Chapter Two

The Juror Selection Process

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Selecting and summoning jurors

THE previous chapter provided a brief outline of the juror selection process for Western Australia. In this chapter the Commission considers the process in more detail: from the compilation of the lists of jurors liable to serve, through the out-of-court summoning and selection process to the final empanelment of a jury in a criminal trial.

COMPILATION OF JURY LISTS

Section 14 of the *Juries Act 1957* (WA) sets out the process for the compilation of lists of jurors for Western Australian trials. The process begins by the sheriff notifying the Electoral Commissioner of the number of jurors required for jury service in each jury district.

Under s 10 of the *Juries Act* a jury district is established for the Supreme Court in Perth (which also caters for District Court trials) and for each circuit court. Each jury district is made up of whole or part of an electoral district (or districts) of the Legislative Assembly.[1] There are 17 jury districts in Western Australia: three in the metropolitan area (Perth, Fremantle, Rockingham); four in the south west of the state (Busselton, Bunbury, Albany, Esperance); one in the south-east Goldfields region (Kalgoorlie); four in the mid- to north-west coastal area of the state (Geraldton, Carnarvon, Karratha, South Hedland) and three in the Kimberley region (Broome, Derby, Kununurra). A further two jury districts cover the federal territories of Cocos Islands and Christmas Island and are rarely used.[2]

On or about 1 March each year, the sheriff notifies the Electoral Commissioner of the juror quota[3] required for each of the 15 jury districts in regular use. The juror quota for the whole of Western Australia is approximately 225,000 people. Perth is by far the district with the largest juror quota at 120,000 people. The next highest is Albany with a quota of 12,000 potential jurors. Other districts are allocated a quota of between 3,000 and 10,000 jurors.[4] It is important to note that for four regional jury districts (Kununurra, Broome, Derby and Carnarvon) the required quota of jurors is never reached because there are not enough qualified electors in the relevant district. Because of this, the actual number of potential jurors for Western Australia each year is just over 200,000.[5]

Following notification from the sheriff, the Electoral Commissioner undertakes a computerised process to randomly select from the electoral roll the required number of jurors for each jury district.[6] Prospective jurors between the ages of 18 and 70 years[7] are identified and a jurors' list is generated for each jury district.[8] The lists are then returned to the sheriff[9] where a process

1. Jury districts are as proclaimed by the Governor and may be varied under the *Juries Act 1957* (WA) s 12. In most regional areas, the distance (between 50 and 80 km) from the courthouse determines how the jury district is defined and therefore which electors come within the jury district. A current list of defined jury districts can be found in *Government Gazette No 71 of 2009* (24 April 2009) 1384.
2. The Cocos (Keeling) Islands and Christmas Island are electoral districts of the Commonwealth division of Lingiari in the Northern Territory. The Australian Government Attorney-General's Department has overall responsibility for the territories including the provision of services delivered under arrangement with the Western Australian government. These services include court services administered by the Department of the Attorney General (WA). Juries are very rarely required in these two districts and when a trial is held there, a jurors' book is created from the Commonwealth electoral roll for Lingiari.
3. The juror quota for each jury district is determined by a calculation set out under the *Juries Act 1957* (WA) s 14(2a) and is based on an estimate of how many jurors the sheriff believes to be required for the jury district.
4. Information provided by the Western Australian Electoral Commission.
5. This issue is discussed further below under the heading 'Regional issues'.
6. The computer program's algorithm is set so that if there are two or more electoral districts in the jury district a proportionate number of jurors are selected from each electoral district. This avoids the potential for jurors to be concentrated from a single suburb, for example, in the metropolitan area.
7. For a discussion of the age requirement for liability for jury service, see below Chapter Three.
8. People who have been permanently excused from jury service by the sheriff (eg, for physical or mental incapacity), prisoners who are sentenced to a term of imprisonment of more than one year and people detained under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) are flagged on the Western Australian Electoral Commission's computer system and are not included in the electors randomly selected for jury service. A manual check of randomly generated juror lists is undertaken by the Western Australian Electoral Commission to ensure that those people who are 'flagged' are not included on the jurors' lists: Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, telephone consultation (15 June 2009).
9. The jurors' lists must be returned to the sheriff before 30 April of the same year: *Juries Act 1957* (WA) s 14(3).

is undertaken to check each prospective juror's name against the state criminal record database for relevant criminal convictions that could cause that person to be disqualified from jury service under s 5(b) of the *Juries Act*. Persons who are disqualified on this basis are removed from the relevant list.[10] Once the jurors' list for a district is settled, it is sent to that district's jury officer and becomes the 'jurors' book' for that district. This book is the source of prospective jurors for the relevant jury district for the whole of the imminent financial year.[11]

Requirement that jury lists be printed

During initial consultations for this reference the Western Australian Electoral Commission raised the point that under s 14(3) of the *Juries Act* the jury lists generated by the Electoral Commission for each district were required to be provided to the sheriff in printed form.[12] This was considered unnecessary given that the Sheriff's Office worked from the electronic copy of the jury lists (also provided by the Electoral Commission), which was transferred directly into the Jury Information Management System (JIMS) database. The jury manager confirmed that a printed hard copy of the jury lists served no useful purpose and was superfluous to requirements. The Commission therefore proposes that s 14(3) of the *Juries Act* be amended to permit the Electoral Commissioner to submit the lists for each jury district in electronic form (eg, by CD).

PROPOSAL 1

Remove requirement that jury lists be printed

That s 14(3) of the *Juries Act 1957* (WA) be amended to permit the Electoral Commissioner to submit the jury lists for each jury district to the sheriff in electronic form.

JUROR SUMMONING PROCESS

The sheriff or relevant jury officer is advised approximately six weeks in advance of the number of trials listed, their likely duration and the total number of accused. This information allows the sheriff to estimate the number of jurors required to be summoned to serve on those trials. Once there is an estimate of the potential jurors needed for a particular week, a random ballot is undertaken using the JIMS database to select the required number of people from the jurors' book for that district. In the metropolitan area, jury summonses are issued between four and five weeks prior to trial,[13] while courts in regional areas issue their juror summonses closer to the trial (approximately three weeks prior).[14]

Approximately 1000 juror summonses are sent by mail to potential jurors each week for Perth trials.[15] A copy of the standard form *Summons to Juror* is contained at Appendix C of this Discussion Paper. The document summarises the main grounds of ineligibility, lack of qualification and excuse under the *Juries Act*.[16] It informs recipients that if they wish to apply to be excused (whether as of right or for cause) or believe that they are ineligible or not qualified, they must complete the statutory declaration on the back of the summons and return it to the Sheriff's Office.[17] Potential jurors must supply evidence to support their claim for excuse for cause under Schedule 3 to the *Juries Act* (such as illness, undue hardship or recent jury service). All applications for excuse from jury service are assessed by summoning officers and the potential juror is advised in writing whether their application was successful or whether they need to provide further information to support their application.

Statistics provided to the Commission for the financial year 2008–2009 show that of 56,935 people summonsed to attend for jury service in Perth, 42,489 (74.63%) were excused from further attendance,[18] 13,602 (23.89%) attended for jury service and of these, 5,647 were selected and empanelled on a jury.[19] The number of people actually

10. Approximately 6–10 in every 1000 prospective jurors are disqualified for relevant criminal convictions. For further discussion of disqualification by criminal conviction, see Chapter Five.
11. Jury lists or jurors' books must be sent to jury officers in each jury district by 1 July of each year: *Juries Act 1957* (WA) s 14(10).
12. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, telephone consultation (29 June 2008).
13. Juries for criminal trials for the Supreme Court and the District Court sitting at Perth are selected from the jury pool summoned pursuant Part VB of the *Juries Act 1957* (WA).
14. Criminal trials in circuit courts utilise general jury precepts under the process enacted in Part VA of the *Juries Act 1957* (WA). Typically, general jury precepts are not issued until closer to the trial date when the circuit court sitting is confirmed.
15. The number of juror summonses can vary greatly between 800 and 1300 depending on the number of trials beginning in that week. Approximately 50 summonses each week are returned to sender either unopened or not known at that address. No separate enquiries are made regarding the current address of the potential juror.
16. The categories of ineligibility, lack of qualification and excuse are discussed in detail in the following chapters.
17. Statutory declarations must be witnessed by a justice of the peace or other authorised person under the *Oaths Affidavits and Statutory Declarations Act 2005* (WA).
18. This includes people who applied to be excused as of right or for cause as well as those people who were released from the obligation to serve for other reasons (eg, because they were disqualified or ineligible).
19. A further 720 (1.26%) of summonses were withdrawn: Sheriff's Office (WA), *Jury Information System Statistic Report: Juror usage 2008–2009.*

empanelled on a jury therefore represents approximately 10% of people summonsed for jury duty.

Withdrawal of juror summons

The Commission is told that in practice around 40% to 50% of trials 'fall over' either because they are adjourned to a later date or the accused pleads guilty before the trial. If the sheriff has sufficient notice of this and if he expects too many jurors to attend for the amount of trials listed for a certain week, a summons may be withdrawn. Potential jurors whose summonses are withdrawn are advised by letter that they are not required to attend for jury service and their name is restored to the jurors' book making them liable for random selection for further attendance during that year.[20]

The current process for withdrawing a summons is set out in the *Juries Act*. Section 32E of that Act provides that a reduction of the jury pool by withdrawal of summons must be done by manual ballot. This requires the summoning officer to create paper cards with jurors' numbers and draw them from a ballot box to reach the required number of jurors by which the general pool must be reduced. The Jury Manager has advised the Commission that significant time would be saved if this process were able to be performed by computer.[21] The Commission agrees that this is a desirable reform.

PROPOSAL 2

Withdrawal of juror summons

That s 32E(2) of the *Juries Act 1957* (WA) be amended to permit the summoning officer to randomly select names by computerised process for the purposes of reducing the number of persons required to attend the jury pool.

THE JURY POOL

Those people who are summonsed for jury service and who are not excused by virtue of the statutory declaration process must attend at the court to perform their civic duty. In Perth, jurors attend at the District Court where they are required to pass through a security check and are shown to the jury assembly room. At the jury assembly room the barcode on the person's summons is scanned and they are assigned an identification number. Once everyone is assembled, potential jurors are addressed by the jury pool supervisor and shown an informative 10-minute video about the in-court selection process and general matters pertaining to jury service.[22] The jury pool supervisor advises potential jurors about the process for payment or reimbursement of lost income and advises that henceforth they be known by their assigned number to protect their anonymity. People who wish to be excused from jury service are asked to approach a jury officer to have their excuse assessed. Very few people are excused at this stage.[23] Those who remain make up the general jury pool for all District Court and Supreme Court trials being held in Perth for that week.

THE JURY PANEL

A computerised random ballot is undertaken in the assembly room to establish the panel from which the jury will be selected for each trial beginning that day. At the time of the ballot potential jurors are usually told the type of trial that they are being selected for and its estimated duration. Any excuses based on the type or length of trial are dealt with by the judicial officer in open court.[24]

The size of the jury panel is generally determined on the basis of the estimated length of the trial,[25] the number of accused[26] and the number of reserve jurors required.[27] Section 32G of the *Juries Act* provides that unless otherwise ordered, the number of jurors in the panel should be 20 plus 'the number of peremptory challenges available to the accused person or persons in the trial'. In practice, a greater number may be ordered. For example,

20. *Juries Act 1957* (WA) s 32E.
21. Carl Campagnoli, Jury Manager (WA), telephone consultation (14 August 2009).
22. These include matters such as making the court aware of any conflict of interest, the process of empanelment (including challenges), choosing a foreperson and confidentiality of proceedings.
23. When the Commission observed the jury pool process in Perth, 22 people of a pool of 326 applied to be excused from jury service on the day and 17 of the 22 people were released from jury service.
24. Although prospective jurors are given the opportunity of putting reasons for seeking to be excused in writing. This is particularly successful in order to enable the court to deal with very personal excuses such as those concerning victims of similar crimes (for example, in a sexual assault case).
25. For lengthy trials the jury panel needs to be relatively large because prospective jurors are likely to seek to be excused for reasons associated with the trial's duration. In July 2009 the Commission observed the empanelment of a jury for a five-week trial. A total of 16 jurors were sworn to allow four reserve jurors in case of discharge of a juror. For this trial, a panel of 80 people were needed. In this instance, specific excuses associated with the length of the trial were not determined by the jury pool supervisor; instead prospective jurors were told that they should seek to be excused by the judge if their number was called by the clerk of arraigns in the in-court ballot.
26. Each accused has the right to peremptorily challenge (that is, challenge without cause) five prospective jurors. Where there is more than one accused the potential number of peremptory challenges is greater.
27. For some trials reserve jurors are empanelled in case a juror is unable to continue to serve (eg, due to sickness or if a juror recognises a witness called during the trial).

the Commission has been advised that usually for a trial estimated to take one to three days (involving only one accused) a panel of at least 26 is required.[28]

Once the jury panel has been selected by random ballot from the total jury pool, it is assembled in the relevant courtroom. The jury panel is accompanied by a jury officer who provides the court with the pool precept and an attached list of the names and identification numbers of all persons in the jury panel.[29] The in-court selection process is then undertaken. Those members of the panel who are not selected for jury service in the trial may be returned to the general jury pool to attend on another day that week to enable possible selection for another trial.

28. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
29. *Juries Act 1957* (WA) s 32H.

Empanelment of a jury

IN-COURT SELECTION PROCESS

When the jury panel is assembled in the courtroom, individual cards showing the identification numbers of members of the jury panel are provided to the clerk of arraigns – these cards are placed into a ballot box for the purpose of the in-court selection process. Although the court is also provided with the names of the persons in the jury panel, members of the jury panel are referred to in open court by their identification number.[1]

Prior to empanelment of the jury, the clerk of arraigns reads the indictment and asks the accused to enter his or her plea. At this stage, the accused, defence counsel and the prosecutor are identified. The trial judge then addresses the jury panel informing them that they are required to disclose any prior knowledge of or association with the case, the accused, the lawyers, the judge or any witness. Prior to this stage, and pursuant to s 32FA(1) of the *Juries Act 1957* (WA), the jury pool supervisor would have already advised the entire jury pool of the matters that they are required to disclose (to the jury pool supervisor or to the court) as set out in the Fourth Schedule. The Fourth Schedule provides that prospective jurors are required to disclose:

> Any incapacity by reason of disease or infirmity of mind or body, including defective hearing, that may affect the discharge of the duty of a juror.
>
> Lack of understanding of the English language.
>
> Any family relationship with, any bias or likelihood of bias by reason of being acquainted with, or employed by the judge or any legal practitioner engaged in the trial, and in the case of a civil trial, the plaintiff or defendant in the trial, and in the case of a criminal trial, the prosecutor or accused in the trial, or with the victim of the crime in question.
>
> Any other reason why there may be bias or likelihood of bias.

Clearly, issues of potential bias may not be apparent until such time as the jury panel is informed of the name of the accused, the identity of the lawyers and judge involved in the trial and the names of witnesses to be called. After the accused is arraigned but before the jury is empanelled the prosecutor reads aloud the names of witnesses to be called by the state. Witnesses who are police officers are separately identified as such. Counsel for the accused may (but is not required to) read out any witnesses to be called for the defence.[2] The judge also advises prospective jurors that if for personal reasons they feel that they will be unable to serve (eg, if a prospective juror was a victim of sexual assault and the current trial involves a sexual offence) they can disclose this information in a more private manner (eg, by providing a written note to the judge). It is important to note that the procedure for enabling jurors to disclose bias is not foolproof – a juror may not voluntarily disclose bias or may not consciously recognise bias when it exists.

The trial judge is also entitled to excuse a prospective juror from attendance on the basis of illness; undue hardship to the juror or another person; circumstances of sufficient weight, importance or urgency; or recent jury service.[3] In practice, most prospective jurors will seek to be excused at an earlier stage (ie, in response to the summons or upon attendance at the jury assembly room). However, prospective jurors may seek excusal in court, especially for long trials. The Commission understands that for long trials the practice is for the trial judge rather than the jury pool supervisor to consider excuses that relate to the length of the trial. Until the ballot to select the jury panel is undertaken, members of the jury pool do not know which courtroom or trial they will attend. There is no point in deciding excusals based on the length of trial until such time as the membership of the jury panel for that particular trial is known.

Ballot

The in-court ballot to select the jury is undertaken by the clerk of arraigns drawing a card and calling aloud the identification number. The person whose identification number is called is asked to proceed to the jury box. This person enters the first seat in the jury box, unless he or she is excused or is challenged by either the accused or the prosecution. This process continues until the required number of jurors is seated and all of the jurors are sworn.[4] If seeking to be excused the person will address the trial judge before taking his or her seat in the jury box and explain the reason for seeking to

1. *Juries Act 1957* (WA) s 36A.
2. See *Vella v The State of Western Australia* [2007] WASCA 59 [58] (Wheeler JA).
3. *Juries Act 1957* (WA) s 32 and sch 3.
4. *Juries Act 1957* (WA) s 36.

be excused. If excused, the person will return to sit in the back of the court. Those people who are excused or challenged or who have not been called in the ballot may still be required for further trials.

Challenges

The accused and the prosecution are entitled to challenge prospective jurors. Currently, there are two forms of challenge available in Western Australia: challenge for cause and peremptory challenge.[5] A peremptory challenge is sometimes also referred to as a challenge without cause (in other words, no reason has to be given by the party making the challenge).

Section 104(5) of the *Criminal Procedure Act 2004* (WA) sets out the basis for making a challenge for cause – the prosecutor or the accused may challenge a juror on the grounds:

> (a) that the juror is not qualified by law to act as juror; or
> (b) that the juror is not indifferent as between the accused and the State of Western Australia.

Section 104(6) provides that:

> If it is necessary to decide any fact for the purposes of determining a challenge made under subsection (5), the fact must be decided by the trial judge on any evidence and in any manner he or she thinks just.

In order to challenge for cause there must be some factual basis for believing that the individual juror is not qualified or is not impartial.[6] It is only once the challenge is made that the individual juror may be questioned in order for the trial judge to determine whether the challenge should be upheld. Each party has an unlimited number of challenges for cause.

It appears that, although available in every Australian jurisdiction, challenges for cause are rarely used.[7] The main reason for their limited use is that the parties to criminal proceedings have very little information about prospective jurors upon which to base such a challenge. In Australia, at the most, the parties are aware of the names, addresses and occupations of prospective jurors and the prosecution may also know if any member of the jury panel has a criminal history.[8] In contrast, in the United States prospective jurors are subjected to extensive questioning in order to determine the existence of any bias or any reason to suggest that the jurors are not qualified for jury service.[9] For example, jurors can be questioned about their 'marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests'.[10]

In addition, the challenge for cause process is arguably underused because it is easier and faster to challenge a juror without giving any reason (by peremptory challenge). Irrespective of whether the challenge for cause process is difficult in practice, it is clear that its rationale is appropriate. Consistent with the Commission's Guiding Principle 1 (that jurors should be independent, impartial and competent) a person who is not qualified or who is not impartial should be excluded from jury service.

Peremptory challenges, on the other hand, are more controversial. They are made without any reason or explanation being given and hence it is difficult to know in any particular case why they are made. Peremptory challenges have been subject to recent criticism in Western

5. Previously, a third form of challenge was available: challenge to the array. Challenge to the array is a challenge to the whole jury panel on the basis that the summoning officer was related or connected to the parties or biased: McCrimmon L, 'Challenging a Potential Juror for Cause: Resuscitation or requiem?' (2000) 23 *University of New South Wales Law Journal* 127, 129. Challenge to the array is no longer available in Western Australia having been abolished by s 104(1) of the *Criminal Procedure Act 2004* (WA): *Hunt v The State of Western Australia* [2008] WASCA 210, [112] (Murray AJA). It is still available in most Australian jurisdictions. However, because random computerised selection processes are used by summoning officers it appears to be rarely, if ever, used: Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 48.
6. See eg, *Murphy v R* [1989] HCA 28, [24] (Mason CJ & Toohey J); *Colbung v The State of Western Australia* [2006] WASCA 239, [11].
7. See Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 48; Queensland Criminal Justice Commission (QCJC), *The Jury System in Criminal Trials in Queensland*, An Issues Paper (1991) 17. The Commission was advised by one Western Australian Supreme Court judge that he had never personally seen a challenge for cause: Justice McKechnie, consultation (19 December 2007). Statistics were provided to the Commission showing the total number of challenges exercised in the first six months of 2009; however, the distinction between peremptory challenges and challenges for cause is not recorded: Carl Campagnoli, Jury Manager (WA), correspondence (27 July 2009).
8. For discussion about the information available, see below, 'Jury Vetting'
9. It is noted that in the United States, jury questioning is time consuming, and arguably very intrusive. The process can last for a number of days: Lord Justice Phillips, 'Challenge for Cause' (1996) 29 *Victoria University Wellington Law Review* 479, 482. Also, the voir dire process in the United States has led to development of jury experts who advise lawyers in the jury selection process: see Darbyshire P, Maughan A & Stewart A, *What Can the English Legal System Learn from Jury Research Published up to 2001?* Kingston University Occasional Paper Series No 49 (2002) 10.
10. Bamberger P, 'Jury Voir Dire in Criminal Cases' [2006] *New York State Bar Association Journal* 24, 25.

Australia and there have been calls for their abolition.[11] In general terms, it is suggested that peremptory challenges are made by the parties to 'stack' the jury in their favour and that they are exercised on the basis of inaccurate and stereotypical views about different groups in the community. Significantly, peremptory challenges are exercised far more frequently than challenges for cause. Therefore, peremptory challenges have much greater impact upon the final composition of the jury and, bearing in mind the recent criticism, the Commission examines peremptory challenges in greater detail below.

Discharge

After the jury has been sworn it is still possible that one or more jurors will be discharged and will not form part of the final jury who decides the verdict. This is why additional jurors are sometimes required.[12] If one or more jurors are discharged, the presence of additional jurors will mean that the trial can continue with a sufficient number of jurors to reach a decision.[13]

The trial judge has the power to discharge an individual juror before the jury delivers its verdict if satisfied that the juror 'should not be required or allowed to continue in the jury'.[14] For example, the possibility of bias may be apparent because a juror recognises a witness by appearance or a previously undisclosed defence witness; or a juror may become seriously ill or experience personal hardship during the trial. This power can only be exercised as long as at least 10 jurors will remain.[15] The entire jury may also be discharged before the jury gives its verdict if the trial 'judge is satisfied that it is in the interests of justice to do so'.[16]

PEREMPTORY CHALLENGES

At common law in England there were originally 35 peremptory challenges available to an accused. This number was reduced at various intervals by legislation until peremptory challenges were eventually abolished in England in 1988.[17] Presently, peremptory challenges are available in all Australian jurisdictions; however, the number available has generally declined over time.[18]

Historically, the prosecution did not have the right to peremptorily challenge. Instead, the prosecution could stand aside a prospective juror. If stood aside, the juror could still be required to serve if there were insufficient numbers remaining in the panel for selection. The prosecution's right to stand aside was similar to the accused's right to peremptory challenge; however, the prosecution's right was unlimited in number. Further, if all of the other potential jurors in the panel were exhausted the prosecution would then be required to provide a reason for its challenge (if maintained). It has been observed that, in practice, the right to stand aside gave the prosecution an advantage and the ability to strongly influence the jury's composition.[19] The prosecution's right to stand aside remains in England (despite the abolition of peremptory challenges) but it is now fairly restricted.[20]

When originally enacted, the Western Australian *Juries Act* provided that each party to criminal proceedings had the right to challenge six jurors peremptorily, but if there were two or more accused, each accused had the right

11. For example, it has recently been reported that Robert Cock, the former Western Australian Director of Public Prosecutions, has called for the abolition of peremptory challenges because they can be used by both the defence and prosecution to 'mould' a jury: Cardy T, 'Lawyers Face Ban: Stop dumping of jurors: DPP', *The Sunday Times*, 14 June 2009, 17. See also Banks A, 'Juror Challenge Limits Planned', *The West Australian,* 13 May 2009, 13.
12. Section 18(1) of the *Juries Act 1957* (WA) provides that a jury is to be made up of at least 12 but not more than 18 jurors. The number is to be determined by the trial judge. If at the time the jury is required to deliberate and consider its verdict there are more than 12 jurors, 11 jurors are to be selected by ballot to retire with the foreperson to consider the verdict.
13. Generally there must be 12 jurors remaining to consider the verdict. The verdict must be unanimous unless after deliberating for more than three hours a unanimous verdict cannot be reached. In that case, the verdict must be agreed on by at least 10 jurors: *Criminal Procedure Act 2004* (WA) s 114. However, in a trial for murder there must be unanimous verdict. Also, for federal offences the verdict must be unanimous: see *Cheatle v R* [1993] HCA 44.
14. *Criminal Procedure Act 2004* (WA) s 115.
15. The 'verdict of the remaining 10 or more jurors has the same effect as if the whole jury had continued to be present': *Criminal Procedure Act 2004* (WA) s 115(3).
16. *Criminal Procedure Act 2004* (WA) s 116: see further below 'Power to discharge whole jury'.
17. Gobert J, 'The Peremptory Challenge – An Obituary' [1989] *Criminal Law Review* 528, 529.
18. For example, in the mid 1980s the number of peremptory challenges in New South Wales was reduced to three. Prior to this, there were 20 peremptory challenges available in a murder trial and eight for other offences. Prior to 1995, the number of peremptory challenges available in Queensland was 23 for treason, 14 for murder and eight for all other offences. Since 1995 the number of peremptory challenges has been eight for all offences. It is also noted that in 2008, the number of peremptory challenges in New Zealand was reduced from six to four despite an earlier recommendation of the New Zealand Law Commission to the contrary: see NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [234].
19. See McEldowney J, 'Stand By For the Crown: An historical analysis' [1979] *Criminal Law Review* 272.
20. The Attorney General must personally authorise the exercise of the right to stand aside in cases where there is a sufficient security risk or risk of undue influence and the case involves terrorism or national security. Further, the prosecution can stand aside a juror who is 'manifestly unsuitable' if the defence agrees: Attorney General Practice Note [1988] 3 All ER 1086.

to peremptorily challenge three jurors. So, if there were two accused the prosecution and defence had an equal number of peremptory challenges but if there were three or more accused, the number of peremptory challenges available to the prosecution would have been less than the total available to all accused. However, at this time the prosecution also had an unlimited right to stand aside prospective jurors. In 1973, the *Juries Act* was amended so that the total number of peremptory challenges for each party was increased to eight. But, where there were two or more accused, each accused only had six peremptory challenges. The prosecution also had the right to stand aside four prospective jurors.[21] In 2000 the number of peremptory challenges for each party was reduced to the present day limit of five.[22] The prosecution no longer has the right to stand aside prospective jurors.

The number of peremptory challenges available to the accused and the prosecution ranges from three each in New South Wales[23] and South Australia[24] to eight each in Queensland[25] and the Australian Capital Territory.[26] With five peremptory challenges for each party, Western Australia is in the middle of this range.[27]

21. *Juries Act Amendment Act 1973* (WA) s 23.
22. *Jury Amendment Act 2000* (WA) s 9.
23. Also, each party has an additional peremptory challenge if reserve jurors are to be selected. And there are an unlimited number of peremptory challenges that can be made by consent: *Juries Act 1977* (NSW) s 42.
24. But if there is more than one accused, each accused has the right to three peremptory challenges: *Juries Act 1927* (SA) ss 61 & 65.
25. The prosecution and the accused also have one additional peremptory challenge if one to two reserve jurors are to be selected or two additional peremptory challenges if three reserve jurors are to be selected. If there is more than one accused, each accused is entitled to eight peremptory challenges and the prosecution is entitled to the same number as the total available to all accused: *Jury Act 1995* (Qld) s 42.
26. In the Australian Capital Territory the prosecution and the accused each have eight peremptory challenges (and more if reserve jurors are to be called): *Juries Act 1967* (ACT) s 34.
27. It is noted that in Tasmania the accused has the right to peremptory challenge six jurors plus the right to peremptory challenge one extra juror if reserve jurors are selected. The prosecution does not have any right to peremptory challenge but it has an unlimited right to stand aside prospective jurors: *Juries Act 2003* (Tas) ss 34 & 35. Section 38 of the *Juries Act 2000* (Vic) provides that the prosecution may stand aside six jurors if there is one accused, 10 jurors if there are two accused; and four jurors for each accused if there are three or more accused. This equates to the accused's entitlement to peremptory challenge under s 39 – an accused has six peremptory challenges but if there are two accused, they each have five peremptory challenges and if there are three or more accused, they each have four peremptory challenges. In the Northern Territory the prosecution and the accused are permitted 12 peremptory challenges if the offence is a capital offence (ie, where the penalty is mandatory life imprisonment) and otherwise six peremptory challenges each: *Juries Act* (NT) s 44(1). The prosecution also has the right to ask the judge to stand aside six jurors (s 43).

Procedures and rules in Western Australia

If a trial involves one accused, the prosecution and the accused will each have the right to make five peremptory challenges. However, if there is more than one accused the total number of peremptory challenges available will increase. For example, if there are three co-accused they will have (between them) the right to a total of 15 peremptory challenges but the prosecution will still only have a total of five peremptory challenges. Some other Australian jurisdictions differ in this regard: in Queensland the prosecution has the same number of peremptory challenges as the combined total available to all co-accused and in Victoria the prosecution's right to stand aside is equal in number to the total number of peremptory challenges available to all co-accused.[28]

A peremptory challenge must be made before the juror is sworn.[29] In practice some jurors are challenged when they are first called and others are challenged after the required number of jurors is seated but before the individual juror begins to recite the oath or affirmation. In some jurisdictions jurors must be challenged before they are seated,[30] while others (like Western Australia) enable the whole jury to be seated (and considered) before a challenge is made.[31]

While a peremptory challenge requires no justification or explanation to be given, there are a number of possible reasons for exercising the right to a peremptory challenge. For example, a peremptory challenge may be made:

- to remove jurors who are considered to be potentially biased against the party making the challenge or biased in favour of the other party;
- to remove jurors who do not appear to be capable of jury service;
- to remove jurors who appear disinterested or resentful about being selected; or
- because a party simply does not feel comfortable about the particular person being selected.

Available information about prospective jurors

Under s 30 of the *Juries Act* a copy of the jury pool list must be available for inspection by the parties and their lawyers four clear days before the day of the trial.

28. *Juries Act 2000* (Vic) s38; *Jury Act 1995* (Qld) s 42.
29. *Criminal Procedure Act 2004* (WA) s 104(2). Pursuant to s 102 a juror is taken to be sworn at the time when the relevant court officer begins to recite the words of the oath or affirmation or the juror begins to recite the oath or affirmation.
30. *Juries Act 2000* (Vic) ss 38 & 39; *Juries Act 1967* (ACT) s 35; *Juries Act 1927* (SA) s 64.
31. *Juries Act 2003* (Tas) s 29(8); *Jury Act 1995* (Qld) s 44; *Juries Act 1977* (NSW) s 45;

This list contains the names, addresses and usually the occupations of those people included on the list.[32] Rule 57 of the Criminal Procedure Rules 2005 provides that a lawyer from the Office of the Director of Public Prosecutions (DPP) may obtain a copy of the jury pool list upon signing an undertaking (Form 18). Other lawyers (ie, defence lawyers) may also obtain a copy of the jury pool list upon signing a different undertaking (Form 19).

The main difference between these two undertakings is that lawyers employed by the DPP are entitled to copy the list and to provide a copy to others employed in their office. Further, DPP lawyers are entitled to disclose the contents of the jury pool list to the DPP, to lawyers instructed by the DPP, and to the Western Australia Police for the purpose of determining if any persons included in the list have a criminal record. Accordingly, disclosure of the contents of the jury pool list to the victim or other prosecution witnesses is not authorised under these Rules. In contrast, defence lawyers are not entitled to copy the list at all and are only entitled to divulge the contents of the list to the accused and to other lawyers acting for the accused.

Thus, in summary, the prosecution potentially knows the identity, address and occupation of each prospective juror and whether the prospective juror has any previous criminal convictions.[33] The defence knows the name, address and occupation (if it is recorded) of each person on the jury pool list. Of course, both the prosecution and the defence may glean information about prospective jurors from observing them in court prior to and during empanelment. Significantly, physical observation may reveal that a particular juror is known to the accused or to counsel. The extent of information about prospective jurors that should be available to the prosecution and the accused for the purpose of making a challenge is considered in more detail below.[34]

How is the right to peremptory challenge exercised?

Despite the fact that the right to peremptory challenge belongs to the accused, it is usually exercised by counsel. Under s 103 of the *Criminal Procedure Act,* the accused must be informed of his or her right to challenge jurors. In practice, counsel informs the judge that the right to challenge has been explained to the accused and that counsel has been instructed to exercise the right to challenge on the accused's behalf. Even so, the judge will confirm that the accused understands that he or she may still exercise the right personally. In practice, it is rare to see an accused personally challenge a juror.[35] In a 1993 study in New South Wales it was observed that in only two out of 10 trials did counsel confer with the client during the empanelment process.[36]

In *Johns v R* [37] Barwick CJ observed that:

> No doubt, in deciding whether or not to exercise the right of challenge, an accused may profit by the views of counsel. But, even so, he may prefer his own instinctive reaction to the person he sees to the experience or theories of the advocate. It is his peculiar right to follow his own impressions and inclinations.[38]

It was further suggested by Barwick CJ that counsel should stand near the dock to assist the accused in exercising his or her right to challenge.[39] The Commission agrees that it would be entirely appropriate for defence counsel (or the instructing solicitor) to stand near the dock during empanelment so that the accused can have direct input into the juror selection process. It is also noted that prior to empanelment, defence counsel will have already met with the accused and discussed the jury pool list. If the accused recognises a name on the list, he or she may instruct counsel to challenge that particular juror if selected. However, it is important for the accused to be able to advise counsel if he or she recognises a juror by sight or notices mannerisms or behaviour that suggest possible bias or a lack of competence.

Do peremptory challenges undermine impartiality, representativeness and randomness?

The main criticism against peremptory challenges is that they undermine three important goals of jury selection: impartiality, representativeness and randomness. The Commission's first two Guiding Principles for reform dictate that juries should be impartial, randomly selected and broadly representative of the community.[40] Impartiality is, to a large extent, attained by random selection (because jurors are not chosen by the accused or by the state) and by ensuring a broadly representative jury to counteract individual prejudices.[41] However, peremptory challenges may potentially result in a jury

32. The Commission proposes below that this list should only contain the locality address (ie, suburb or town) see Proposal 5.
33. Not all prior convictions will disqualify a person from serving on a jury. For further discussion of disqualifications based on criminal history, see Chapter Five, 'Criminal history'.
34. See below, 'Jury vetting'.
35. NSWLRC, *Jury Selection*, Report No 117 (2007) 177.
36. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 49–50.
37. [1979] HCA 33.
38. Ibid [20].
39. Ibid [33].
40. See above Chapter One, 'Guiding principles for the reform of the jury selection process'.
41. See above Chapter One, 'Objectives of juror selection'.

that is clearly unrepresentative and possibly biased against one party.

In England, the main reason for abolishing peremptory challenges was concern that defence counsel were 'stacking' the jury with those who were believed to be favourable to their case.[42] The New South Wales Law Reform Commission (NSWLRC) observed in its 1986 report that:

> The use of the right of peremptory challenge may serve to cut across the principles of representativeness … and the important functions which they serve. It is desirable that the jury express the conscience of the entire community, not just the conscience of those 'least obnoxious to the parties to the litigation'. The object of the process of jury selection should be to pick 12 people who can be fair. It should not be a tactical manoeuvre by which each side tries to secure the 12 most sympathetic jurors from their particular point of view.[43]

In relation to prosecutors, the practice of vetting jurors for criminal records[44] enables the prosecution to peremptorily challenge jurors who are believed to be biased against the police and who are, therefore, more likely to favour the accused. In addition, it has been suggested that Aboriginal jurors have been challenged in cases involving an Aboriginal accused.[45] More recently, the Commission has been told of an example in Western Australia where peremptory challenges were exercised to obtain an all-male jury. It was also explained that this type of manipulation is more likely in cases involving more than once accused.[46] Because the prosecution in Western Australia does not have an equal number of peremptory challenges to the number available to all accused, it is possible for co-accused to 'join forces' in an attempt to obtain a particular jury composition.

However, just as peremptory challenges can potentially be exercised in order to achieve a partial and unrepresentative jury, they can equally be exercised in order to ensure impartiality and representativeness. In this regard, it has been observed that peremptory challenges are 'one of the principal safeguards of an impartial jury'.[47] Importantly, random selection does not a guarantee an impartial and representative jury. As the Auld Review in England in 2001 observed, '[n]ot only does randomness not equal representativeness [it] can result in juries in individual cases being grossly unrepresentative'.[48]

Thus, in terms of safeguarding the representative nature of the jury, one party can exercise its peremptory challenges to redress the balance if those who have already been randomly selected do not appear to be broadly representative of community.[49] For example, if the first 10 jurors who have been sworn are all female, and the 11th juror (who is about to be sworn) is also female, one of the parties can peremptorily challenge that juror in order to try to achieve a jury with some male representation. The Commission notes that the DPP Guidelines support this approach by providing that it is 'reasonable to challenge in order to ensure that the jury is properly representative of the community'.[50]

It is also important to emphasise that the right to peremptorily challenge does not involve a right to choose a particular juror but instead the right to object to a particular juror. Therefore, if so-called jury stacking occurs it can only be done by default. For example, if defence counsel believes that young jurors will be more favourable to the accused's case, he or she cannot select or choose young jurors. Defence counsel can only challenge older jurors hoping that the final jury will be predominantly younger. And, assuming an equal number of peremptory challenges, it will always be possible for the prosecution to counteract such tactics by challenging younger jurors.

Further, while peremptory challenges may appear to infringe the principle of random selection to some extent—because the parties have direct input into the selection process—the final jury selected in any given trial is always comprised of people who have in fact been randomly selected. The degree of influence over the selection of jurors is limited to those who do not serve. Similarly, the out-of-court selection process equally compromises random selection by determining who cannot or will not serve on a jury. For example,

42. Gobert J, 'The Peremptory Challenge – An Obituary' [1989] *Criminal Law Review* 528, 532.
43. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.61]. In its more recent report the NSWLRC did not recommended its abolition but instead suggested that 'its use be monitored with a view to its eventual abolition if it is assessed as not serving any legitimate purpose': NSWLRC, *Jury Selection*, Report No 117 (2007) 175.
44. See below 'Jury Vetting'.
45. See NSWLRC, *Jury Selection*, Report No 117 (2007) 178; Vodanovich I, *The Criminal Jury Trial in Western Australia* (PhD Thesis, University of Western Australia, 1989) 88; 'White Jury Discharged' [1981] *Aboriginal Law Bulletin* 23.
46. Judge Mazza, consultation (19 December 2007).
47. Gobert J, 'The Peremptory Challenge – An Obituary' [1989] *Criminal Law Review* 528.
48. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 155.
49. Gobert J, 'The Peremptory Challenge – An Obituary' [1989] *Criminal Law Review* 528, 532. See also NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.62].
50. See DPP, *Statement of Prosecution Policy and Guidelines* (Perth, 2005) 19. It is also provided that it is reasonable to challenge to if there are grounds to believe that the prospective juror may not be impartial and, further, that 'no attempt should be made to select a jury that is unrepresentative as to race, age or sex'.

the legislative criteria in relation to qualification and the provision to be excused from jury service removes from the jury pool some people who have been 'randomly selected' in the original ballots. In this regard, it has been argued that the legislative criteria for eligibility and disqualification and the granting of excusals from jury service in England did 'far more to distort the random quality of juries than the [previous] maximum of three peremptory challenges' available to the accused.[51]

Significantly, peremptory challenges can be used to object to a juror who is known to the accused (or a witness, lawyer or other person involved in the trial) or if a particular juror behaves in such a way as to suggest possible bias or incompetence. However, the challenge for cause process may be available in these situations so its utility should be considered.[52]

The alternative: challenge for cause

Although the right to challenge for cause is available to object to jurors who are believed to be biased or incompetent, it is problematic. A specific factual basis must exist in relation to an individual juror in order to challenge for cause.[53] The Queensland Criminal Justice Commission observed that 'a challenge for cause is specifically designed to eliminate jurors known to be biased' whereas a 'peremptory challenge is used to eliminate jurors who may be merely suspected of bias'.[54] There may be reasons for suspecting that a prospective juror *might* be biased but this is unlikely to be sufficient to justify a challenge for cause. For example, in *Georgiadis (No 2)*[55] a number of accused were charged with conspiring to take abalone in excess of the number allowed under the relevant law. Some of the accused sought information about the occupations of prospective jurors in order to determine if any of the jurors were involved in the fishing industry. It was stated that even if it were known that one or more of the prospective jurors was a professional fisherman that would not be a sufficient basis for a challenge for cause. It was also observed that

> There is no reason to suppose, absent specific statements or other evidence, that a farmer will not impartially try another farmer charged with stealing cattle. For that matter there is no reason to suppose that a householder who has been the victim of a burglary, will bear malice to an accused charged with that crime.[56]

While peremptory challenges are sometimes criticised because they are embarrassing and confusing for jurors[57] (because they do not know why they have been challenged), a challenge for cause is potentially far more embarrassing and difficult. For example, a juror might be challenged for cause because of a past association with the accused or a witness, or because of apparent incompetency due to mental illness. Alternatively, the parties may be aware of personal information about the juror (eg, that one of the jurors was a victim of a sexual offence in the past or had used illicit drugs). Significantly, challenges for cause require reasons for the challenge to be stated in open court. As the New Zealand Law Commission (NZLC) observed:

> One advantage which peremptory challenges have over challenges for cause is that the latter are more demeaning, as counsel must publicly articulate their reasons for asserting a jurors' unsuitability. Prior to empanelling, some judges explain to the jurors the peremptory challenge process and tell them that the reasons for challenge are not to be regarded as personal. This takes most of the sting out of peremptory challenges, and the Commission would endorse this practice.[58]

In the Western Australian context it is important to highlight that jury trials are held in a number of regional locations. The potential for challenges for cause is greater in smaller regional towns because prospective jurors are more likely to be known to the parties or the parties are more likely to be aware of personal information about prospective jurors.[59]

Relying on challenges for cause, instead of peremptory challenges, to eliminate bias would be more resource intensive and hence costly (for the accused and for the state). Although it has been suggested that peremptory challenges waste resources because a larger jury pool is required, challenges for cause are more time consuming because they require jurors to be questioned (after the challenge is made), legal argument to be presented and a decision to be reached.

51. Gobert J, 'The Peremptory Challenge – An Obituary' [1989] *Criminal Law Review* 528, 532.
52. See NSWLRC, *Jury Selection*, Report No 117 (2007) 179 where the argument was noted that peremptory challenges are unnecessary because other forms of challenge are available.
53. *Murphy v The Queen* (1989) 167 CLR 94,103–4 (Mason CJ & Toohey J).
54. QCJC, *The Jury System in Criminal Trials in Queensland*, An Issues Paper (1991) 18.
55. [2001] TASSC 48.
56. *R v Georgiadis* [No 2] [2001] TASSC 48 [18].
57. See eg, NSWLRC, *Jury Selection*, Report No 117 (2007) 175–6. The Jury Manager in Western Australia advised the Commission that many jurors complain about the peremptory challenge process despite being advised about it before empanelment and told not to take it personally: Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
58. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [226].
59. In this regard, it has been observed that in smaller locations the right to peremptory challenge 'is more meaningful': QCJC, *Report by the Honourable WJ Carter QC on His Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen* (1993) 480.

Nonetheless, the Commission acknowledges that it is impossible to predict exactly what would happen to the process of challenge for cause if peremptory challenges were abolished. Presently, challenges for cause are rarely used and it is likely that the challenges for cause are underused because it is far easier to use peremptory challenges. So, arguably, if peremptory challenges were to be abolished in Western Australia there may be an increase in the use of challenges for cause. It is not suggested that the abolition of peremptory challenges would automatically lead to a voir dire jury selection process (as used in the United States). This would only occur if the law was changed to enable jurors to be questioned or cross-examined *before* a challenge for cause is made.[60]

The Commission notes that such a provision exists in Queensland but its scope is limited. Section 47 of the *Jury Act 1995* (Qld) enables an application to be made to the judge to allow jurors to be questioned at the final stage of the selection process to determine if there is any bias. But there must be a special reason, such as pre-trial publicity. Generally, the application must be made three days before trial commences and jurors can be questioned by the judge (individually or as a group) and the parties may be given leave to cross-examine. While rejecting an extensive jury voir dire system, the NSWLRC recommended in 1986 that the *Juries Act 1977* (NSW) should be amended to enable the judge to question jurors about their occupation or residential location in cases where that information may have a bearing on their suitability as jurors. And, further, if the answers demonstrated that the person would be unsuitable that should be sufficient to enable a challenge for cause to be made.[61] A Western Australian Supreme Court judge has suggested to the Commission that challenges for cause should be easier to make; that counsel should have access to up-to-date occupations; and that judges should have limited power to question prospective jurors.[62] It is quite possible that if peremptory challenges were to be abolished in this state, there would be calls for an expanded right to challenge for cause. At the very least, it is likely that the challenge for cause process in Western Australia would be used and tested far more frequently.

60. When peremptory challenges were abolished in England in 1988, fears that a voir dire jury selection process would develop appear to have been unfounded (mainly because under English law questioning of prospective jurors is not allowed): Buxton R, 'Challenging and Discharging Jurors' [1990] *Criminal Law Review* 225, 226. See also Lloyd-Bostock S & Thomas C, 'Decline of the "Little Parliament": Juries and jury reform in England and Wales' (1999) 62(2) *Law and Contemporary Problems* 25–6.
61. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986) Recommendation 60.
62. Justice McKechnie, consultation (19 December 2007).

Other criticisms of peremptory challenges

It has also been argued that peremptory challenges are objectionable because they are founded on false assumptions and stereotypical views (eg, perceptions about behaviour based on age, gender or race).[63] In a study of the Western Australian jury system in 1989 it was noted that:

> Experienced criminal lawyers consider it to be very much an individual thing often based on nothing more than a 'gut feeling'. More often than not, this feeling is a snap reaction to a person's sex, race, appearance or demeanour. To the experienced legal eye, things like age, occupation, clothes, grooming and even lapel badges can be important.[64]

Judge Valerie French has questioned the appropriateness of peremptory challenges noting that potential jurors 'with management experience, small business operators, accountants and teachers are routinely excluded' because it is considered that these groups are too conservative or too informed.[65]

However, predicting the likely behaviour of particular groups of jurors is inherently unreliable because

> [i]t is extremely difficult to predict the response or behaviour of a given individual to a concrete situation on the basis of such gross characteristics as occupation, education, sex or age. In any given situation what a person thinks or does is a function of who he is, the exigencies of the situation, how strongly he feels about the problem, and a host of other factors.[66]

Yet, those who claim that peremptory challenges are based on inaccurate assumptions and stereotypical views are arguably also making assumptions because it is difficult to know from an outsider's point of view why a particular juror may have been challenged. A 1993 study in New South Wales examined the empanelment process of 10 criminal trials over a two-month period. It was observed that sometimes peremptory challenges appeared to be exercised on an illogical and arbitrary basis. For example, defence counsel often challenged prospective jurors who might be considered 'conservative' such as people wearing business suits or middle-aged men and the prosecution challenged young people and people who appeared to belong to the same social grouping as

63. See NSWLRC, *Jury Selection*, Report No 117 (2007) 176–7; Duff P & Findlay M, 'Jury Reform: of myths and moral panics' (1997) 25 *International Journal of the Sociology of Law* 363, 373.
64. Vodanovich I, *The Criminal Jury Trial in Western Australia* (PhD Thesis, University of Western Australia, 1989) 96.
65. French V, 'Juries – A Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System' (2007) 90 *Reform Journal* 41
66. Simon RJ, *The Jury and the Defence of Insanity* (Boston: Little, Brown & Co, 1968) 118, as cited in NZLC, *Juries in Criminal Trials*, Preliminary Paper No 31 (1998) Pt 1, 60.

the accused. Nonetheless, it was also noted that in some instances lawyers appeared to challenge a juror for the abovementioned reasons yet failed to challenge another juror with the same characteristics. It was concluded that overall the 'gender, ethnicity, and the age of the jury seemed very often to be only minimally altered after the peremptory challenge process had run its course'.[67] Further, while it was stated that the peremptory challenge process does not seem to achieve its intended purpose (ie, to secure an impartial jury), it was also acknowledged that the researchers did not always know why a juror was challenged.[68]

The Commission emphasises that it is risky to rely on assumptions about why peremptory challenges are made. When making peremptory challenges the parties do not rely solely on the age, gender and appearance of prospective jurors; other relevant information may include the juror's name, address and occupation as well as physical observations of his or her behaviour and mannerisms in court. For example, defence counsel might challenge a juror of conservative appearance, but this juror may in fact have been challenged because the accused recognises the juror's name and thinks that he might be related to someone who dislikes the accused. Likewise, the prosecutor may challenge a young shabbily dressed juror but the reason may be because the prosecutor observed this juror yawning and appearing disinterested when the judge was addressing the jury panel. Nevertheless, the Commission acknowledges that the less information available about prospective jurors the more likely it is that peremptory challenges will be based on inaccurate stereotypical assumptions. Because parties to criminal proceedings in Western Australia are provided with the names, addresses and occupations of prospective jurors it is more likely that peremptory challenges are made for valid reasons than in jurisdictions (such as New South Wales) where no information is provided.

Should peremptory challenges be retained in Western Australia?

Much of the discussion concerning peremptory challenges focuses on whether they undermine or, alternatively, protect the impartiality of the jury. Yet, as has been observed, there is no way of ensuring a 'truly impartial jury'.[69] By their very nature, juries are comprised of people with different life experiences and views – the collective decision-making process (and the trial judge's direction to only consider the evidence heard in court) is designed to counteract individual prejudices.

The Commission believes that when evaluating the merits of peremptory challenges the most important issue is the perception of bias.

> For both sides to have any confidence in the system, the arbiter must *appear* to be impartial, disinterested in the outcome.[70]

In advocating for peremptory challenges, it is often said that the accused should have a 'good opinion' of (or confidence in) his or her jury.[71] It has been argued that peremptory challenges enable an accused to challenge a juror whom they 'simply dislike' and this promotes acceptance of the verdict by the accused.[72] Likewise, if peremptory challenges were abolished, the fairness of the trial may be questioned if either party believes that a juror is biased or lacks the capacity to serve as a juror. Since the abolition of peremptory challenges in England, it has been observed that:

> Sometimes one has only to look at a juror… to appreciate that the juror is totally unsuitable to be entrusted with the responsibility for determining a verdict or any responsibility.[73]

The right to peremptory challenge is also significant in two other specific circumstances – if a challenge for cause is unsuccessfully made[74] or if a juror unsuccessfully seeks to be excused. A juror who has been unsuccessfully challenged for cause may 'harbour resentment or bias'[75] against the challenging party. Similarly, a juror whose excuse is rejected by the trial judge may be angry at being 'forced' to serve on a jury. It has been observed that a 'disgruntled juror' is 'a potential threat to sound deliberation'.[76] The Commission believes that it is important, in order to ensure that there is a fair trial, for both the accused and the prosecution to be able to challenge jurors in these circumstances.

67. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 51.
68. Ibid.
69. McCrimmon L, 'Challenging a Potential Juror for Cause: Resuscitation or requiem?' (2000) 23 *University of New South Wales Law Journal* 127, 146.
70. Israel M, 'Ethnic Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 37 (emphasis added).
71. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial,* Report No 48 (1986) [4.59]; *Katsuno v R* [1999] HCA 50 [83].
72. Gobert J, 'The Peremptory Challenge – An Obituary' [1989] *Criminal Law Review* 528, 529. See also NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [229].
73. Lord Justice Phillips, 'Challenge for Cause' (1996) 29 *Victoria University Wellington Law Review* 479, 483.
74. See *Katsuno* [1999] HCA 50 [83]; NSWLRC *Jury Selection*, Report No 117 (2007) 180.
75. McCrimmon L, 'Challenging a Potential Juror for Cause: Resuscitation or requiem?' (2000) 23 *University of New South Wales Law Journal* 127, 132.
76. Lord Justice Phillips, 'Challenge for Cause' (1996) 29 *Victoria University Wellington Law Review* 479, 480.

Despite the criticisms, the Commission is of the view that there is insufficient justification for abolishing the right to peremptory challenge. In particular, the Commission emphasises that in Western Australia it appears that the maximum number of peremptory challenges available to both parties is not always used. Statistics provided to the Commission show that in Western Australia from 1 January 2009 until 21 July 2009 there were 837 challenges (this includes peremptory challenges and challenges for cause) in a total of 212 jury trials.[77] Hence, there was an average of only 3.9 challenges per trial – the maximum number of peremptory challenges available per trial is at least 10 (ie, five each for the accused and the prosecution).[78] These data suggest that peremptory challenges are not being over-used.

Even after concluding that peremptory challenges appeared to be exercised on an arbitrary basis, a New South Wales study concluded that:

> The possibility that peremptory challenge may provide some guarantee against bias in random selection is all the more significant in a system where other formal procedures for rectifying bias are either not possible or are politically unpalatable.[79]

The Commission agrees and emphasises that the process of peremptory challenge is preferable to an expanded challenge for cause process because peremptory challenges can be made relatively quickly. Furthermore, the peremptory challenge process is far less embarrassing and intrusive than a system where prospective jurors are questioned about their background and views. Overall, the Commission has concluded that the right to peremptory challenge is an important tool for ensuring that juries are, and are perceived to be, as impartial and as representative as possible.

Nonetheless, the Commission acknowledges there is one unequal aspect of the current system that could be improved by reform; that is, in instances of trials involving more than one accused where there is the potential for co-accused to work together to 'stack' the jury in their favour. Any risk of peremptory challenges being used to undermine impartiality and representativeness in these circumstances can be minimised by ensuring that each side has the same number of peremptory challenges. The Commission notes that this is the position in Queensland.[80] Additionally, in Victoria the prosecution has the right to stand aside the same number of jurors as the total number of peremptory challenges available to all co-accused.

PROPOSAL 3

Equal number of peremptory challenges between the state and all accused

That s 104 of the *Criminal Procedure Act 2004* (WA) should be amended to provide that in trials involving more than one accused, the state should have the same number of peremptory challenges as the total number of peremptory challenges available to all co-accused.

However, the Commission is concerned that there may be practical difficulties in ensuring that there is a sufficiently large jury panel in cases involving more than one accused. If, for example, there are four co-accused each entitled to five peremptory challenges the prosecution would be entitled to 20 peremptory challenges. In Victoria, the number of peremptory challenges available is reduced if there is more than one accused. If there are two accused each has five peremptory challenges (instead of six for one accused) and if there are three or more co-accused each has four peremptory challenges.[81] Thus, if there was four co-accused the total number of peremptory challenges available to all of the accused would be 16 and the state would have the right to stand aside 16 jurors. Hence, the Commission seeks submissions about the appropriate number of peremptory challenges that should be available in cases involving more than one accused.

INVITATION TO SUBMIT A

The number of peremptory challenges available in trials involving more than one accused

The Commission invites submissions about the number of peremptory challenges that should be available to each accused and the prosecution in trials involving more than one accused. In other words, should each accused continue to have the right to five peremptory challenges each or should the number available to each co-accused be reduced?

77. Carl Campagnoli, Jury Manager (WA), correspondence (28 July 2009).
78. Where there is more than one accused the total number of peremptory challenges would be greater.
79. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 176.
80. In Queensland the *Jury Act* was significantly reformed in 1995 following a number of inquiries about the jury system. Prior to this reform, the prosecution did not have the right to peremptory challenge but, instead, the right to stand aside prospective jurors. The prosecution had the right to stand aside the same number of jurors as the total number of peremptory challenges available to all co-accused. Section 42 of the *Jury Act 1995* (Qld) now provides that the prosecution has the right to peremptory challenge the same number of prospective jurors as the total number available to all accused in trials involving more than one accused.
81. *Juries Act 2000* (Vic) s 39.

Power to discharge whole jury

There is a further option (available in Queensland and New South Wales) designed to protect the representative nature of the jury. Under s 48 of the *Jury Act 1995* (Qld) the judge has discretion to discharge the whole jury if the selection of the jury appears to have 'resulted in a jury of a composition that may cause the trial to be, or appear to be, unfair'. Similarly, in New South Wales s 47A of the *Juries Act 1977* (NSW) provides that:

> The judge presiding at the trial of any criminal proceedings may discharge the jury that has been selected if, in the opinion of that judge, the exercise of the rights to make peremptory challenges has resulted in a jury whose composition is such that the trial might be or might appear to be unfair.

In regard to the Queensland provision, it was observed that a 'jury might be comprised of all women, or all men, or of all young persons, or all old persons. Alternatively, the right to use challenges may have resulted in the exclusion of persons from the same ethnic background as the accused person'.[82] As far as the Commission is aware these provisions do not appear to have been used often.[83] The only reported case to discuss either of these provisions is *R v Ronen*.[84] In this case, it was suggested that invoking s 47A of the *Juries Act 1977* (NSW) would be 'unusual'. Further, it was noted that under this provision the trial judge would be required to observe the jury at the end of the selection process and consider if (given the nature of the trial and the accused) the jury appears to be unrepresentative.[85] It was also highlighted that a representative jury does not mean a 'statistically representative jury' but rather 'representative in a general sense'.[86]

The Commission is not convinced that such a provision is necessary for Western Australia. By ensuring equality between the accused and the state, peremptory challenges are unlikely to result in an obviously unrepresentative or unfair jury. Further, the current Western Australian legislation permits a judge to discharge the entire jury if it is in the interests of justice to do so. Nonetheless, the Commission notes the concern about the lack of Aboriginal people on juries and the possibility that peremptory challenges may be purposefully used to eliminate Aboriginal jurors.[87] It was suggested to the Commission that a similar provision as exists in New South Wales might be a useful safeguard if peremptory challenges are used to exclude Aboriginal jurors in cases involving Aboriginal accused.[88] Accordingly, the Commission invites submissions about whether the *Criminal Procedure Act 2004* should be amended to provide that a judge has discretion to discharge the entire jury if it appears that the selection process has resulted in a jury that is or appears to be unfair.

82. Samford K, *Reforming Queensland's Jury System: The Jury Bill 1995,* Legislation Bulletin No 2/95 (Queensland Parliamentary Library, 1995) 12.
83. There are no reported or publicly available cases where these provisions have been used.
84. [2004] NSWSC 1294.
85. Ibid [33].
86. Ibid [34].
87. See further below, 'Aboriginal Participation in Jury Service'.

INVITATION TO SUBMIT B

Power to discharge whole jury

The Commission invites submissions about whether the *Criminal Procedure Act 2004* (WA) should be amended to provide that a trial judge has the power to discharge the whole jury if it appears that, because of the exercise of the right to make peremptory challenges, the composition of the jury is or appears to be unfair.

JURY VETTING

Although the Commission has concluded that the right to peremptorily challenge prospective jurors should remain, it is necessary to consider the extent to which jury vetting should be permitted for the purpose of exercising peremptory challenges. The practice of jury vetting involves 'checking on potential jurors before trial'.[89] Information obtained is then used to decide which jurors to challenge. In Australia, jury vetting has taken different forms. In the early 1990s in Queensland, following two high profile trials, it was revealed that prospective jurors had been telephoned and polled in relation to their political views and that private investigators had been engaged to investigate the background of jurors.[90] During the investigation of these incidents, it was observed that up until the 1970s in Queensland police would visit the neighbourhood of prospective jurors and ask neighbours about their character and background.[91] The inquiry was also told that private investigators had been engaged in other trials to check prospective jurors (by undertaking electoral searches, by interviewing people who might know the prospective juror, and by visiting their neighbourhood and viewing their residential premises).[92]

88. Chief Judge Kennedy, consultation (17 January 2008).
89. QCJC, *The Jury System in Criminal Trials in Queensland*, An Issues Paper (1991) 26.
90. The George Herscu trial: see QCJC, *Report of An Investigative Hearing into Alleged Jury Interference* (1991) 5; and the trial of Sir Johannes Bjelke-Petersen: see QCJC, *Report by the Honourable WJ Carter QC on His Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen* (1993) 478.
91. QCJC, *The Jury System in Criminal Trials in Queensland*, An Issues Paper (1991) 28.
92. Ibid 33–4.

Jury vetting by the prosecution

Today, the most recognised form of jury vetting in Australia is undertaken by the state: prosecutors are provided with copies of criminal records of prospective jurors so that they may challenge those whom they believe will be biased against police and the prosecution. This form of jury vetting occurred in Western Australia up until late 2007.[93]

The vetting of prospective jurors' criminal histories is authorised under the Criminal Procedure Rules 2005. In *Hunt v The State of Western Australia*[94] the practice of jury vetting by the DPP was unsuccessfully challenged.[95] It was held that Rule 57 of the Criminal Procedure Rules 2005 authorises the vetting of prospective jurors by the DPP by obtaining criminal records from the police.[96] Recently, the merits of this practice were raised publicly following the acquittals in the McLeod case in March 2009. In this case, a police officer was seriously injured following a violent incident outside a Perth tavern.[97] It was revealed that one of the jurors in this case had a criminal record and the DPP had not had access to the criminal records of jurors before jury selection.[98] The former DPP, Robert Cock, reportedly stated that the practice of jury vetting should not be reinstated. It was reported that instead he believed there should be a broader range of people serving on juries to balance out any potential bias against police.[99]

93. Banks A, 'Juror Challenge Limits Planned', *The West Australian,* 13 May 2009, 13. Previously, criminal records were provided to the DPP by the Sheriff's office. The reason for the change in policy is unclear, although it appears the Sheriff's office procedure for identifying prospective jurors with disqualifying criminal records was changed in October 2007 to an on-line checking system. At that point, the DPP was no longer given copies of the criminal records: Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
94. [2008] WASCA 210. It is noted that s 17 of the *Juries Act 1957* (WA) states that police officers are to provide assistance to the Sheriff's office for the purpose of determining if any person is not qualified to serve or 'for any other purpose of the administration of the Act'. In *Hunt v The State of Western Australia* [2008] WASCA 210, [126] it was observed that the practice of jury vetting by the DPP is not an example of police officers being required to assist under s 17 of the Act.
95. In *Katsuno* [1999] HCA 50, [45] (Gaudron, Gummow & Callinan JJ) a similar practice in Victoria was challenged. Although it was held that the practice in Victoria was unlawful, the majority of the court held that because a peremptory challenge can be made for any reason (good or bad), there was no 'defect in the criminal process'.
96. Ibid [121] (Murray AJA, Wheeler JA & Miller JA concurring).
97. Cordingley G, 'McLeod family face trial over Constable Matt Butcher bashing', *Perth Now*, 3 February 2009 available at <http://www.news.com.au/perthnow/story/0,21598,25002295-2761,00.html>.
98. Western Australia, *Parliamentary Debates*, Legislative Council, 19 March 2009, 2141 (Simon O'Brien).
99. Banks A, 'Juror Challenge Limits Planned', *The West Australian*, 13 May 2009, 13.

The DPP's practice of vetting prospective jurors for criminal convictions has been criticised because the prosecution has access to information which is not available to the accused and therefore it 'denies a level playing field'.[100] As the NSWLRC observed:

> [T]he practice is exclusively in the hands of the prosecuting authorities. By permitting the Crown to manipulate the composition of the jury panel it is given an unconscionable advantage in the process of jury selection.[101]

Although the justification for jury vetting in this context is to enable the prosecution to exercise their right to peremptory challenge by objecting to jurors who may be biased against the police,[102] a similar right is not afforded to the accused. For example, the accused is not entitled to know if any of the prospective jurors have previously been victims of any crimes (and therefore may be biased against the accused).

Moreover, the practice of vetting and challenging prospective jurors on the basis of past criminal convictions may be based on misconceived assumptions. It is not always the case that a person who has been convicted of a crime in the past will be biased against the police.[103] A person who has been unfairly charged and subsequently acquitted is probably more likely to be biased against police than an offender who has since reformed. The *Juries Act* currently disqualifies certain categories of offenders from jury service. The Commission examines in detail the appropriateness of these categories in Chapter Five. At this stage, it is sufficient to emphasise that if the legislative categories of disqualifying convictions are inappropriate these categories can be amended.[104]

The Commission notes that the vetting of prospective jurors' criminal histories is approached differently throughout Australia. For example, in Tasmania the practice is expressly authorised and it extends to checking

100. Percy T & Papamatheos A , 'Jury Vetting in Western Australia' (2006) 33 *Brief* 6. See also See NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [213]; VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [5.27].
101. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986) [4.45].
102. The VPLRC noted that it has been argued that some criminal convictions would justify a peremptory challenge (eg, where there is a close connection between the nature of the conviction and the current trial). For this reason the VPLRC recommended that the practice of jury vetting should continue: VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [5.28]–[5.30].
103. This argument was raised in submissions to the VPLRC: see VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [5.27].
104. As was stated during Parliamentary debates in Victoria, it 'is preferable that persons should be excluded only from the rights and obligations to sit on juries pursuant to clear legislative criteria': Victoria, *Parliamentary Debates*, Legislative Assembly, 14 March 2000, 301 (Mr Wynne).

whether any prospective jurors have been charged with a non-disqualifying offence.[105] In the Australian Capital Territory, the vetting of jurors' criminal records is undertaken by the Sheriff's Office rather than the prosecution. Upon receiving a report from the police, the sheriff is entitled to consider if, because of the number and nature of past offences, a prospective juror would be 'unable to adequately exercise the functions of a juror'.[106] If so, the sheriff is required to notify the person that he or she has been removed from the list and that person is entitled to lodge an objection.

In Queensland, if either the prosecution or the defence obtains information about a prospective juror that indicates that the person is unsuitable for jury service, they must disclose that information to the other party.[107] In New South Wales, the parties are not given access to the names of prospective jurors and therefore no vetting can occur.[108] Although jury vetting occurred for many years in Victoria it no longer takes place. When it did occur, the Chief Commissioner of Police gave the DPP a list of persons in the jury panel who had criminal convictions (but who were not disqualified under the legislation) and, sometimes, information in relation to acquittals was provided.[109] It was subsequently held that this practice was not authorised under the relevant Victorian legislation.[110] Now, the prosecution and defence are only informed of the name and occupation (and sometimes only a number and occupation) of prospective jurors during in-court selection.[111] In practical terms this scheme precludes jury vetting and, further, unauthorised disclosure of information identifying prospective jurors is an offence under the legislation.[112]

Other forms of jury vetting

It has been observed that the legislation in Western Australia is generally 'designed to prevent jury vetting'.[113] Certainly, any extensive jury vetting is precluded because a prosecutor is only entitled to divulge the contents of the jury pool list to other DPP lawyers or to the police, and defence counsel is only permitted to disclose the contents of the list to the accused or to another lawyer acting for the accused. Hence, it would not be lawful to provide information about prospective jurors to third parties such as private investigators, associates of the accused, the victim or witnesses. However, there is no express provision prohibiting the parties from making their own inquiries in relation to prospective jurors. For example, there is nothing in the legislation to prevent a prosecutor from accessing an internal database to determine if a person on the jury pool list has previously been prosecuted by the DPP or to prevent a defence lawyer or the accused from making lawful inquiries via the internet or any public database about prospective jurors.

These types of jury vetting practices may potentially lead to 'inappropriate contact'[114] and risks to juror safety. Further, vetting practices may infringe the privacy of jurors. Although any attempt to influence a juror by threats, promises or intimidation is a serious criminal offence,[115] lawful contact with a prospective juror may still potentially undermine the integrity of the jury system. Jurors may feel intimidated and as a consequence may approach their deliberations in a less objective manner.[116] Following the investigation of jury vetting in Queensland, s 31 of the *Juries Act 1995* (Qld) was inserted to provide that a person must not ask questions of a person (or about a person) who has been summoned for jury service to find out how that person is likely to react to issues arising in a trial unless otherwise authorised under the Act. This provision is designed to prevent direct questioning of prospective jurors or questioning other people in relation to prospective jurors.

The current Western Australian provisions—which enable the prosecutor and defence counsel to have access to the names and addresses of prospective jurors four days before the day of trial—potentially encourage jury vetting. As was observed by the Queensland Criminal Justice Commission, the 'abuses which one identifies with jury vetting are likely to be more excessive, the longer the time made available to facilitate the process'.[117] The Commission notes, however, that in practice DPP lawyers generally access the jury pool list on the Friday morning (for all trials listed the following week) and

105. *Juries Act 2003* (Tas) s 24.
106. *Juries Act 1967* (ACT) s 24.
107. *Juries Act 1995* (Qld) s 35.
108. *Jury Act 1977* (NSW) ss 29 & 37. See NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.45].
109. VPLRC, *Jury Service in Victoria*, Final Report 1997) vol 1, [5.17].
110. See *Katsuno v The Queen* [1999] HCA 50.
111. *Juries Act 2000* (Vic) s 36.
112. *Juries Act 2000* (Vic) s 65.
113. *Hunt v The State of Western Australia* [2008] WASCA 210, [121].
114. QCJC, *The Jury System in Criminal Trials in Queensland*, An Issues Paper (1991) 26.
115. *Criminal Code* (WA) s 123.
116. In a recent paper, Judith Fordham explains some of the results of her research into Western Australian juries. She notes that the degree of intimidation of jurors appears to be less than popularly believed (although the term 'intimidation' is not defined). Further, she states that in '*most* instances, jurors were not influenced by the intimidation into voting a different way from that which their dispassionate consideration of the evidence would dictate': Fordham J, 'Bad Press: Does the jury deserve it?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 8.
117. QCJC, *Report by the Honourable WJ Carter QC on His Inquiry into the Selection of the Jury for the Trial of Sir Johannes Bjelke-Petersen* (1993) 480.

defence counsel tend to access the list on the morning of the first day of the trial.[118]

The Commission is of the view that when considering what information should be available to the parties in a criminal proceeding, fairness dictates that the prosecution and the accused should have a 'level playing field'. Of course, one party may have information about a prospective juror based on personal knowledge (eg, recognising a juror in the back of the court) but one party should not be entitled to access information that is not equally available to the other. For this reason, the Commission has concluded that the Criminal Procedure Rules 2005 should be amended to ensure that the DPP is not entitled to check the criminal histories of prospective jurors. This conclusion has been strongly influenced by the view that the legislative criteria for disqualifying people from jury service on the basis of their criminal history should be determinative – it is up to Parliament to decide the degree of past criminality that renders a person incapable of jury service.

Furthermore, the Commission believes that—in order to ensure that jury vetting does not occur in practice—the parties should only have access to the jury pool list on the morning of the trial. The only real justification for earlier access is to enable some form of vetting to occur. In this regard, the Commission notes in Victoria and in the Northern Territory information about prospective jurors is only available to the parties at the time of or just before empanelment. In the Australian Capital Territory, the parties are entitled to access the jury pool list on the day of the trial and in Queensland, access is available from 4 pm on the day before the trial (or on the Friday if the trial is listed to commence on a Monday). The Commission believes that restricting access to the morning of the trial provides an appropriate balance between enabling the parties to examine the jury pool list and ensuring that inappropriate jury vetting does not take place. Further, as will be discussed below, restricting the availability of information to the morning of the trial is important to minimise any risk to juror safety.

PROPOSAL 4

Jury vetting and the provision of information concerning prospective jurors

1. That the Criminal Procedure Rules 2005 (WA) be amended to provide that lawyers employed by or instructed by the Office of the Director of Public Prosecutions are not authorised to check the criminal background of any person contained on the jury pool list as provided under s 30 of the *Juries Act 1957* (WA).
2. That s 30 of the *Juries Act 1957* (WA) be amended to provide that instead of being available for four clear days before the applicable criminal sittings or session commences, a copy of every panel or pool of jurors who have been summoned to attend at any session or sittings for criminal trials is to be available for inspection by the parties (and their respective solicitors) from 8.00 am on the morning of the day on which the trial is due to commence.

118. Carl Campagnoli, Jury Manager (WA), consultation (4 August 2009).

Juror security

Having concluded that the prosecution and the accused should have access to the same information (or the same opportunity to obtain information) it is then necessary to consider exactly what that information should be. The availability of any information which identifies jurors inevitably leads to questions concerning juror security (and privacy). The Commission is not aware of any recent examples in Western Australia where jurors have been threatened or directly contacted by the parties;[119] however, during Parliamentary debates an incident in 1985 was mentioned whereby 'a prisoner who had been convicted of murder sent Christmas cards to members of the jury'.[120]

A review by the South Australian Sheriff's Office in 2002 referred to various examples from South Australia and other Australian jurisdictions where jurors had been contacted or threatened.[121] It was observed that:

> Actual cases of threats or retaliation against jurors are rare, but they do occur, so individual's concerns regarding their privacy and safety are very real.[122]

In Western Australia jurors' names are no longer disclosed to the public or stated in open court and it is unquestionable that this is appropriate.[123] However, as discussed above,

119. It has been recently observed that there have been examples of intimidation of Western Australian jurors by the accused, his or her supporters or from the victim or his or her supporters. However, the nature of that intimidation is not discussed: Fordham J, 'Bad Press: Does the jury deserve it?' (Paper presented at the 36th Australian Legal Convention, Perth 17–19 September 2009) 7.
120. Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 February 2003, 4713–4714 (Attorney General, J. McGinty).
121. South Australian Sheriff's Office, *South Australian Jury Review* (2002) 9–11. For other interstate examples, see Western Australia Parliamentary Debates, *Legislative Assembly*, 26 February 2003, 4713–4714 (Attorney General, J McGinty).
122. South Australian Sheriff's Office, *South Australian Jury Review* (2002) 7.
123. In 2003 the *Juries Act 1957* (WA) was amended to provide for juror anonymity during criminal proceedings. During Parliamentary debates it was stated that the Chief Justice had told the previous Attorney General that a number of jurors had reported concerns about the jury selection process which

prosecuting lawyers, defence lawyers and the accused generally have access to the names (and addresses) of prospective jurors. The Commission recognises that jurors would, understandably, be concerned if they were aware that the parties (in particular, the accused) had access to their names and addresses. During the juror induction process prospective jurors are informed that they will be referred to by their identification number in order to protect their anonymity.[124] Hence, prospective jurors may be left with the impression that they are completely anonymous.

In addition to the risk of actual threatening behaviour, the fear or concern about such behaviour arguably impacts on the integrity of jury deliberations. In *Ronen v The Queen*[125] it was observed that the legislative provisions in New South Wales, which prohibit the disclosure of the identity of jurors, protect the 'integrity of the system' on the basis that a jury should consider its verdict uninfluenced by factors external from the trial process.[126]

In order to address security concerns, a number of amendments were made to the Western Australian *Juries Act* in 2003. Section 36A was inserted to provide that during criminal proceedings a juror or prospective juror is to be referred to by an identification number. During parliamentary debates it was observed that:

> A principal object of the Bill is to protect the security of jurors and thereby protect the integrity of the jury system. This will be achieved by establishing a system by which potential jurors are identified in court by a designated number rather than by name. This will provide jurors with a measure of anonymity and, consequently, significantly reduce the prospect of individual jurors being subjected to an unwelcome approach or improper interference during, or as a result of, their service as a juror.[127]

Section 43A was also inserted in order to enable a court to restrict or prohibit access to the jury pool list. It was intended by this provision to 'strike a balance between the need to protect jurors and undue interference with the process of peremptory challenge'.[128] Section 43A provides that if a judge considers it necessary to protect the security of prospective jurors (or jurors) the judge may do any one or more of the following:

(a) prohibit, restrict or impose conditions on the inspection by the parties of the jury pool list;

(b) prohibit, restrict or impose conditions on the provisions of a copy of the jury pool list;

(c) direct the summoning officer to delete the names and addresses (other than suburb or town) on the copy of the jury pool list;

(d) direct the summoning officer to restrict inspection of the jury pool list for a period less than four days before the day of the trial;

(e) if an order has been made prohibiting or restricting the inspection of a jury panel, direct that the parties or their solicitors may have access to a copy of the list in open court just prior to empanelment.

As far as the Commission is aware, this provision has only been used in a handful of cases.[129]

The extent of juror anonymity varies between jurisdictions. New South Wales has the strictest regime: no identifying information about prospective jurors is provided to the parties (or to the public).[130] In Victoria, parties are provided with the name and occupation of prospective jurors at the time of empanelment; however, there is scope for restricting this information to a number and occupation only.[131] Queensland is similar to Western Australia because the parties have access to the jury pool list containing names, addresses and occupations; however, this list is only available from 4.00 pm on the day before the trial.[132] On the other hand, in Queensland the names of jurors are read out in open court (unless the judge orders otherwise because of security concerns).[133] Tasmania is the same as Queensland in this regard.[134] In the Australian Capital Territory, the jury pool list contains the names and occupations of prospective jurors (addresses are not listed).[135] The parties are generally only entitled to inspect or obtain a copy of this list on the day of the trial.[136] During in-court selection of the jury, the names and occupations of prospective jurors are read aloud.[137] In the Northern Territory, the names of jurors are called out in open court during empanelment; however, there is no provision for the prosecution or the accused to have prior access to

identifies jurors name, address and occupation: Western Australia Parliamentary Debates, *Legislative Assembly*, 26 February 2003, 4713–4714 (Attorney General, J McGInty).

124. Western Australia, *Jury Duty Induction* (DVD).
125. [2004] NSWCCA 176.
126. Ibid [96] (Ipp JA, Grove & Howie JJ concurring).
127. Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 February 2003, 4713–4714 (Attorney General, J McGinty).
128. Ibid.
129. Carl Campagnoli, Jury Manager (WA), correspondence (3 August 2009).
130. *Juries Act 1977* (NSW) s 29.
131. *Juries Act 2000* (Vic) s 36.
132. *Juries Act 1995* (Qld) s 29.
133. *Juries Act 1995* (Qld) s 41(2).
134. *Juries Act 2003* (Tas) s 29(7). As mentioned above, jury vetting of criminal histories is expressly permitted in Tasmania.
135. *Juries Act 1967* (ACT) s 27(3).
136. *Juries Act 1967* (ACT) s 29. In order to obtain access before the day of the trial leave of the Supreme Court is required.
137. *Juries Act 1967* (ACT) s 31(1).

the names of prospective jurors.[138] In South Australia, although the legislation refers to the reading out of names in court, the Commission understands that the practice is now to only refer to an identification number in court. However, the parties are provided with a list of names, suburbs and occupations.[139]

Under the Commission's proposal above, the parties would not be entitled to access the jury pool list until 8.00 am on the first day of the trial. Pursuant to the Criminal Procedure Rules 2005, prosecuting and defence lawyers are entitled to obtain a copy of this list upon signing the applicable undertaking. Defence lawyers are entitled to show the list to the accused but the accused is not entitled to retain a copy. The list must be returned to the jury officer immediately following empanelment. Thus, under the Commission's proposal the accused would only have limited access to the information on the jury pool list; that is, for a relatively short period of time prior to the commencement of the trial. However, the Commission can see no reason for the parties to have access to the full street addresses of prospective jurors. While the locality address (ie, suburb or town) might be relevant to the exercise of peremptory challenges, the street number and name is not relevant. Accordingly, the Commission also proposes that the jury pool list provided under s 30 of the *Juries Act* should not contain the street address of prospective jurors.

PROPOSAL 5

Information available about prospective jurors: addresses

That the *Juries Act 1957* (WA) be amended to provide that the jury panel or pool list made available to the parties to a criminal proceedings (and their respective solicitors) under s 30 should not contain the street address but instead list the suburb or town for each person included in the list.

Bearing in mind the powers under s 43A of the *Juries Act* (ie, the power to restrict the information available in any particular case) the Commission is of the preliminary view that its proposals to restrict access to the jury pool list to 8.00 am on the day of the trial and to ensure that only the locality address is provided are sufficient to protect the security of jurors. Having said that, the Commission acknowledges that if jurors are aware that they can be identified by the parties, there is a potential risk that they may find it difficult to undertake their duty objectively. Accordingly, the Commission seeks submissions about whether the names of prospective jurors should continue to be provided to the parties for the purpose of jury selection.

INVITATION TO SUBMIT C

Information available about prospective jurors: names

The Commission invites submissions about whether, taking into account the arguments presented above, the jury panel or pool list made available to the parties to a criminal proceeding (and their respective solicitors) under s 30 of the *Juries Act 1957* (WA) should continue to contain the full name, of each person included in the list.[140]

138. *Juries Act* (NT) s 37.
139. South Australia, *Parliamentary Debates*, House of Assembly, 4 December 2003, 1141.
140. In this regard, the Commission notes that the full results of the *Jury Intimidation Project* are soon to be publicly released (the report is currently with the Attorney General). The results of this project may well have a bearing on this issue: Fordham J, 'Bad Press: Does the jury deserve it?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 7. Further, it is noted that Justice Michael Murray recently stated that '[p]eremptory challenges should be retained, but without the provision of private information about jurors to the parties, particularly the accused': Murray M, 'Bad Press: Does the jury deserve it? Communicating with Jurors' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 6.

Problems with the jury selection process

HAVING examined how jurors are selected in Western Australia earlier in this chapter, the Commission now considers specific problems arising from the processes involved in jury selection. Hence, the focus in this section is on the administrative rules and procedures impacting on jury selection rather than on the legislative criteria governing who can and who cannot serve on a jury (these criteria are examined in the following four chapters).

REGIONAL ISSUES

As mentioned above, there are a number of jury districts in regional Western Australia whose required juror quota is higher than the number of eligible persons on the electoral roll in that jury district. In four jury districts—Kununurra, Broome, Derby and Carnarvon—all enrolled voters between the ages of 18 and 70 are listed as prospective jurors.[1] In these regional jury districts members of the community can be required to serve on a jury more than once a year[2] (possibly two or three times a year).[3] As recently stated in a review of the operations of the Indigenous Justice Taskforce 'jury fatigue' is a problem in the Kimberly.[4] In all other Western Australian jury districts, community members are not required to serve on a jury more than once a year.

The Commission has made a number of general proposals in this paper that should, among other things, assist in ensuring that the burden of jury service is shared more equitably in regional areas (eg, abolition of 'excuse as of right',[5] restriction of categories of ineligibility[6] and deferral of jury service[7]). However, in the regional districts that experience particular difficulties in meeting the required juror quota additional strategies can be employed to increase the available jury pool.

Increasing and updating electoral enrolments

In order to be liable for jury service in a particular jury district, a person must be registered on the roll of electors and the roll must show that the person resides in the jury district.[8] For example, to be liable for jury service in Broome, a person must be enrolled to vote and their recorded address must be within an 80 km radius of the Broome courthouse. Therefore, in order to increase the available jury pool it is important to ensure, first, that as many eligible electors as possible are enrolled to vote and, secondly, that electors notify the Western Australian Electoral Commission when they move address.

A person is eligible to enrol to vote in an electoral district after residing in that district for one month. The person must enrol within 21 days of becoming eligible for enrolment.[9] Many people in regional locations are transient because of seasonal work and high staff turnover[10] and as a result electoral details may not match

1. For 2008–2009 there were 2,816 eligible people in Kununurra to meet the juror quota of 10,000; there were 5,912 eligible people in Broome to meet the juror quota of 7,000; there were 1,612 eligible people in Derby to meet the juror quota of 10,000; and there were 2,713 eligible people in Carnarvon to meet the juror quota of 10,000: Information provided by the Western Australian Electoral Commission. Also, in Port Hedland the required juror quota is just below the number of enrolled eligible voters (5,221 eligible persons to meet quota of 5,000).
2. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
3. Judge Yeats, consultation (20 December 2007). The Victorian Parliament Law Reform Committee (VPLRC) made a similar observation in relation to regional locations in Victoria: VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [4.9].
4. Indigenous Justice Taskforce, *A Review of the Indigenous Justice Taskforce* (2009) 7 & 21. The Indigenous Justice Taskforce was established in 2007 to address issues associated with the high number of sexual offence prosecutions in the Kimberley region.
5. Under the Commission's Proposal 45 it will still be possible to seek to be excused on a case-by-case basis. It is noted that currently in regional locations, local court staff determine excuses. Because there is no specific training for staff in relation to juries and because of high staff turnover in some locations practices vary. The Commission has been advised that there is a proposal to bring the Sherriff's Office under the auspices of the Directorate of Higher Courts and, therefore, the Jury Manager will be in a position to standardise practices in relation to determining juror excusals: with Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009). In Chapter Six, the Commission proposes the development of guidelines for determining excuses to be used by the Sheriff's Office, summoning officers and judicial officers; these guidelines will assist in ensuring a reasonably consistent approach to excuses.
6. See generally Chapter Four.
7. See Proposal 48. In relation to deferral of jury service the Commission notes that in regional locations some occupations are season-based (eg, tourism and farming) so deferral of jury service will enable people in these occupations to serve during the off-peak season: Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
8. *Juries Act 1957* (WA) s 4.
9. *Electoral Act 1907* (WA) s 45.
10. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007); Warren Richardson, Manager, Enrolment

their current residential location. People may not feel compelled to notify the Electoral Commission if they are only intending to reside in a regional location for a relatively short period of time (especially if there are no scheduled elections during that period). The Western Australian Jury Manager advised the Commission that in some regional areas, addresses on the electoral roll are often out-of-date because of transient populations.[11] Further, it has been suggested that Aboriginal people are less likely to be enrolled to vote.[12] This may impact on the available number of jurors in regional locations where there are high numbers of Aboriginal residents.[13] The Commission notes that the Western Australian Electoral Commission is already embarking on a campaign to increase Aboriginal enrolments and improve the accuracy of electoral details for those Aboriginal people who are enrolled. Enrolment field trips to remote communities and attendance at the annual NAIDOC ceremony are two proposed initiatives to achieve these goals.[14]

In a more general sense, the Federal Joint Standing Committee on Electoral Matters recently suggested that the Australian Electoral Commission and 'its state and territory counterparts should work together and be proactive and innovative, devising and implementing strategies aimed at raising awareness and encouraging enrolment at all times, not just in the lead up to elections'.[15] Unless there is a pending election there may be little incentive for people who are moving to notify the Electoral Commission that their details have changed.[16] Currently, if a person moves from one electoral district to another it is necessary to complete an Electoral Enrolment Form.[17] This form covers enrolment for federal, state and local government elections and is required to be signed and witnessed. When completing this form it is necessary to provide proof of identification in order to be registered on the federal electoral roll. Insertion of a driver's licence number is sufficient for this purpose; however, for those people who do not hold a driver's licence other forms of identification must be sighted by an authorised person who must sign the form.[18] Arguably, this process discourages prompt notification of any changes of address to the Electoral Commission.

In contrast, there is a more simple procedure for notifying other Western Australian government agencies. An on-line form enables simultaneous notification of change of address (and other details) to a number of Western Australian government agencies including the Department of Housing, the Department of Transport and the Water Corporation.[19] It would be ideal if people could simultaneously notify their change of address for the purposes of electoral enrolment and drivers licence details. It has been noted that young people are underrepresented on the electoral roll yet they are usually very willing 'to participate in other obligatory activities; for example, getting a drivers licence in order to legally drive a motor vehicle.[20] The Commission also notes that because drivers licences are often used for identification purposes people are more likely to update licence details without delay. However, the current law does not allow dual notification because it is a requirement to notify the Department of Transport within 21 days of moving address but a person must have resided at the new address for at least one month in order to change their electoral enrolment. In order to enable simultaneous notification it would be necessary to change one of the stipulated timeframes (eg, enable people to notify their change of address to the Department of Transport within one month of moving instead of within 21 days).

Also, it is noted that the on-line multi-government notification form (referred to above) provides direct on-line access to the separate 'Electoral Enrolment' form. However, the Department of Transport's 'Change of Personal Details' form (which can be sent by fax or post) does not contain any reference to the Electoral Commission's notification requirements. In order to encourage people to update their electoral details (and therefore their jury service liability) it would be a useful starting point to ensure that the relevant form highlights the necessary electoral requirements and for 'Electoral Enrolment' forms to be physically available at licensing centres.[21]

Group, Electoral Commission of Western Australia, telephone Consultation (15 June 2009).

11. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
12. See further below, 'Aboriginal Participation in Jury Service'.
13. However, Aboriginality is 'not a prescribed attribute of electoral roll data' and, therefore, 'it is not possible to accurately and directly measure Indigenous participation': Western Australia Electoral Commission, *Reconciliation Action Plan 2008–2010*, 4.
14. Ibid 8, 11.
15. Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (2009) 86.
16. The penalty for failing to enrol within 21 days of becoming eligible to do so (ie, after residing in a new district for one month) is a fine of $50: *Electoral Act 1907* (WA) s 45 (1).
17. <http://www.waec.wa.gov.au/voting/enrolling_to_vote/#ChangeAddress>. If a person moves to a new address within the same electoral district they are required to notify the Electoral Commission in writing: *Electoral Act 1907* (WA) s 45(2).
18. Otherwise it is necessary to have two people verify that they have known the person for at least one month and each must sign the form.
19. <https://www.lifeevents.wa.gov.au/servlet/LifeEventAddressVerification>.
20. Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (2009) 83.
21. The Western Australia Electoral Commission website states that Electoral Enrolment forms are available at the Electoral

The Commission is also of the view that the Western Australian Electoral Commission should continue to devise ways of encouraging Western Australians (especially those residing in regional areas) to update their electoral details after moving address. If at all possible, these strategies should include the development of a dual notification form (both on-line and manual) that can be used for simultaneously notifying a change of address to the Electoral Commission and the Department of Transport.

PROPOSAL 6

Change of address notification forms

1. That the Department of Transport 'Change of Personal Details' form include advice that people are also required to update their details with the Electoral Commission after they have resided at their new address for at least one month and that the Electoral Enrolment forms be available at licensing centres.
2. That the Western Australian Electoral Commission continue to develop strategies to encourage Western Australians to update their electoral details including a dual notification form so that people can notify a change of address to the Electoral Commission at the same time as notifying the Department of Transport for the purposes of licensing details.

Because jury books are only produced annually, it is important to ensure that updated electoral details can be transferred to the jury books. Currently, the Western Australian Electoral Commission provides the Sheriff's Office with monthly updates of the electoral rolls. The jurors' books can be amended by changing a person's address or deleting the person from a juror book; however, it is not possible under the legislation to add a person to the jurors' book for a different jury district.[22] For example, if a person moved from Perth to Kununurra (and they had advised the Electoral Commission of their new address) they could be removed from the jurors' book for Perth but they could not be added to the jurors' book for Kununurra. In order to increase the available jury pool (especially for those four locations that cannot currently meet the required jury quota) the Commission proposes that the *Juries Act* be amended to enable the sheriff to add people to the jury lists and the jurors' books.[23] In practical terms, the best option would be for the jury lists and the jurors' books to be amended automatically by computer when the sheriff receives the monthly updates from the Electoral Commission.

PROPOSAL 7

Amending Jury Lists and Jurors' Books

1. That s 14(9) of the *Juries Act 1957* (WA) be inserted to provide that if a person who has been removed from a jury list pursuant to s 14(8) the sheriff can add that person's name to another jury list if it appears that the person currently resides in the jury district to which that list relates.
2. That s 34A(4) of the *Juries Act 1957* (WA) be inserted to provide that if a person has been removed from a jurors' book under s 34A(3), the sheriff can add that person's name to another jurors' book if it appears that the person currently resides in the jury district to which that jurors' book relates.

Awareness raising

In those areas suffering from 'juror fatigue', it is important to raise awareness about the importance of undertaking jury service. Such an awareness campaign was conducted in 2007 in the Pilbara, Mid-West and Goldfields. This campaign was later extended to the Kimberley and it has been reported that 'juror participation rose nine per cent in Broome and six per cent in Kununurra'.[24] It is understood that as part of this campaign the Jury Manager visited Broome and discussed jury service on the radio (including on Aboriginal radio).[25] However, it has been observed that this rise in juror participation has not been sustained.[26] Accordingly, resources should be allocated for ongoing and regular awareness raising strategies to ensure members of the community in regional areas are encouraged to attend and participate.[27]

Commission offices, post offices, and the electoral offices of Members of Parliament.

22. Section 34A(3) of the *Juries Act 1957* (WA) provides that a person can be removed from the jurors' book if he or she is ineligible or disqualified from serving as a juror; is dead; has an unknown address; or no longer resides in the jury district. Currently, jurors' addresses are updated in the jurors' book but they are not removed: Carl Campagnoli, Jury Manager (WA), consultation (18 August 2009).
23. As explained earlier in this chapter, the jury lists are compiled on about 1 March each year and the jurors' books are complied on about 1 July each year.
24. Indigenous Justice Taskforce, *A Review of the Indigenous Justice Taskforce* (2009) 21.
25. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
26. Indigenous Justice Taskforce, *A Review of the Indigenous Justice Taskforce* (2009) 21.
27. In this regard the Commission notes that it is important that members of the community are aware about juror entitlements so that any misconceptions about the right to be reimbursed for

PROPOSAL 8

Jury service awareness raising – regional areas

That the Western Australian government provide resources to the Sheriff's Office to undertaken regular jury service awareness campaigns throughout regional Western Australia.

Expanding jury district boundaries

Currently, the jury districts in Broome, Carnarvon, Derby and Kununurra are defined as those parts of the applicable Legislative Assembly electoral districts that are within an 80 km radius of the courthouse.[28] Hence, people who are registered to vote at an address more than 80 km from the local courthouse will not be included in the jury books (unless they fall within another jury district).

In South Australia there are three jury districts covering the entire state and therefore no one 'is disenfranchised' from jury service.[29] For those people in the annual jury list who reside more than 150 km from the court a letter is sent so that they can advise the sheriff if they are willing to serve (if called).[30] Those people who reside within 150 km of the court are expected to serve unless there is no available public transport and they do not have access to a vehicle.[31] This mirrors the approach recommended by the New South Wales Law Reform Commission (NSWLRC) in 1986; namely, that all adult citizens should be 'equally liable' to serve on a jury.[32] Although, in New South Wales anyone who resides more than 56 km from the relevant court is entitled to be excused as of right.[33] In its 2007 report the NSWLRC observed that in regional areas the 56 km exception reduces the available jury pool and 'imposes excessive obligations on residents who live close to' the court.[34] It recommended that no person should be entitled to be automatically excused from jury service 'because of personal characteristics or situations' including geographical circumstances.[35] Instead, people summoned for jury service should be permitted to be excused for good cause including 'undue hardship or serious inconvenience'.[36] This is consistent with the Commission's approach to excuses in this Discussion Paper.[37]

The Commission acknowledges that jury service may be extremely difficult for people who reside long distances from the courthouse.[38] However, expanding jury district boundaries would enable people who are currently excluded to participate in jury service and assist in reducing the burden on those people who reside closer to regional courts. It should not be assumed that everyone who resides further than 80 km from the court is unable to serve (eg, some people will have private transport and some people may be able to stay with friends or relatives during the trial). Further, the somewhat arbitrary cut-off of 80 km may operate unfairly to those who reside within the 80 km boundary. For instance, a person who resides 79 km from the courthouse may have no access to transport but a person who resides 81 km may own a car and be able to serve. Accordingly, the Commission invites submissions about whether the current jury districts should be extended and if so, to what extent.

INVITATION TO SUBMIT D

Jury Districts

1. The Commission invites submissions about whether the current jury districts should be extended to reach beyond 80 km from the courthouse in Broome, Derby, Carnarvon and Kununurra and, if so, to what extent?
2. The Commission also invites submissions about whether the jury districts across the entire state should be extended so that all Western Australians are equally liable for jury service. If so, what is the best way to ensure that people for whom jury service would be extremely difficult as a result of excessive travelling requirements could be excused from jury service?[39]

lost income do not discourage jury service: see below Chapter Seven, 'Need for community awareness' (Proposal 49).

28. *Government Gazette,* No 71 of 2009 (24 April 2009) 1384.
29. *Juries Act 1927* (SA) s 8; Neil Iversen, Jury Manager (SA), telephone consultation (17 June 2009).
30. *Juries Act 1927* (SA) s 23(3a).
31. Jurors are reimbursed 62 cents per kilometre for travel: Neil Iversen, Jury Manager (SA), telephone consultation (17 June 2009).
32. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.12]. Similarly, the VPLRC recommended that the entire state of Victoria should be divided into jury districts: VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [4.10].
33. *Juries Act 1977* (NSW) sch 3.
34. NSWLRC, *Jury Selection*, Report No 117 (2007) 148.
35. Ibid 123.
36. Ibid 132, 135. It was also recommended that guidelines should be prepared to assist the sheriff in determining who should be excused and these guidelines include that the sheriff should consider the 'fact that excessive time or excessive inconvenience would be involved in travelling to and from court'. It is also noted that in Victoria, people can be excused from jury service for good cause if they reside more than 50 km from the court if the relevant jury district is in Melbourne or more than 60 km if the district is outside Melbourne: *Juries Act 2000* (Vic) s 8.
37. See below Chapter Six, 'Excuse for good cause'.
38. It is noted that jurors are eligible to be reimbursed for road travel ($0.375 per km): *Juries Act 1957* (WA) s 58B(2); *Juries Regulations 2008* (WA) r 5.
39. It is recognised that this approach may place additional responsibilities on those who are required to deal with applications to be excused. In Chapter Six the Commission

ABORIGINAL PARTICIPATION IN JURY SERVICE

As noted in Chapter One, Aboriginal[40] people in Western Australia were not permitted to vote until 1962. But it was not until 1983 that it became compulsory for Aboriginal people to enrol to vote.[41] Since that time law reform bodies, researchers and others involved in the criminal justice system have highlighted the underrepresentation of Aboriginal people on juries.[42] In 1986 the Australian Law Reform Commission observed that '[i]n those parts of Australia where Aborigines represent a sizable proportion of the population, it is still rare for an Aborigine to sit on a jury'.[43] It its reference on Aboriginal customary law in 2005, this Commission noted that Aboriginal people appeared to be underrepresented on juries.[44] More recently, the Chief Justice of Western Australia expressed his concern about the

> very low rate of Aboriginal participation in jury service, even in those parts of the State in which Aboriginal people comprise a significant proportion of the population.[45]

However, it is difficult to accurately estimate the number of Aboriginal people who are summoned for jury service and who are selected as jurors because the Aboriginal status of jurors is not routinely recorded. A 1994 study in New South Wales conducted surveys with jurors and found that less than 1% of empanelled jurors (who responded to the survey) were Aboriginal.[46] A more recent survey of empanelled jurors in New South Wales, South Australia and Victoria also observed that less than 1% of respondents identified as Aboriginal (a total of 628 jurors responded to the survey and the majority of respondents were from metropolitan areas).[47]

In Western Australia statistics are not collected on a statewide basis. The only up-to-date information for Perth is found from an exit survey conducted with jurors from 1 June 2008 until 4 June 2009. Of those jurors who completed the survey, 1% self-identified as Aboriginal. Five per cent provided no response to this question (hence, 94% identified as non-Aboriginal).[48] Bearing in mind that Aboriginal people comprise 3% of the Western Australian population[49] it appears that Aboriginal people are, to some extent, underrepresented as jurors in the metropolitan area.

The proportion of Aboriginal people residing in regional Western Australia is much higher than 3% (eg, Aboriginal people comprise approximately 45% of the population in Derby; over 26% in Kununurra; approximately 20% in Broome and in Carnarvon; between 13% and 15% in Port Hedland and South Hedland; and 8% in Geraldton).[50] Although no statistics are kept, the Commission has been told anecdotally that approximately 20% of the people who attend for jury service in response to a summons in Kununurra are Aboriginal.[51] In Derby, where almost half of the population is Aboriginal, the Commission has been told that approximately half of all people who turn up in response to a juror summons are Aboriginal and usually about 4 to 5 (but sometimes less and sometimes more) Aboriginal people are selected to serve on a jury.[52] Hence, in these locations it appears that Aboriginal people are relatively well represented.

The Commission notes that historical data is a somewhat unreliable measure of the degree of Aboriginal

proposes the development of guidelines for determining excuse applications: see Proposal 47.

40. For the purpose of this Discussion Paper, reference to Aboriginal people includes Torres Strait Islander people; however, the Commission notes that, according to the 2006 Census, there were 1,057 Torres Strait Islander people (and 1,004 people who are of both Aboriginal and Torres Strait Islander origin) usually residing in Western Australia.
41. See above Chapter One, 'The *Juries Act 1957*'.
42. See eg, Vodanovich I, *The Criminal Jury Trial in Western Australia* (PhD Thesis, University of Western Australia, 1989) 160; Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 5; VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 3, [3.167]; Israel M, 'Ethical Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 37; Auty K, 'Putting Aboriginal Defendants Off Their Country', in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (Perth: UWA Press, 2004) 60; NSWLRC, *Jury Service*, Issues Paper (2006) 12; Goodman-Delahunty et al, *Practice, Polices and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 78 & 84.
43. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) vol 1, [590].
44. LRCWA, *Aboriginal Customary Laws*, Discussion Paper (2005) 231.
45. Chief Justice of Western Australia, Hon. Wayne Martin, 'Current Issues in Criminal Justice' (Speech delivered at the Rotary District 9460 Conference, Perth, 21 March 2009) 18.
46. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 61.
47. Goodman-Delahunty et al, *Practice, Polices and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 164.
48. An earlier exist survey shows that from 1 July 2007 until 14 February 2008, 2% of respondents identified as Aboriginal or Torres Strait Islander (6% provided no response to this question).
49. Department of Immigration and Citizenship (Cth) & Office of Multicultural Interests (WA), *The People of Western Australia: Statistics from the 2006 Census* (2008).
50. See ABS, *2006 Census QuickStats: Western Australia* (2007).
51. Owen Deas, Clerk of Courts, Kununurra Magistrates Court, telephone consultation (18 August 2009); Debbie Cooper, Aboriginal Fines Liaison Officer, Kununurra Magistrates Court, telephone consultation (18 August 2009).
52. Peta Smallshaw, Clerk of Courts, Derby Magistrates Court, telephone consultation (18 August 2009).

participation in juries. For instance, observations that the selection of an Aboriginal juror was rare in 1989 must be viewed in the context that Aboriginal people were not required to be enrolled to vote (and therefore not liable to serve as jurors) until 1983. Currently, it appears that Aboriginal people may be underrepresented as jurors in Perth but possibly better represented in some regional locations.

Explanations for low Aboriginal participation on juries

Various reasons have been put forward to explain the underrepresentation of Aboriginal people on juries. Some of these reasons include:

Enrolment to vote: It is often said that Aboriginal people are less likely to be enrolled to vote and hence not liable for jury service.[53] However, as mentioned above, electoral roll data does not stipulate Aboriginality and therefore it is impossible to know the extent of under-enrolment.

Disqualification criteria: In all jurisdictions people with specified criminal convictions are disqualified from serving on juries. Because Aboriginal people are disproportionately overrepresented in the criminal justice system and in prison it is more likely that they will be excluded from jury service on this basis.[54] People are also disqualified from serving on a jury if they do not understand English and for this reason it has been observed that some Aboriginal people will be precluded from jury service.[55] The Commission examines these disqualification categories in Chapter Five.

Summoning process: Aboriginal people are often transient, especially in regional locations. Apart from the difficulty this creates in maintaining accurate electoral details (discussed above), it means that many Aboriginal people are unlikely to actually receive their jury summons. The Commission has been told that the main problem in ensuring Aboriginal juror attendance in Kununurra and in Broome is the summoning process. Summonses are served by post; however, in these locations (and possibly others) there is no postal delivery service. In order to access mail, it is necessary to have a post office box. Some Aboriginal people will not have their own post office box and when they do, mail is generally collected sporadically especially if the person usually resides a long distance from the town. For those Aboriginal people living in remote communities, there may be a post box for the entire community but individuals may not receive their mail in a timely manner if they are regularly moving around.[56] The Commission notes that this problem with the summoning process is not confined to Aboriginal people – there will be non-Aboriginal people also living in remote communities, on stations and farms who may not receive their summons in time.[57] In the past, summonses were served personally by the police. The Commission does not consider that this is a realistic alternative to postal service; personal service would no doubt be expensive and time consuming, and not necessarily any more effective for transient populations.

Cultural issues and community ties: Aboriginal people may be reluctant or unable to serve on juries because of cultural constraints.[58] The Commission has been told by one Western Australian judge that an Aboriginal juror stood up during the trial and informed the judge

53. See eg, Vodanovich I, *The Criminal Jury Trial in Western Australia* (PhD Thesis, University of Western Australia, 1989) 161; LRCWA, *Aboriginal Customary Laws*, Discussion Paper (2005) 231; NSWLRC, *Jury Service*, Issues Paper (2006) 12; Goodman-Delahunty et al, *Practice, Polices and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 164. See also Joint Standing Committee on Electoral Matters, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (2009) 148.
54. See Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 5; NSWLRC, *Jury Service*, Issues Paper (2006) 12; Goodman-Delahunty et al, *Practice, Polices and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 84.
55. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) vol 1, [590]; Vodanovich I, *The Criminal Jury Trial in Western Australia* (PhD Thesis, University of Western Australia, 1989) 161; Israel M, 'Ethical Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 43.
56. Owen Deas, Clerk of Courts, Kununurra Magistrates Court, telephone consultation (18 August 2009); Debbie Cooper, Aboriginal Fines Liaison Officer, Kununurra Magistrates Court, telephone consultation (18 August 2009); Jim Adair, Regional Manager, Broome Magistrates Court, telephone consultation (18 August 2009); Rick Pugh, Registry Manager, Broome Magistrates Court, telephone Consultation (18 August 2009).
57. The Commission notes that people who do not receive their summons and hence do not attend court may be penalised. The Commission proposes an infringement system in Chapter Seven and emphasises that some investigation about why the person failed to attend should be undertaken before an infringement is issued. This is particularly important in the regional context bearing in mind the lack of postal services and the long distances between post offices and some residences.
58. Goodman-Delahunty et al, *Practice, Polices and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (Australian Institute of Criminology, 2008) 164; NSWLRC, *Jury Service*, Issues Paper (2006) 12. See also FranKLand R, 'Mr Neal is Entitled to Be an Agitator: Indigenous people put upon their country', in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (Perth: UWA Press, 2004) 50–7. Aboriginal people may also be precluded from hearing certain evidence because of customary law obligations: LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 323.

that he couldn't judge a person whom he didn't know.[59] Other judges have also emphasised the difficulties faced by Aboriginal people in this context.[60] Significantly, in regional locations Aboriginal people are more likely to know the accused or a witness and seek to be excused on this basis.

Challenges: It has been claimed that Aboriginal jurors are peremptorily challenged in cases involving Aboriginal accused. In 1981 in New South Wales, three Aboriginal jurors in the panel were challenged by the prosecution. The judge discharged the jury in fairness to the accused.[61] Defence counsel in this case has been reported as saying that 'it was common practice to challenge all potential Aboriginal jurors' in cases involving Aboriginal accused.[62] In a case in 1984 in Derby, seven Aboriginal jurors were challenged by both prosecution and defence.[63] At that time 60% of the population in Derby was Aboriginal.[64] Earlier in this chapter the Commission invites submissions about whether the *Juries Act* should contain a provision to enable the trial judge to discharge the entire jury in circumstances where the jury selection process appears to have resulted in a jury that is or may appear to be unfair.[65]

What can be done?

As Mark Israel observes, Aboriginal people are entitled to participate in jury service in the same way as every other citizen and Aboriginal people are entitled to be tried by a representative and impartial jury.[66] In response to the underrepresentation of Aboriginal jurors, it has been suggested that procedures could be adopted to ensure that there is adequate representation of Aboriginal people on juries in specific cases involving Aboriginal people.[67] Similar proposals have been made in other countries. The United Kingdom Royal Commission on Criminal Justice in 1993 recommended that in exceptional circumstances a trial judge should be able to order that the jury include up to three ethnic jurors (and at least one from the same ethnic background as the accused).[68] In considering the underrepresentation of Maori people on juries, the New Zealand Law Commission noted that the proportion of Maori people included in a jury list could be matched to the proportion of Maori people living in the relevant jury district.[69] But it was concluded that 'proportional adjustment is contradictory to the principle of random selection, and once an exception is made for one group there is no reason in principle why it should be not be made for all other ethnic minorities and any other group'.[70] The Commission agrees that these types of deliberate selection methods would unjustifiably interfere with the principle of random selection and, further, there is insufficient evidence to suggest that such radical measures are necessary in Western Australia.

The Commission recognises that some of the barriers to Aboriginal participation in jury service are difficult, if not impossible, to overcome. Cultural issues must be acknowledged and Aboriginal people should not be compelled to serve where cultural obligations or community ties would render jury service unduly onerous or where association with the accused or witness would lead to actual or perceived bias. Further, there does not appear to be any practical alternative to serving jury summonses by post.

The Commission is also not convinced that the level of Aboriginal participation in juries in Western Australia is necessarily as low as perhaps it once was. However, it is impossible to know the number of Aboriginal jurors who are being selected in the absence of reliable data. To the extent that underrepresentation exists, the Commission is of the view that its proposals above to address problems in regional areas will assist in increasing the number of Aboriginal people who are enrolled to vote and will help ensure enrolment details are accurately recorded so that juror summonses are sent to the correct address. Further, if jury district boundaries are extended, the number of Aboriginal people living in remote parts of Western Australia who are liable for jury service would increase.

59. Judge Mazza, consultation (19 December 2007).
60. Chief Judge Kennedy, consultation (17 January 2008); Judge Yeats, consultation (20 December 2007); Justice McKechnie, consultation (19 December 2007).
61. '*R v Smith*' [1982] *Aboriginal Law Bulletin* 8.
62. 'White Jury Discharged' [1981] *Aboriginal Law Bulletin* 23.
63. Vodanovich I, *The Criminal Jury Trial in Western Australia* (PhD Thesis, University of Western Australia, 1989) 88.
64. Ibid 161.
65. Invitation to Submit B .
66. Israel M, 'Ethical Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 45.
67. See McGlade H & Purdy J, '...No Jury Will Convict: An account of racial killings in Western Australia' (2001) 22 *Studies in Western Australian History* 91, 105.
68. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 5; VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, 4.
69. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 69–70.
70. Ibid 70.