

**Submission
No 6**

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

Organisation: Local Court NSW
Name: Mr Graeme Henson
Position: Chief Magistrate
Date received: 19/07/2010



The Chief Magistrate of the Local Court

19 July 2010

The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Director

Re: Invitation for submissions – Inquiry into the eligibility of Members of Parliament to serve on juries

Thank you for your invitation to make a submission in respect of the above inquiry.

I note that this inquiry is concerned only with Members of Parliament who do not hold Ministerial portfolios. It further raises questions as to the nature, scope and appropriateness of the common law immunity or privilege preventing MPs from being required to serve on juries and the ineligibility provisions of the *Juries Act* 1977.

In my view, irrespective of whether or not the common law immunity of MPs from being required to perform jury service is applicable in NSW, the current provisions of the *Juries Act* 1977 that prevent MPs from being eligible to serve on juries are both necessary and appropriate.

I do not propose to analyse at any length the common law immunity of MPs, save to note that on balance, it is thought to be applicable to MPs in NSW,¹ and is based upon the rationale that such individuals should be entitled or allowed to foremost be dedicated to their parliamentary duties.

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. Lord Auld concluded that there was therefore “*no reason why that should entitle them to*

¹ See NSWLRC, Report 117 (2007) *Jury Selection* at [4.19]-[4.20]

*excusal as of right simply by virtue of their position.*² You would be aware that in 2003, upon the recommendations of the Auld review, the exclusion of MPs and a range of other professions from eligibility for jury service was removed in England and Wales.

Whilst the common law immunity is concerned with the right or privilege of MPs to be *exempt* from jury service, it does not appear to be concerned with several other, in my view more compelling, policy reasons for rendering MPs *ineligible* for service on juries. These include the need to preserve the independence of the jury from any actual or apprehended influence from the legislative arm of government (of which all MPs are a part, including those who do not hold executive Ministerial portfolios), and the associated need to maintain public confidence in the independence and integrity of the criminal justice process.

It is acknowledged that in its 2007 report on jury selection, the New South Wales Law Reform Commission expressly disagreed with the view that the doctrine of separation of powers provides a reason for the continued ineligibility of MPs to serve on juries, commenting:

*[T]he doctrine of separation of powers does not, in our view, provide any logical basis for the exclusion of Members of Parliament because jurors serve in a private capacity.*³

With respect, I do not agree. The need to avoid the appearance of bias by making ineligible for jury service those involved in executive or administrative roles within the criminal justice system (such as police officers and prosecutors) has long been recognised as appropriate, notwithstanding that otherwise individuals falling within that class would likewise serve as jurors in a private capacity. In my view, if individuals who perform a legislative role are eligible during the term of their office to undertake a role within the judicial arm of government that brings with it a direct involvement in the outcome of court proceedings, this runs the risk of there being an attendant undermining of public confidence in the integrity of the criminal justice system and its freedom from political influence.

As you would be aware, 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. Further, the concerns discussed in the preceding paragraphs have been formative of the approach taken in several jurisdictions. For instance, in Victoria, the *Juries Act 2000* was developed having regard to a range of objectives developed by the Victorian Parliament Law Reform Committee. These relevantly include:

- The need to maintain the separation of powers between the executive, legislative and judicial branches of government.

² Lord Justice Auld (2001) *Review of the Criminal Courts of England and Wales* at Ch 4, [37]

³ NSWLRC, Report 117 (2007) *Jury Selection* at [4.26]

- The need to ensure, as best as can be, that an accused person receives, and is generally perceived to receive, a fair trial from an impartial tribunal.
- The need to maintain respect for the justice system.⁴

The Law Reform Commission of Western Australia has also recently reaffirmed its view that the exclusion of MPs from jury service is “appropriate to preserve public confidence in the independence and impartiality of the criminal justice system.”⁵ As it had earlier pointed out:

*[I]neligibility should also extend to those who enact laws, as well as to those who enforce them.... [T]he Commission considers it 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.*⁶

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.

Having regard to the foregoing, I am of the opinion that it would be undesirable for the *Juries Act* 1977 to be amended in NSW so as to enable any MP, whether or not holding a Ministerial portfolio, to serve on a jury.

Thank you for the opportunity to contribute to this inquiry.

Should you have any questions in respect of the enclosed submission or wish to discuss and details with me further, please do not hesitate to contact me.

Yours sincerely,



Graeme Henson
Chief Magistrate

⁴ Quoted in Victorian Department of Justice, Draft Discussion Paper (December 2009) *Jury Service Eligibility* at [3.3.1], accessed 12/07/2010 at: [http://www.courts.vic.gov.au/CA256902000FE154/Lookup/Jury_Eligibility/\\$file/jury_eligibility_discussion_paper_16Dec09.pdf](http://www.courts.vic.gov.au/CA256902000FE154/Lookup/Jury_Eligibility/$file/jury_eligibility_discussion_paper_16Dec09.pdf). The issue of whether MPs should remain ineligible for jury service has likewise been raised again for consideration in Victoria.

⁵ LRCWA, Project 99, Discussion Paper (September 2009) *Selection, eligibility and exemption of jurors* at 73

⁶ LRCWA, Project 71, Report (1980) *Exemption from Jury Service* at [3.13]