985 at p 15.

²² Report of the Joint Select Committee upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985 at p 20.

²³ Report of the Joint Select Committee upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985 at p 17.

²⁴ Standing Committee on Parliamentary Privileges and Ethics, *Report on a memorandum of understanding with the Independent Commission Against Corruption relating to the execution of search warrants on the Parliament House offices of Members*, 26 November 2009 at p 5.

Part Two

Exemption from jury service under the *Jury Act 1977* (NSW)

Members of Parliament are currently ineligible for jury service under the *Jury Act 1977*.²⁵ Recently, the NSW Parliament enacted the *Jury Amendment Act 2010*,²⁶ which amends the *Jury Act* in respect of the eligibility and selection of jurors. The commencement of the amending legislation has yet to be proclaimed. Of note, upon commencement, the amending provisions will extend the terms of the current exemption applicable to Members of Parliament by excluding them from jury service for a further 3 years after they cease to hold office as a Member of Parliament.²⁷

Recent developments in other jurisdictions

In all other local jurisdictions Members of Parliament are ineligible for jury service.²⁸ In Victoria and Western Australia ineligibility extends for a further 10 and 5 year period, respectively, after the Member ceases to hold office.²⁹

The issue of jury eligibility, including the eligibility of Members of Parliament as a specific occupational group, is currently being considered by the Western Australian Law Reform Commission and the Queensland Law Reform Commission.³⁰ In a Discussion Paper published in September 2009 the WA Law Reform Commission commented that:

The Commission considers that the current exclusion of Members of Parliament from jury service is appropriate to preserve public confidence in the independence and impartiality of the criminal justice system.³¹

In making the above comment the Commission acknowledged that its position remains unchanged from the views expressed in a previous report on this topic. In 1980 the Commission's *Report on Exemption from Jury Service* concluded 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.'³²

²⁵ *Jury Act 1977* (NSW) Schedule 2, item 5.

²⁶ The *Jury Amendment Act 2010* (NSW) was passed on 22 June 2010 and assented to on 28 June 2010. As at the time of writing none of the provisions are in force and the Act will commence on a day or days to be appointed by proclamation.

²⁷ Clause 22 of Schedule 1 of the *Jury Amendment Act 2010* (NSW) omits Schedules 1 and 2 of the *Jury Act 1977* (NSW) and inserts instead a new Schedule 1, clause 5, sub clause (2) of which provides that a person who held an office excluded under the Act from jury service, will continue to be excluded for jury duty for the period of 3 years after ceasing to hold that office.

²⁸ *Jury Exemptions Act 1965* (Cth), section 4(1) with reference to the Schedule to the Act; *Juries Act 2000* (Vic) Schedule 2; *Jury Act 1995* (Qld) section 4(3)(b); *Juries Act 2003* (Tas) Schedule 2; *Juries Act 1957* (WA) Second Schedule, Part 1; *Juries Act 1927* (SA) Schedule 3; *Juries Act* (NT), Schedule 7; *Juries Act 1967* (ACT) Schedule 2.

²⁹ In Western Australia Members continue to be ineligible for a further 5 years after holding office. In Victoria, Members continue to be ineligible for a further 10 years after holding office. In Victoria there is currently a bill before Parliament which seeks to reduce this period of time to 5 years, see *Juries Amendment (Reform) Bill 2010* (Vic).

³⁰ For details on the current reference before the Western Australia Law Reform Commission see <http://www.lrc.justice.wa.gov.au/099-DP.html>

For details on the current reference before the Queensland Law Reform Commission see <http://www qlrc.qld.gov.au/projects.htm#JurySelection>

³¹ Western Australia Law Reform Commission, *Selection, eligibility and exemption of jurors*, Project 99, Discussion Paper, September 2009 at p 73 accessed at http://www.lrc.justice.wa.gov.au/3_jurors.html.

³² Western Australia Law Reform Commission, *Report on Exemption from Jury Service*, Project 71, June 1980 at p 13 as cited in Western Australia Law Reform Commission, *Selection, eligibility and exemption of jurors*,

With regard to the position of Members of the United Kingdom Parliament, recent legislative amendments and changes to practice now make Members eligible to serve on juries. Amendments to the *Juries Act 1974* by the *Criminal Justice Act 2003* repealed the entitlement of Members to be excused from jury service as of right and they are now required to show good reason in order to be excused from jury service. The legislative changes were prompted by a wide-ranging and comprehensive review of criminal courts in England and Wales conducted in 2001 by Lord Justice Auld.³³

The amendments also provided for the introduction of updated guidelines for the Central Jury Summoning Bureau regarding matters to be considered when assessing deferral and excusal applications. The Guidance makes provision for excusal in 'extreme circumstances' at the discretion of the Summoning Officer. Significantly, in respect of the exercise of this discretion, the Summoning Officer is to observe a number of principles one of which relates specifically to Members of Parliament. Clause 16 of the Guidance specifies:

Members of Parliament who seek *excusal* of jury service on the grounds of parliamentary duties should be offered *deferral* in the first instance. If an MP feels that it would be inappropriate to do jury service in his/her constituency, they should be allowed to do it elsewhere (emphasis added).³⁴

The Assembly understands that there are two cases in United Kingdom of Members of Parliament having served on a jury since the reforms were implemented. Rt Hon Michael Alun MP, a former Home Office Minister and a former First Minister for Wales, served on a jury while he was a Minister. His jury service was performed partly during the parliamentary recess and partly when Parliament was sitting.³⁵ John Whittingdale MP also has been reported to have served on a jury.³⁶

It is relevant to note that in Australia, there has been at least one occasion in which the involvement of a juror with a strong undisclosed, party-political affiliation raised questions of perversions of justice.³⁷

There does not appear to have been any comprehensive assessment performed of the legislative changes in the United Kingdom to date.

Is the statutory exemption appropriate?

It is the Assembly's view that the statutory exemption is appropriate and necessary for reasons relating to the state of law surrounding parliamentary privilege in New South Wales and for various public policy reasons relevant to the position of Members within the NSW system of government.

Project 99, Discussion Paper, September 2009 at p 73 accessed at http://www.lrc.justice.wa.gov.au/3_jurors.html.

³³ R E Auld, *Review of the Criminal Courts of England and Wales*, September 2001, accessed at <http://www.criminal-courts-review.org.uk/ccr-00.htm>

³⁴ Her Majesty's Courts Services "Guidance for summoning officers when considering deferral and excusal applications" presented to Parliament pursuant to section 9AA *Juries Act 1974*. See clauses 4 and 16.

³⁵ Advice from Clerk of the Journals, House of Commons, email dated 13 July 2010.

³⁶ House of Commons Library, Standard Note: *Recent developments concerning juries*, 19 May 2009 at p 5 accessed at <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-02876.pdf>

³⁷ See Queensland Crime Commission, Report by the Honourable W J Carter QC on his *Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen* (1993)

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. In these circumstances retention of the statutory exemption is both appropriate and necessary.

In addition, the Legislative Assembly also considers that there are several arguments against repeal of the statutory exemption:

1. The public interest in preserving the ineligibility of Members of Parliament from jury service, which has been a traditional, long-standing immunity, recognised in statute, far outweighs any public interest in broadening the pool of citizens available to undertake jury service by involving Members of Parliament.
2. Removing the statutory exemption for Members may undermine the doctrine of the separation of powers and weaken the principle that the criminal justice system is free from all forms of political influence and involvement.
3. Given the relatively small number of Members of Parliament, even including Ministers, the practical impact of the proposed change would be negligible. Further, enforcing existing jury service obligations would have far greater effect in increasing the size of the available jury pool.
4. The distinction drawn between Members who hold Ministerial portfolios and other Members of Parliament for the purposes of jury service exemption, on the basis that the former have a direct involvement in the promotion and passage of legislation affecting the criminal law, is not considered valid or persuasive.³⁸ All Members may potentially be involved in debate on legislation and ultimately are required to vote on the terms and passage of legislation. It is relevant to note that Members of Parliament may also consider proposed legislation in their capacity as members of internal Party committees.

To add, some Members who do not hold Ministerial portfolios may still have a direct involvement in considering legislation by virtue of their membership of Parliamentary committees and their participation in deliberations, for example, the Legislation Review Committee. A particular consideration for the Legislative Assembly is that in addition to Ministers, Parliamentary Secretaries also play an active role in bringing forward legislation. For instance, Parliamentary Secretaries in the Legislative Assembly are permitted to act on behalf of Ministers in certain respects and may, 'give notice of, introduce and have carriage of Government business.'³⁹

³⁸ The NSW Law Reform Commission in their report *Jury selection* commented that Ministers of the Crown as Members of the Executive Council and its officers should continue to be ineligible for the following reasons: their direct involvement in the promotion and passage of legislation affecting the criminal law; their responsibility for the enforcement or the administration of laws of the State; and their need to attend the regular meetings of the Executive Council. New South Wales Law Reform Commission, *Jury selection*, Report 117, Sydney, NSW Law Reform Commission, 2007 at [4.15].

³⁹ NSW Legislative Assembly, *Practice, Procedure and Privilege*, edited by Russell D Grove, Sydney, 2007 at p 35

5. The nature of the role performed by a Member of Parliament as an elected representative is quite distinct from that of other occupations where alternative arrangements can be made to address an individual's absence from their workplace. 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.
6. Participation as a juror may present real conflicts of interest for elected representatives, including in circumstances where a Member may be called on to serve in a case relevant to a constituent or local issue. Conflicts of interest may not always be readily apparent. For instance, there may be occasions where a potential conflict of interest arises for a Member because of matters in a different electorate or portfolio area, of which they are aware of but are in no way directly involved. Any 'show cause' system for claiming exemption could readily lead to publicity and controversy.
7. Changes to the jury service exemption for Members of Parliament in other comparable jurisdictions, most notably the United Kingdom, are relatively recent developments the impact of which appears not to have been the subject of any systematic evaluation.

Additionally, the Assembly is not convinced that guidelines for assessing applications from Members for excusal from jury service would be capable of properly addressing the above concerns.

Conclusion

Although, as the Law Reform Commission has reported, the immunity of Members from the obligation to serve on juries is one of the '*ancient privileges*' of Members of Parliament it remains a valid and relevant privilege in 2010. In this respect, it should be noted that the Executive has previously identified that certain powers, privileges and immunities of the Parliament are 'unquestionably recognised as still being necessary for the proper exercise of Parliamentary functions'.⁴⁰

In conclusion, the Legislative Assembly considers that it would be particularly undesirable to repeal or narrow the existing statutory exemption in the *Jury Act 1977* without prior codification of the NSW Parliament's privileges. 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. Moreover, there seems little value in seeking to repeal the existing statutory exemption in the *Jury Act 1977* and relying instead on the less explicit common law immunity based on the traditional privileges of Parliament, particularly as the repeal itself may be interpreted as a rejection of that traditional immunity.

⁴⁰ The Hon J R A Dowd QC, *Parliamentary Privilege in New South Wales*, Discussion Paper, Legislation and Policy Division, NSW Attorney General's Department, Sydney, 1990 at p 12.