Submission
No 14

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

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NEW SOUTH WALES LEGISLATIVE COUNCIL
STANDING COMMITTEE ON LAW AND JUSTICE

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

Submission by the Clerk of the Parliaments

Background to the inquiry

In September 2007, the NSW Law Reform Commission published a report entitled *Jury Selection*.[1] The report examined the operation and effectiveness of the system for selecting jurors in New South Wales. It contained a number of recommendations intended to broaden the pool of potential jurors with the aim of ensuring that the burden of jury duty is widely distributed and that juries remain representative of society.

Three of the recommendations made by the Law Reform Commission concerned members and officers of the Parliament of New South Wales:

- 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.[2]

In support of recommendation 12, the Law Reform Commission made reference to Lord Justice Auld's 2001 Review of the Criminal Courts in England and Wales.[3] At that time, members of the United Kingdom Parliament were excused from jury duty as of right. Justice Auld opposed the excusal of occupational categories as of right:

> ... 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. [4]

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1 NSW Law Reform Commission, *Jury Selection*, Report No. 117, September 2007.

2 This recommendation has since been implemented through the *Jury Amendment Act 2010*. The Act removed the statutory exemption of officers and staff of the New South Wales Parliament from jury service. The provisions of the act relating to jury duty by staff are yet to commence.

3 Right Hon Lord Justice Auld, *Review of the Criminal Courts of England and Wales*, September 2001.

4 *Ibid*, p 150.

Justice Auld continued 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'.[5] Accordingly, Justice Auld recommended that 'no-one should be excusable from jury service as of right, only on showing good reason for excusal'.[6]

Following the Auld Review, in 2003, the statutory exemption of members of the British House of Commons and House of Lords from jury service under the *Juries Act 1974* (UK) was removed.[7]

The same removal of the statutory exemption from jury duty for members of Parliament is now under contemplation here in New South Wales.[8]

This submission supports the retention of the current statutory immunity of members of the New South Wales Parliament from being compelled to attend court in response to a summons for jury service.

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'.[9]

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'.[10] The matter was referred to the Committee of Privileges to remove any doubt on the issue.

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5 *Ibid.*
6 *Ibid*, p 151.
7 *Criminal Justice Act 2003* (UK).
8 Currently, members of the Legislative Council and Legislative Assembly are ineligible to serve as jurors under section 6 and Schedule 2 of the *Jury Act 1977*.
9 Hatsell, *Precedents of Proceedings in the House of Commons*, 1818, vol. 1, p 112.
10 *Parliamentary Debates* (UK), 1826 vol. 14, col. 570.

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'.[11] 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'.[12]

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'.[13] 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.[14]

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'.[15] Lord Enfield subsequently '... thanked the Lord Chief Justice for so clearly expressing the undoubted privilege of members of Parliament'.[16]

These cases demonstrate that the immunity of members of Parliament from jury service, as it originally developed in Britain, was clearly contemplated as attaching to sittings of the Parliament. They also suggest that the immunity was believed to attach to meetings of committees of the Parliament, as well as applying during adjournments of the House.

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11 *Ibid*, col. 643.
12 *Ibid.*
13 *Parliamentary Debates* (UK), 1829 vol. 21, col. 1770.
14 *Ibid*, 1771.
15 *The Times*, 8 February 1861.
16 *Ibid.*

In its report, the NSW Law Reform Commission acknowledged that the common law immunity of members of Parliament from jury duty is an ancient privilege of the British Parliament.[17]

The receipt of the common law immunity in New South Wales

It seems reasonable to assert that upon their establishment, the Houses of the New South Wales Parliament received the ancient common law immunity against jury duty from the British Parliament.

It is well-established that the colonial Parliament of New South Wales did not inherit on establishment all the powers and immunities of the British Parliament, only such powers and immunities as are 'reasonably necessary' for the proper exercise of its functions. This position was developed in a series of four cases decided by the Privy Council between 1842 and 1886.[18] It has continued to find judicial expression ever since.[19]

Accordingly, the question of whether the Houses of the New South Wales Parliament inherited a common law immunity of their members from jury duty depends on whether such an immunity is 'reasonably necessary' for the proper exercise of their functions. While there is no judicial authority on this point, 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.

A case concerning the existence of the common law immunity from jury service arose in the New South Wales Legislative Assembly on 11 August 1881. *Hansard* from that date records that Mr James Garvan refused to pay a fine for not complying with a summons to attend jury service on a day that the House was sitting. Mr Garvan then brought the matter before the Legislative Assembly. The debate indicates that there was some doubt amongst the assembled members whether the fine was imposed on Mr Garvan in the knowledge that he was a member of Parliament. In addition, there was dispute as to whether the *Jurors and Juries Consolidation Act 1847*, which at that time gave statutory exemption from jury duty to members of the Legislative Council, also applied to members of the Assembly. In the event, however, a motion that the Speaker take the necessary steps to protect the privileges of the House was withdrawn, as the mover of the motion said he was satisfied that 'nothing further will be necessary, and that justice will be done in regard to the case of the honourable member and the privileges of the House'. The fact that Mr Garvan indicated that he would seek the protection of Parliament if there were a further attempt to impose the fine, but he never had occasion to do so, suggests that the immunity was recognised.[20]

The subsequent codification of the privilege in statute in New South Wales

While there seems little doubt as to the receipt of the ancient common law immunity against jury duty by the New South Wales Parliament upon its establishment, that immunity subsequently was codified in statute.

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17 NSW Law Reform Commission, *op cit*, p 67.

18 The four cases were *Kielley v Carson* (1842) 12 ER 225, *Fenton v Hampton* (1858) 14 ER 727, *Doyle v Falconer* (1866) 16 ER 293 and *Barton v Taylor*(1886) 11 AC 197.

19 See for example *Armstrong v Budd*, (1969) 71 SR (NSW) 386, *Egan v Willis* (1998) 195 CLR 424.

20 *LA Hansard* (11/8/1881) 585-609.

In 1829, members of the legislature were first exempted by statute from jury service under the *Juries for Civil Issues Act 1829* (NSW).[21] This exemption continued for both members of the Executive and Legislative Council, and possibly the Legislative Assembly following its formation in 1855, in the *Jurors and Juries Consolidation Act 1847* (NSW).[22] It was subsequently incorporated in the *Jury Act 1901*, and finally the current *Jury Act 1977*.

The reasons for the immunity (whether at common law or statute)

The are two fundamental reasons for the immunity of members of parliament from being compelled to attend court in response to a summons for jury service, whether at common law or as currently provided under the *Jury Act 1977*. First, the doctrine of the separation of powers; and second, Parliament's right to the attendance and service of its members.

The doctrine of the separation of powers

The doctrine of the separation of powers refers to the separation between the executive, legislative and judicial branches of government, in order to maintain the independence and impartiality of each arm of government.

While the doctrine of the separation of powers has no formal expression in the *Constitution Act 1902*, as it has in the Commonwealth Constitution, it is nevertheless central to an understanding of the system of responsible government in New South Wales. In this context, the separation between the executive and legislature arms of government on the one hand, and the judiciary on the other, is taken as axiomatic in the New South Wales system of government.

In support of this position, in 1996, the Victorian Parliament's Law Reform Committee noted that it had 'seriously considered'[23] removing the ineligibility of members of Parliament for jury service, but had decided against this due to the 'overriding principle'[24] of the need to maintain the separation of powers between the executive, legislative and judicial branches of government. Indeed the Committee recommended that the exemption of members of Parliament be strengthened, and that 'the category of right to be excused which currently applies to Members of Parliament should be redesignated as a category of ineligibility'.[25]

The Law Reform Commission of Western Australia also examined the issue of jury service in 1980, and found it to be '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'. As with the Victorian Parliament's Law Reform Committee, the Commission concluded that the exemption of members of Parliament should be strengthened, and that members (and officers) of Parliament should be ineligible for jury service rather than exempt.[26]

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21 10 George IV No 8

22 11 Victoria No. 20

23 Parliament of Victoria, Law Reform Committee, Jury service in Victoria, Final Report, Vol. 1, December 1996, p 100.

24 *Ibid*, p 74.

25 *Ibid*, p 100.

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

The Western Australian Law Reform Commission revisited the issue in a discussion paper issued in September 2009 entitled *Selection, Eligibility and Exemption of Jurors.*[27] The Western Australian Commission considered, and criticised heavily, the approach adopted in the Auld Review and subsequent reforms of the English law. In the context of the current discussion concerning the separation of powers, the Commission observed:

> 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* (emphasis added). In this regard the Commission's view remains unchanged from its 1980 report on this matter where it said: 'The 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.
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> The Commission also made the point in its 1980 report that in the exercise of Parliament's power to punish for contempt, members held a 'judicial or quasi-judicial' function that further justified their exclusion from jury service. Recognising that political influence may exist (or be seen to exist) beyond a member's term of office, the Commission believes that it is prudent, in the interests of preserving public confidence, to extend the exclusion of members of Parliament from jury service for a period of five years following the termination of their elected office.[28]

In effect, the Comission found that where members of parliament may sit on juries, public perception of the integrity and independence of the judicial process is necessarily blurred, even if this is not the reality. For example, the presence of a member on a jury may attract media attention, and result in public discussion of the jury's verdict. This has the potential to undermine public confidence in the integrity of the court process.

By contrast, the New South Wales Law Reform Commission in its report concluded that 'the 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.'[29]

At the same time, however, the NSW Law Reform Commission suggested that ministers of the Crown should continue to be ineligible to serve as jurors while holding such office. Two of the bases forwarded by the Commission for this position were:

- 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.[30]

These are both reasonable and appropriate arguments why ministers should not perform jury duty, founded on the separation of powers. Members of the Executive (ie ministers)

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27 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper, Project No 99, September 2009.
28 *Ibid*, p 73.
29 NSW Law Reform Commission, *op cit*, p 67.
30 *Ibid*, p 66.

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.

Moreover, it should also be observed that backbench members of Parliament may also engage in the promotion and passage of legislation affecting the criminal law by way of private members' bills.

In addition, while it is true that backbench members of Parliament, if required to serve on a jury, would do so as private citizens, presumably the same would apply to ministers of the Executive were they compelled to do so.

The Law Reform Commission also submits 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'.[31]

The report does not cite any authority in support of this statement. The ancient common law immunity from jury service of the English Parliament is almost certainly founded on the long struggle by the English Parliament to assert its sovereignty and independence of the Crown and royal justice, especially during the Tudor and Stuart periods, which culminated in the 'Glorious Revolution' of 1689 and the adoption of the *Bill of Rights 1689*. It is presumed that the Commission's reference to 'the Parliament's historical status as a court' is a reference to the evolution of the House of Commons and the House of Lords as the 'High Court of Parliament', the highest court of royal justice in the United Kingdom. While this may have been a factor in the development of the common law immunity, the basis of the immunity is almost certainly the struggle for sovereignty by the English Parliament.

It is true that the British unwritten or uncodified constitution is founded on the bedrock of parliamentary sovereignty rather than the separation of powers. However, it is also taken as axiomatic that the system of responsible government adopted in New South Wales in 1856 embodied the understanding that the Executive Government, including the Cabinet, is responsible to Parliament, and through Parliament to the people. It would be incorrect to suggest that the Westminster system of parliamentary democracy, incorporating the principle of responsible government, as inherited in New South Wales is not founded on due recognition of the separation of the Executive and the Legislature, and in turn of both from the courts, of which the common law immunity of members of parliament from jury duty is one aspect.

The current blanket statutory ineligibility of members of Parliament, along with members of the Executive, from jury duty preserves the fundamental principle of the separation of powers. Indeed it could be argued that a member of Parliament should not be eligible to serve on a jury, even if he or she wants to, in the interests of preserving the integrity and

31 *Ibid*, p 69.

independence of both the courts and Parliament. This is only achieved by the statutory ineligibility of members of Parliament from jury service.

The right of the Houses of Parliament to the attendance and service of their members

The second reason for the immunity of members of parliament from being compelled to attend court in response to a summons for jury service, whether at common law or as currently provided under the *Jury Act 1977*, is the right of the Houses of Parliament to maintain the attendance and service of their members.

The Legislative Council of New South Wales currently has 42 members, 36 of whom are backbench members who could potentially perform jury duty. There is perhaps a little over double that number of backbenchers in the Legislative Assembly. 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.

This argument finds clear expression in *Odgers' Australian Senate Practice. Odgers* notes that the immunity that exempts members of Parliament from jury service 'seldom arise[s] in practice', but nevertheless argues that there is 'good ground' for retaining it, based on '... the principle that the Houses should have first right to the services of their members, witnesses and officers, and that those services should not be impeded by the requirements of legal proceedings before a court'.[32]

Similarly, *Erskine May* concludes that '... the service of Members upon juries not being absolutely necessary, their more immediate duties in Parliament are held to supersede the obligation of attendance in other courts...'.[33]

It should also be noted that 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 cross-bench members. Moreover, even when pairs are available, the citizens of this State are entitled to have their views represented in Parliament by their elected members. The same arguments also apply to committees of the House, on which the numbers are equally finely balanced, given their membership of only six or seven members.

In its report, the Law Reform Commission noted that ministers should not be compelled to serve on juries because of their 'need to attend the regular meetings of the Executive Council'. The same principle applies to members of Parliament, who equally need to attend parliamentary sittings and committee meetings as a priority.

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32 H.Evans (ed), *Odgers' Australian Senate Practice*, 13th edn, p 57.

33 Sir Charles Gordon (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 20th edn, Butterworths, London, 1983, p 108.

The consequences of removing the statutory immunity

The removal of the blanket statutory exemption of members of the New South Wales Parliament from jury duty would lead to considerable uncertainty concerning the application and extent of the common law immunity. This is discussed below.

Uncertainty concerning the revival of the common law immunity

If the statutory exemption from jury service for members of the Parliament of New South Wales under the *Jury Act 1977* is repealed, there is uncertainty as to whether the common law immunity would take effect again.

In its report, the NSW Law Reform Commission concluded that 'the weight of opinion appears to be in support of the continued existence of the [common law] immunity from jury service.[34]

It is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words. Parliamentary privilege generally may not be altered by implication.[35]

On this basis, it may be argued that were the statutory ineligibility of members of Parliament to serve as jurors to be removed from the *Jury Act 1977*, the common law immunity would be revived.

However, it is possible that the common law immunity may have been extinguished at the point of the enactment of the *Jury Act 1977* or its predecessors. 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.[36]

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34 NSW Law Reform Commission, *op cit*, p 67.

35 The principal authority for this position is the decision of the House of Lords in *The Duke of Newcastle v Morris* (1870) LR 4 HL 661. In most instances, if not perhaps all, a provision intended to affect the powers and immunities of the Parliament of New South Wales must expressly state as such before it can be effective. However, as a matter of law, rights may be amended not only by statutory expression but by 'necessary implication'. See *Pyneboard Pty Ltd v Trade Practices Commission*, (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ. The test of necessary implication is solely one of ascertaining the intention of Parliament, having regard to the language of the statue as interpreted in its historical context. On this basis, it is not inconceivable that a provision adopted by the Parliament may be interpreted by the courts as affecting the law of parliamentary privilege, depending on the particular historical circumstances of the case. However, as expressed by Carney, '...the presumption against the abrogation of fundamental rights is particularly strong in relation to parliamentary privileges, given their importance to the effective functioning of parliament. Parliament is unlikely to intend to alter its privileges without making its intentions clear. Accordingly, a court will require very clear evidence of parliament's intention before parliamentary privilege is abrogated by statute.' See Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, p 202.

36 Correspondence from Dr Malcolm Jack, Clerk of the House of Commons, to Ms Lynn Lovelock, Clerk of the Parliaments, 16 July 2010. This precedent from Britain may not translate directly to the situation in New South Wales, where as discussed, the Parliament's common law privileges rely on the principle of 'reasonable necessity', which is not the case in the United Kingdom.

It is also possible that the Parliament, should it in the future choose to remove from the *Jury Act 1977* the statutory exemption of members from jury service, could in doing so make it very clear that its intention was at the same time either to alter or abolish the common law immunity, or not to alter it.

On a related matter, it is possible that the common law immunity may also attach to senior officers of the Parliament of New South Wales, based on the principle that the House is entitled to the attendance and service of its officers. The statutory ineligibility of officers and staff of the Parliament of New South Wales from jury service was removed through the *Jury Amendment Act 2010*. When the Act commences, it is possible that the common law immunity of senior officers may be revived.

Uncertainty concerning the extent of the common law immunity (assuming it revives)

In addition to the uncertainty concerning whether the common law immunity would revive upon the removal of the statutory ineligibility under the *Jury Act 1977*, there is uncertainty as to the extent of the immunity as it affects parliamentary business. There is no modern authority to clarify the issue because in all comparable jurisdictions there has been a blanket statutory exemption from jury duty.

Nevertheless, it may reasonably be assumed that parliamentary business incorporates sittings of Parliament. As discussed in the historical British cases outlined earlier in this submission, there is no doubt that the immunity as it originally developed in Britain attached to sittings of the House of the British Parliament.

It may also reasonably be assumed that parliamentary business incorporates committee business, including hearings, site visits, deliberative meetings and the like. The historical British cases outlined earlier also contemplated the immunity attaching to meetings of committees of the British Parliament.

This interpretation is supported in modern times in New South Wales by section 15(2) of the *Evidence Act 1995*, which codifies the extent of the immunity of members of parliament from attendance as a witness in court as including 'a meeting of a committee'. Section 15(2) provides:

> 15(2) A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:
> (a) a sitting of that House, or a joint sitting of that Parliament, or
> (b) a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.

Where the definition of parliamentary business, and hence the extent of the common law immunity of members from a summons for jury service, becomes more problematic is in relation to the work of members outside of day-to-day sittings of the House and its committees. Does the work of a member visiting a constituent to investigate a particular matter, where the member intends to raise the matter in Parliament, constitute parliamentary business for the purposes of the immunity?

An argument may reasonably be made that it does. The historical British cases cited earlier seemingly contemplated the immunity as extending to periods of adjournment, which would incorporate such activities by members. Even were this not the case, the

extent of the common law immunity may have changed over time to incorporate constituency work and other such activities.[37]

Although not directly comparable, some guidance may be taken from section 16 of the Commonwealth *Parliamentary Privileges Act 1987*, which is often cited when interpreting 'proceedings in Parliament' in this jurisdiction as well as others.[38] Section 16(2) 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'. This definition includes in 'proceedings in Parliament' a member's activities undertaken as part of his or her constituency work, including correspondence entered into with members of the public, site visits to examine issues of concern to a community, and so on, provided the member had a reasonable basis for arguing that he or she sought information with a view to informing his or her activities in Parliament.

In summary, assuming its ongoing existence, the extent of the immunity from jury duty that attaches at common law to members of Parliament almost certainly captures all sittings of the House and all proceedings associated with committees. It may well also incorporate constituency work for the purposes of or incidental to proceedings in the House. It is also possible that it extends beyond these activities, although that is less certain.[39]

The following observations may be made in relation to the modern extent of parliamentary business undertaken by members:

- The annual sitting calendar of the Parliament of New South Wales is fairly constant, usually involving approximately 50 sitting days over approximately 18 sitting weeks. These sitting days are distributed over two sitting periods: the autumn or budget sitting period from late February/March to June, and the spring sitting period from September to Christmas.

- The Council's committee system, which has developed since the mid-1980s, now consumes a considerable amount of the time of backbenchers. Almost all backbench members of the Legislative Council are members of at least one standing committee, and many are members of joint and select committees as well.

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37 The courts have found that the common law privileges of the Parliament of New South Wales that are 'reasonably necessary' for its effective operation may change over time. As Wallace P observed in the New South Wales Supreme Court in *Armstrong v Budd*: '[T]he critical question is to decide what is 'reasonable' under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists. See *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 402. This was reaffirmed by the High Court in *Egan v Willis* when Gaudron, Gummow and Hayne JJ observed: 'What is 'reasonably necessary' at any time for the 'proper exercise' of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council. See *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 454.

38 Section 16 defines 'proceedings in Parliament' for the purposes of Article 9 of the *Bill of Rights 1689*.

39 The NSW Law Reform Commission noted in its report that there are various interpretations of the extent of the common law immunity attaching to parliamentary business, some suggesting the immunity only applies when a parliament is sitting, others that it applies at all times up 40 days after a parliament is prorogued, and up to 40 days before the next scheduled meeting of the parliament, drawing parallels with the freedom from arrest and attendance in court immunities. See NSW Law Reform Commission, *op cit*, pp 67-68.

Many of these committees continue to conduct their proceedings during the winter and summer long adjournments between the two sitting periods, and indeed are busy at times when the Houses are not sitting. Information taken from the Department of the Legislative Council's Annual Report for 2008-2009 indicates that in that financial year, 26 inquiries were conducted, involving 161 committee meetings, and 82 hearings held over 383 hours.

- When members are not sitting in Parliament or on a committee, they are frequently undertaking constituency work.

It is possible that the only time that members would clearly be available to perform jury duty is during periods of prorogation of the House. However, even there, there is some uncertainty. The position of the Legislative Council is that certain committees may continue to meet after prorogation. Indeed there have been instances in the past where legislation has been passed specifically to enable committees of both Houses, other than statutory committees, to continue to meet and transact business after prorogation. The most recent legislation was the *Parliamentary Committees Enabling Act 1996* and the *Parliamentary Committees Enabling Amendment Act 1997*.[40]

Uncertainty concerning 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.

For example, it is not unknown for the House to be recalled early to deal with urgent legislation. In such circumstances, a member of Parliament should not be placed in the position of being called at the same time to attend both Parliament and a court to serve on a jury. For example, most recently, the House was recalled on 28 August 2008 to deal with bills to enable the Government to restructure the State's electricity industry. The scenario whereby a member of the Legislative Council could feel restrained from attending the sitting because he or she was due also to attend court to serve on a jury that day should not be entertained.

It is also not uncommon for Legislative Council committees to meet at short notice to discuss urgent matters arising. Certain Council committees also have the power to self-refer inquiries into certain matters at short notice. Again, those committees are equally entitled to the first call on their members, who should not be constrained by a need to attend jury duty.

Similar questions would arise were a member to undertake jury duty, but the court proceedings continued over a longer period than expected, with the result that the member was called away to a scheduled meeting of the House or a committee.

The common law immunity does not adequately address these scenarios. While in reality a member of the Parliament, placed in such scenarios, would be expected to attend the House or its committees over the courts, and would be entitled to claim immunity from

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40 See the discussion in L.Lovelock and J.Evans, *New South Wales Legislative Council Practice*, The Federation Press, 2007, pp 575-577.

any punishment for failing to attend his or her jury duty as a result, it is possible that the court processes could be been severely disrupted as a result of the member's absence.

Court processes if the statutory immunity were abolished

If the statutory ineligibility of members of Parliament to serve on juries under the *Jury Act 1977* were to be abolished, court processes would need to be put in place for members of Parliament to seek exclusion/exemption or deferral of their jury service.

If a member were to seek to defer his or her jury service on the basis of the common law immunity, one possibility is that the process for doing so could be modelled on the process set out in section 15(2) of the *Evidence Act 1995* concerning a member subpoenaed to give evidence in court. In such an instance, the President of the Legislative Council may communicate with the court, drawing attention to the privilege and asking that the member be excused because of the sitting of the House. The difficulty with this situation is that if a member of Parliament requested to be excused from jury service on the basis of the common law immunity, this could place court officials in the invidious position of determining what activities constitute parliamentary business.

It is pertinent at this point to refer to the reforms adopted in the United Kingdom, as a result of which the common law immunity was taken to be extinguished. If a member of the United Kingdom Parliament does not wish to serve as a juror, the member is required to apply for deferral or excusal of jury service in the same way as all other jurors, and show 'good reason' why he or she should not be summoned. Her Majesty's Court Service has issued guidelines that specifically establish the principles to be observed in considering applications for deferral or excusal of jury service by members of Parliament, including that:

> Members of Parliament who seek excusal or deferral or 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.[41]

In addition, the Lord Chief Justice in his Practice Direction to trial judges provides guidance on how to deal with jurors who may find themselves in difficult circumstances during a trial, which may require the trial to be adjourned for a short period or for the juror to be discharged. If a juror is discharged, it is possible for the trial (particularly a short trial) to continue with a reduced number of jurors. The Practice Direction gives as a possible example a 'Member of Parliament who has deferred their jury service to an apparently more convenient time, but is unexpectedly called back to work for a very important reason'. The Practice Direction notes that 'all such applications should be dealt with sensitively and sympathetically'.[42]

In relation to New South Wales, the definition of 'good cause' in section 14A of the *Jury Amendment Act 2010* provides a range of reasons as to why a person has 'good cause' to

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41 Her Majesty's Courts Service, *Guidance for summoning officers when considering deferral and excusal applications*, p 2.

42 Lord Chief Justice, *Practice Direction: Further directions applying in the Crown Court: Juries IV.42.3*, March 2010, accessed 23 July 2010 <www.justice.gov.uk/criminal/procrules_fin/contents/practice_direction/part4.htm#id6178156>.

be exempted or excused from jury service.[43] It is not immediately clear that any of these would apply to members of Parliament seeking excusal on the grounds of parliamentary duties. If this is indeed the case, members of Parliament would not be eligible to apply for exclusion from jury service due to their parliamentary duties. Members who were unable to attend jury service due to their parliamentary duties would therefore be required to apply for deferral of jury service (as deferral is not restricted by the good cause criteria). Consideration may need to be given to developing similar guidelines to those in the United Kingdom, which provide guidance on how to approach requests for deferral of service by members of Parliament. Alternatively, the *Jury Amendment Act 2010* could be amended to provide that members of the Parliament of New South Wales fall under the definition of 'good cause' which would enable them to apply for excusal from jury service.

The UK experience

As noted at the start of this submission, the statutory exemption of members of the House of Commons and House of Lords from jury service under the *Juries Act 1974 (UK)* was removed by the *Criminal Justice Act 2003*.[44] Members of the United Kingdom Parliament are now required to attend jury service unless they apply for excusal or deferral and can show 'good reason' as to why their application should be granted.

It is instructive to note that in making his recommendations, Justice Auld did not examine the basis of the immunity that attached to members of Parliament. There was also no discussion of the separation of powers, and no discussion of the right of the Houses of the United Kingdom Parliament to maintain the attendance and service of their members.

There was a similar lack of focus on this issue during the debate on the Criminal Justice Bill 2003 in the British Parliament. 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.

In correspondence, the Clerk of the House of Commons, Dr Jack, advised that the House of Commons does not keep records of whether members of Parliament have been summonsed to serve on juries, but that he was aware of one instance where a minister served on a jury when the House sat. The House of Commons also does not keep records on whether any members of Parliament have been summonsed to attend jury duty, but has applied for and been granted excusal or deferral.[45]

Other Westminster Parliaments

Finally, it is noted that all Australian jurisdictions continue to provide that members of Parliament have a statutory immunity from jury duty.[46] Indeed, the legislation in Victoria

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43 They are undue hardship or serious inconvenience, disability, conflict of interest and any other reason. These amendments, which amend the *Jury Act 1977*, are yet to commence.

44 *Criminal Justice Act 2003* (UK).

45 Correspondence from Dr Malcolm Jack, Clerk of the House of Commons, to Ms Lynn Lovelock, Clerk of the Parliaments, 16 July 2010.

46 *Jury Act 1977* (NSW) Sch 2 Item 5, *Juries Act 2000* (Vic) Sch 2 cl 1(i), *Juries Act 1957* (WA) Sch 2 Part 1 cl 2, *Juries Act 1927* (SA) Sch 3 cl 2, *Jury Act 1995* (Qld) s 4(3)(b), *Juries Act 2003* (Tas) Sch 2 cl 6,

and Western Australia goes even further: former members of parliament are ineligible for jury service for periods of ten[47] and five years respectively, 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. Members of Parliament are also excluded from jury service in Canada[48] and New Zealand.[49] The United Kingdom is the only Westminster system in which the statutory exemption has been removed.

It could be argued that by maintaining the statutory immunity, New South Wales would ensure consistency on this issue among Australian jurisdictions.

Conclusion

There are good reasons for maintaining the provisions in the *Jury Act 1977* that make members of Parliament ineligible for jury service. These reasons include the preservation of the fundamental principle of the separation of powers, and the uncertainty concerning the revival and extent of the common law immunity. Another consideration is the uncertainty of the timing of parliamentary business, particularly committee business, together with the potential disruption to the court system if members were to serve as jurors but were re-called to attend to their parliamentary duties. Moreover, the removal of the exemption would lead to inconsistency with other Australian jurisdictions.

If, notwithstanding these objections, it was decided that serious consideration should be given to removing the statutory immunity under the *Jury Act 1977*, it would be highly desirable for the proposed regime for managing jury duty by members to be available for close scrutiny before any further action were taken.

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Clerk of the Parliaments

Juries Act 1967 (ACT) Sch 2 Part 2.1 item 14, *Juries Act 1963* (NT) Sch 7, *Jury Exemption Act 1986* (Cth), s 4

47 The Juries Amendment (Reform) Bill 2010 currently before the Victorian Parliament proposes to halve the period in which former members of Parliament are ineligible for jury service from ten to five years.

48 For more detail see R.Marleau & C.Montpetit (eds), *House of Commons Procedure and Practice*, Montreal, 2000, pp 80-81, especially footnote 149.

49 *Juries Act 1981* (NZ).