Submission
No 18

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

Organisation: Parramatta Community Justice Clinic (PCJC)

Name: Mr Paul Rogers

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PCJC

Parramatta Community Justice Clinic
Level 3, Justice Precinct Offices
160 Marsden Street, Locked Bag 5111 Parramatta NSW 2124
Email: pcjc@uws.edu.au
Telephone: (02) 8688 7873

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Dear Committee Chair,

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

This submission is made on behalf of the Parramatta Community Justice Clinic (PCJC) and the responsible person will be Paul Rogers, Manager of the PCJC and Senior Lecturer at the University of Western Sydney, School of Law. The substantive writing and research was undertaken by Ms. Shanuki Kathriarachchi, a UWS law student, undertaking her five (5) days of clinical legal training at the PCJC.

We have been advised of this inquiry by way of the invitation sent to the School of Law at UWS, and we thank you for the opportunity to express our thoughts on this matter.

In summary, the PCJC does not support any proposal to vary the ineligibility of Members of Parliament to serve as jurors. As a community justice clinic we are most concerned with the access to justice and the law for all persons, in particular those disadvantaged or elderly in the community. We feel that our local community will be adversely affected by any such amendment. Abolishing the ineligibility of MPs to serve on juries has the potential to decrease the accessibility of the peoples MPs to their local community. Further this would also impede on the independence and impartiality required by jurors, by infringing on the doctrine of separation of power and opening the doors for politics in the jury room. It would also have a detrimental impact on public perception of the criminal justice system.

Sources of Immunity

The exemption of MPs from jury service stems from both common law and statute. At common law there is an exemption derived from the long standing notion of parliamentary privilege and in NSW the *Jury Act 1977* provides that MPs are in a class of person ineligible to engage in this service.

Common law

Parliamentary privilege affords to each House of Parliament, its committee and Members, powers, rights and immunities necessary for the effective performance of parliamentary functions.[1] One of these is the qualified immunity of Members and officers from legal process, included in which is the exemption from jury service.[2] This

[1] Gareth Griffin, 'Parliamentary Privilege: Major Developments and Current Issues' (Research Paper No 1, NSW Parliament, 2007) 1.
[2] Ibid 4.

immunity was confirmed in 1826 by the House of Commons stating 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".[3] Arguably, on this basis, there is room in the presence of the common law immunity alone, to consider that it applies only while Parliament is sitting.

Statute

By way of the *Jury Act 1977*, MPs are made ineligible from service as jurors.[4] This ineligibility defeats any uncertainties as to the nature or extent of the immunity afforded by the common law.

Common Law Application in NSW

There have been arguments presented that irrespective of the application of the common law in NSW, the Statute renders MPs ineligible, and therefore there is no reason to inquire into this aspect of the problem. However, in considering the background of the inquiry, the NSW Law Reform Commission Report on Jury Selection in 2007 would suggest otherwise. That report recommended that the current provisions of the *Jury Act* be repealed and the common law and the extent of its operation be reviewed.[5] In the event that that removal of the provisions of the Act were to occur, any exemption available to MPs will rest on common law immunity and thus, there must be some attempts to understand its application and parameters.

The crux of the debate in terms of application appears to be in regard to whether this immunity is in fact one of the parliamentary privileges that apply in the state of NSW. This concern stems from the fact that NSW is the only state in Australia which has not comprehensively legislated to define the privileges of its Houses of Parliament. Thus, some contend that those immunities and privileges that apply are only those which are "necessary for the proper exercise of the functions it was intended to execute",[6] and question whether this implied necessity encompasses the immunity in relation to jury service.

It is our opinion, and that of many others, that this immunity is included in those afforded to NSW Parliamentarians and that the common law is so deeply embedded in our history and in the workings and understanding of the system as we know it, that this should not be changed. Although the mere fact that any notion has so long remained and accumulated layers upon it, should not stop it from being dug up if it is reasonable to do so, the 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.

In addition, it is 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 lack of defining legislation.

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[3] New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (2007) [4.18].
[4] *Jury Act 1977* (NSW) sch 2.
[5] New South Wales Law Reform Commission, above n 3, [4.31].
[6] *Kielly v Carson* (1842) 4 Moo PC 63, 88; 13 ER 255 in Garreth Griffin 'Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW' (Research paper No 01, NSW Parliament, 2004) 1.

Extent of Immunity

As alluded to above, any uncertainty as to the extent of the application of the common law immunity was extinguished by Statute in that it rendered MPs wholly ineligible. Many supporting the proposed changes do so, on the basis that at its common law roots, the reason for the immunity is to avoid any hindrance to MPs in carrying out their parliamentary obligation. According to this argument, it then follows that there is no reason for MPs to be ineligible even during times where parliament is not sitting.[7] That logic then suggests that the Statute should be repealed and the common law immunity defined so as to apply only when sitting or excuse for good cause.

We believe that this concern is correctly addressed in stating that 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. This effect on the MP's ability to fully perform his or her obligations also illustrates how this may fall within the scope of the common law immunity. Selection to a jury may take the members of that jury away from their families and employment for many days if not weeks at a time.

Addressing the Grounds for Proposed Changes

In considering the underlying reasons behind the proposal for revising the existing ineligibility, the most apparent are the need to 'broaden the pool of eligible jurors to ensure the burden of jury duty is widely distributed' and also so that juries are 'representative of society'.[8]

Burden of jury duty

In addressing the first concern, it is helpful to look at the current statistics. It is reported that 200,000 people are sent a notice of inclusion each year, in 2009, only 114,790 were subsequently summoned and required to attend. Of these 52,766 attended and 9,039 were selected to serve. It is estimated that around 50% of those summoned seek and receive approval to be excused.[9] The burden, therefore, does not appear to be too great with only 9,039 in all required to serve in that year. The numbers may illustrate the ease of seeking exemption, however, even a change in the legislation will see common law immunity remain, at least providing an exemption so far as there is good cause, and thus would not change this situation.

Representative jury

The second issue raised rightly states that juries are meant to be representative of society so that the defendant's behaviour is judged by societal standards. Although this may be a fair representation in regard to those who are

[7] New South Wales Law Reform Commission, above n 3, [4.20].
[8] New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2010, 23675 (Barry Collier).
[9] Ibid.

engaged in work as doctors, pharmacists and others with a right to claim exemption it cannot rightly encompass MPs. There are two reasons for this, first in terms of the overlap in the arms of government, MPs who are already privileged in their ability to contribute to the making of laws should have no right to be entitled to contributing to the outcome of its application in the courts. Secondly, MPs are representatives of their respective communities; hence it can be argued that it is erroneous to then have them act as jurors or judges of fact upon their constituents.

Further Reasons for Continuing Eligibility

Fair Trial

Further to the requirement that the jury is representative of society, there is also a requirement of fair trial at international law.[10] 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".[11] Whether MPs could constitute an independent and impartial tribunal is debateable. Some reasons for this are discussed in terms of separation of powers, closeness to the administration of the law, the potential of politicising the jury and tainting public confidence.

Possible bias/ Politicising of Jury

By placing MPs on a jury there is concern of possible bias or politicising of the jury. This may occur in several ways. One of the underlying rationales given for the ineligibility is to 'protect the accused against the potential of a jury chosen or influenced by the state',[12] and there is potential, however slight, for this to occur. Will Ministers and or Parliamentary Secretaries be exempt?

There is also a potential for political bias. The reason that judges are given tenure is so that they may remain impartial without the risk of ramifications when deciding against government agenda. Juries, consisting of lay people are also devoid of such pressures. 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. The NSW Parliament is not affectionately called the "Bear Pit" for nothing.

Moreover, there are certain circumstances which may ensue, that could see the jury unduly conflicted. For example, in the event that two MPs from opposing parties, or even a MP and a strong supporter from opposing parties, were to be placed on the same jury there is a possibility that they may lose sight of purpose for which they are present.

Separation of Powers/ Public Confidence

[10] Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors,* Discussion Paper No 99 (2009) 60.
[11] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14(1) (entered onto force 23 March 1976).
[12] Law Reform Commission of Western Australia, above n 10.

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 MPs 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. Although 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, and it would appear that there is no contention to the contrary. The NSWLRC however found that such a concern is not well founded on the basis that any appointment of MPs to a jury will only be in a private capacity.[13]

We would like to revisit the reason for the ineligibility provided to MPs by way of Statute in order to illustrate why we respectfully disagree. The UK Departmental Committee on Jury Selection attributed the need for this ineligibility as it stands, to those connected with the administration of law and justice, to the need to preserve the system's appearance of impartiality.[14] This 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. The Issue paper by the NSWLRC goes on to state that perhaps these persons should be entitled to excusal rather than ineligibility based on the fact that not all persons within these occupations will in fact have a conflict with every case,[15] but again this begs the question as to perception. Conflict does not have to exist, it is enough that there is a possibility that the public may perceive that there is.

Practicality

Even putting aside the issue of public perception, in order to determine which MP has a conflict with which case there would have to be separate procedure in place. The Law Reform Commission of Western Australia points out that in the USA that states that have abolished occupation-based exclusions from jury service, they have 'established and rigorous' jury selection practices in order to ensure that juries are in fact impartial and independent. This process allows jurors to be cross-examined extensively,[16] and the lengthy questioning of each potential juror for each case would make for a costly, time consuming and intrusive procedure.

In any case, it is likely that even with the ineligibility repealed, most MPs 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. The jury system would be undermined from within and the public would lose confidence in the system.

Conclusion

In conclusion, we believe it would be in the best interest of the NSW population for the current ineligibility for MPs to serve on juries to continue. The ineligibility as it exists today ensures that there is no conflicting interests in the decisions made by the courts, that MPs are not removed from reach of their constituents, that public confidence remains in the criminal justice system and that the procedure operates more efficiently at less cost to the taxpayer.

[13] New South Wales Law Reform Commission, above n 3, [4.26].
[14] NSWLRC, *Jury Service,* Issues paper No 28 (2006) [3.13].
[15] Ibid.
[16] Law Reform Commission of Western Australia, above n 10, 62.

Even if a possible uneven distribution of the burden of jury duty could be argued, it is not enough to outweigh the benefits of the continuing ineligibility. The public perception is paramount in retaining the current system as a loss of confidence in our jury system would have a flow on effect in other areas of the administration of justice.

Yours Faithfully

Paul Rogers