Selection, Eligibility and Exemption of Jurors

Discussion Paper

Project No 99

September 2009

Law Reform
Commission of
Western Australia

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ISBN: 978-1-74035-062-4

Printed by Quality Press, Western Australia

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The Commission would like to thank Western Australia's Jury Manager, Mr Carl Campagnoli, for his generous assistance in providing relevant data and information for this Discussion Paper.

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Foreword

RECENT public debate about juries has centred upon the concern about whether juries have become unrepresentative of the community because of the number of people who are either disqualified, ineligible to serve or who seek to be excused as of right or apply to be excused for good reason. This has led to a perception that juries are populated by the unemployed and 'housewives'. The Commission has analysed the data available from the Western Australian Sherriff's Office and has found no support for this proposition in relation to Western Australian juries. Statistics for the most recent financial year show only 2% were Centrelink recipients and only 3% listed their employment status as 'home duties'. A further 25% were employed in the public sector with 3% self-funded retirees and 2% students. The majority (57%) of jurors were employed in the private sector representing an extremely diverse occupational cross-section of the community.

Despite this the Commission has regarded the review of the processes and procedures concerning jury selection as timely in light of the fact that reforms have recently occurred in other Australian jurisdictions and internationally and the fact that the last formal review of the *Juries Act 1957* (WA) by the Law Reform Commission occurred in 1980. In reviewing the law in this area the Commission has been guided by a number of principles of reform which include recognising that the obligation to serve on a jury is an important civic responsibility to be shared as equitably as possible by the community. This should be balanced with an accused's right to a fair and impartial trial before a lay jury that is independent of the state.

The Commission has proposed abolishing excuse as of right for certain professions and other groups in the community, reducing the categories of occupational ineligibility and introducing a system of deferral of jury service. In this way the Commission expects that the numbers of excusals will dramatically decrease and representation of the community will correspondingly increase.

Other important issues also addressed in this Discussion Paper are the process of empanelling juries, jury representativeness in regional areas and when a physical or mental disability should disqualify a person from serving as a juror. It is recognised that there may not be appropriate representation of Aboriginal people on juries; the Discussion Paper sets out the factors which may contribute to under-representation and makes suggestions for increasing representation of this group.

The Commission has approached its task of reforming the law relating to juror selection and exemption with the aim of ensuring that the law is principled, clear, consistent and relevant to the specific conditions experienced in Western Australia. The Commission has established six principles that have guided its proposals for reform which are set out in Chapter One. The paper goes on to examine the criteria for liability to serve as a juror, the categories of occupational ineligibility and disqualification from service, the categories of excuse, allowances for jury duty, protection of employment and enforcement of juror obligations.

The purpose of this Discussion Paper is to provide those interested in the issue of jury selection with a review of the law and a discussion of what the Commission believes are the relevant issues. The Commission has closely examined available research and data from Western Australia, other Australian jurisdictions and the United Kingdom. It has also consulted widely with people involved in the jury selection process in several jurisdictions in Australia and in England. As a result of its research the Commission has arrived at very considered and clear proposed reforms. Where the Commission has not been able to arrive at a clear proposal the Commission has posed consultation questions on which it invites submissions. A list of proposals and invitations to submit can be found at Appendices A and B. The Commission hopes that this Discussion Paper will engage our readers and stimulate responses for us to draw upon when we write our Final Report and make recommendations for government.

This is a fascinating and timely reference. I would like to thank the many people who have given the Commission their experience, advice and assistance. Their names appear in Appendix E.

Mary Anne Kenny
Chair

Executive summary

JURY trials have existed in Western Australia from the earliest days of settlement, but their use has diminished over time. Today juries are virtually unheard of in civil trials and are empanelled in less than 0.5% of criminal cases. Nonetheless, juries are widely considered to be an important protection of liberty and a guarantee of the sound administration of justice. Indeed, public confidence in the criminal justice system has been shown to be enhanced by the public's participation as jurors.

The *Juries Act 1957* (WA) sets out the system for selecting people for jury service in Western Australia. Only people aged between 18 and 70 years who are enrolled to vote in Western Australia are currently liable to serve as a juror. Each year a number of people are randomly chosen from the electoral roll for potential jury service. Of these people, some will be disqualified by reason of their criminal history, lack of understanding of English or mental or physical incapacity. Others will be ineligible for jury service because of their occupation (eg, police, lawyers, judges, members of Parliament etc). And still others will seek to be excused from jury service, either 'as of right' (eg, health professionals, emergency service workers and full-time carers) or for good cause (eg, undue hardship or illness). The judge or the summoning officer may also excuse a person from attendance on their own motion or the person may be challenged by counsel for the prosecution or the defence before being sworn as a juror.

Presently, the incidence of pre-attendance excuse (52%) and failure to attend (16%) pursuant to a jury summons is unacceptably high and it is this that has triggered a review of the provisions that govern selection, eligibility and excuse in the *Juries Act 1957* (WA).

The Commission has closely examined available research and data from all Australian jurisdictions, New Zealand and the United Kingdom. It has also consulted widely with people involved in the jury selection process in these jurisdictions. The Commission's analysis of Western Australian data has shown that several of the popular criticisms of juries have little or no basis in fact. For example, it has been reported that Western Australian juries are populated by the unemployed and by 'housewives'. The Commission has found that this is not the case, with data showing that these categories make up only 5% of current jurors. There is also a perception that the 'professional' classes are not widely represented on juries. Again, data analysed by the Commission shows that this criticism cannot be sustained. Further, there is a perception that Aboriginal people and ethnic minorities are significantly underrepresented on juries. The available evidence does not appear to support this contention; however, existing data is limited in this regard. There is also a misconception that jurors in Western Australia are poorly remunerated for their service.

However, the Commission's research did find that the burden of jury service in Western Australia may presently be borne unequally. This is particularly so in regional areas where people may be called upon to serve as jurors much more often than those in metropolitan Perth. Indeed, in some regional areas it is possible that a person may be summoned to serve as a juror more than once a year. Further, there are a number of categories of people that are entitled to be excused from jury service 'as of right' irrespective of their individual circumstances or actual availability for jury service. The Commission makes a series of proposals to broaden the pool of potential jurors in Western Australia to increase participation in the jury system. These include such things as raising the age of jurors to 75 years; potentially increasing the size of jury districts; limiting those people who are automatically exempt from jury service; and enabling, by a series of practical measures, the source lists from which jurors are drawn to be more regularly updated.

The Commission has also found that the current list of ineligible occupations is unnecessarily wide. The Commission proposes that the number of ineligible occupations be reduced so that only those people who are intimately involved in the administration of justice (and in particular criminal justice) and whose presence on a jury may compromise its independent, impartial and lay nature are ineligible for jury service. Another significant proposed reform is the removal of 'as of right' excuses for health professionals, emergency service workers and others. Under the Commission's proposals people will only be relieved of the obligation to undertake jury service—and hence excused from further attendance—in the following circumstances:

- Where service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person.

- Where a person who, because of an inability to understand and communicate in English or because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror.

- Where a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror

Currently many people apply to be excused from jury service for temporary reasons such as holidays, illness, exams, medical appointments or pressing work commitments. The Commission proposes that a deferral scheme be introduced in Western Australia to enable people who have a valid but temporary excuse to postpone their jury service to a time that is convenient to the juror and the court within the following 12 months. The capacity to postpone jury service is likely to facilitate greater participation in jury service, which will in turn ease the burden on other members of the community and increase the representative nature of juries.

Noting the current problems with a drawn-out process of penalising those who fail to comply with a jury summons, the Commission has proposed that an infringement notice system be introduced with a significant penalty attached. The Commission has also identified that there is currently no provision to protect a juror's employment while he or she is performing jury service. For this reason the Commission has proposed that a new provision be inserted into the *Juries Act* making it an offence for an employer or anyone acting on behalf of an employer to terminate, threaten to terminate or otherwise prejudice the position of an employee because the employee is, was or will be absent from employment on jury service.

Inadequacy of remuneration for jurors is a common complaint in many jurisdictions and anecdotally it appears that many people have the perception that jurors are not properly compensated for their loss of income in Western Australia. This is perhaps the most widespread misconception about jury service in Western Australia and it may be a significant barrier to participation in jury service. In fact, the Commission has found that Western Australia has the most generous system of juror allowances in Australia, covering actual loss of earnings for self-employed jurors and actual wages for employed jurors. The Commission proposes that awareness-raising strategies be implemented to dispel any misconceptions that performing jury service will impose a financial burden on the juror or the juror's employer. Furthermore, the Commission proposes that the relevant legislation provide for reimbursement of reasonable child care and other carer expenses incurred as a consequence of jury service.

Finally, the Commission has proposed reforms to tighten up the current provisions regarding disqualification from jury service. This includes removing the significant anomalies caused by the current wording of the *Juries Act* in relation to jurors' past criminal convictions. For example, a person fined for fraud in the District Court is currently qualified for jury service, while a person sentenced to a Community Based Order for disorderly conduct (a much lesser offence) within five years is disqualified. Further, an adult offender convicted and sentenced to two years' imprisonment in August 2002 for sexual assault would presently be qualified for jury service, while a young offender sentenced to a Youth Community Based Order for six months in August 2005 for stealing would not. The Commission believes that the best way to ensure that the disqualifying provisions operate fairly and maintain public confidence in the jury system is to use a combination of offence-based and sentenced-based classifications with legislative criteria that distinguishes between those convictions that are so serious as to justify permanent disqualification and those that only demand temporary exclusion from jury service.

The Commission has approached the task of reforming the law relating to juror selection with the aim of ensuring that the law is principled, clear, consistent and relevant to the specific conditions experienced in Western Australia. It has devised six guiding principles for reform to encourage juries that are independent, impartial, competent and broadly representative. The Commission makes 51 proposals to improve the current process of juror selection, which reflect these guiding principles and, most importantly, ensure that the right to a fair and impartial trial before a lay jury is protected and the public's confidence in the jury system is maintained.

Introduction

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Introduction

THE former Attorney General of Western Australia, the Hon. Jim McGinty MLA, gave the Law Reform Commission of Western Australia (the Commission) a reference to

> examine and report upon the operation and effectiveness of the system of jury selection giving consideration to:
>
> (i) whether the current statutory criteria governing persons who are not eligible, not qualified or who are excused from jury service remain appropriate;
>
> (ii) the compilation of jury lists under Part IV of the *Juries Act 1957* (WA);
>
> (iii) recent developments regarding the selection of jurors in other jurisdictions; and
>
> (iv) any related matter.
>
> And to report on the adequacy thereof and on any desirable changes to the existing law, practices and procedures in relation thereto.

The reference was initiated in response to concerns raised about the growing number of people who apply for and are granted exemptions from jury service, or who are disqualified or ineligible to participate on a jury. These concerns have been recently reiterated by the current Attorney General, the Hon. Christian Porter MLA.[1]

SCOPE OF THE REFERENCE

A number of cases[2] in recent years have inspired vigorous public debate in Western Australia about the continuing viability and value of the jury system.[3] Commentators have criticised the lack of transparency of the jury process and the fact that juries are not—like other adjudicating bodies—required to give reasons for their decisions.[4] As a result, jury verdicts are less amenable than judicial decisions to 'proper appellate scrutiny'.[5] Former Western Australian District Court judge Valerie French has argued that trial by jury is anachronistic and a 'significant impediment to a timely, efficient and effective criminal justice system'.[6] While defending the jury system, the Chief Justice of Western Australia has suggested that the process be changed to allow trial judges to oversee and guide jury deliberations.[7] At the same time, senior members of the Western Australian legal profession have advocated that the system of trial by jury ought to be abolished.[8]

While the Commission accepts that the jury is a 'dynamic institution'[9] and acknowledges the very interesting law reform questions raised by this public debate, it is not mandated to inquire into the viability or fundamental characteristics of the jury system in Western Australia. Such questions are beyond the scope of this reference. As the above terms of reference make clear, the Commission's inquiry is confined to a very specific and important aspect of the jury system in Western Australia: the operation and effectiveness of the system of jury selection. This Discussion Paper is therefore primarily concerned with those parts of the *Juries Act 1957* (WA) that provide for the selection, eligibility and exemption of jurors, together with the means by which lists of potential jurors are compiled.

1. 'Jury Duty Crackdown', *The West Australian* (1 March 2009) 3.
2. One such case in Western Australia (known as the Walsham case) concerned the conviction by a jury of three men for murder ultimately overturned by the Court of Appeal, while another (known as the McLeod case) concerned the acquittal by a jury of two men involved in a brawl in which a police constable was left paralysed. The conduct of jurors in the high-profile Folbigg case in New South Wales (where jurors made independent investigations outside of the court process leading to cause for appeal against the conviction) has also raised questions about the system of trial by jury: 'Jury Sleuths Give Folbigg a Chance', *The Australian* (28 November 2007) 10.
3. See eg, 'Walsham Murder Jurors Ask "Is This Really Justice?"' (10 July 2007) <www.crikey.com.au>; 'Walsham Trio's Lawyer Puts Juries in the Dock', *The West Australian* (24 July 2007); 'I'll Change Jury Laws: Porter', *The West Australian* (14 March 2009) 4; 'Lawyers Defend Juries and Their Decisions', *The West Australian* (14 March 2009) 5; 'Porter Flags Switch to "Expensive" Jurors', *The West Australian* (19 March 2009) 4; 'DPP Backs Overhaul of Jury Selection System', *The West Australian* (24 March 2009) 6; 'Dumped Juror Takes Complaints to Porter', *The West Australian* (30 March 2009); 'Police Bash Case Juror "Set Up" for Expulsion' *The West Australian* (31 March 2009).
4. See Martin WS, *Current Issues in Criminal Justice* (Speech delivered to the Rotary District Conference 2009, Perth, 21 March 2009) 20; 'Walsham Trio's Lawyer Puts Juries in the Dock', *The West Australian* (24 July 2007).
5. French V, 'Juries – A Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System' (2007) 90 *Reform* 40, 42.
6. Ibid.
7. Martin WS, *Current Issues in Criminal Justice* (Speech delivered to the Rotary District Conference 2009, Perth, 21 March 2009) 22; 'Put Judges into Jury Rooms Says Court Chief', *The West Australian* (21 March 2009) 1. See also 'Radical Jury Plan is Rejected', *The West Australian* (22 March 2009).
8. See eg, Malcolm McCusker QC's views expressed in 'Prejudice Sent Trio to Jail', *The Perth Post* (9 June 2007); 'Walsham Trio's Lawyer Puts Juries in the Dock', *The West Australian* (24 July 2007); 'Attorney General Orders Review on Jury Duty Service', *Perth Now* (28 February 2009).
9. Findlay M, 'Juries Reborn' (2007) 90 *Reform* 9, 11.

PREVIOUS INQUIRIES

Over the past two decades there have been a number of important inquiries by law reform agencies into the selection, eligibility and exemption of jurors and other aspects of jury service in common law jurisdictions. Among other sources, the Commission has been informed by the following important reviews of this area:

- The Victorian Parliament Law Reform Committee's (VPLRC) comprehensive review of jury service in Victoria.[10]
- The New South Wales Law Reform Commission's (NSWLRC) reviews of jury service, juror selection, and blind or deaf jurors.[11]
- The New Zealand Law Commission's (NZLC) review of juries in criminal trials.[12]
- Lord Justice Auld's review of the criminal courts of England and Wales ('the Auld Review').[13]

The Commission has also been informed by earlier inquiries undertaken on this subject.[14] Most important among these is the inquiry into exemption from jury service undertaken in Western Australia by this Commission from 1978 to 1980.[15]

ABOUT THIS DISCUSSION PAPER

This Discussion Paper is presented in seven chapters as follows:

Chapter One provides the history and current use of jury trials in Western Australia, summarises the selection process, highlights the objectives of juror selection and sets out the Commission's guiding principles for reform.

Chapter Two outlines the current law and practice for compilation of jury lists from the electoral roll and details the summoning, selection and empanelment process. This chapter also discusses the issue of jury representativeness in regional Western Australia.

Chapter Three examines the criteria for liability to serve as a juror in Western Australia.

Chapter Four discusses the categories of occupational ineligibility for jury service found in s 5(a) and the second schedule of the *Juries Act*.

Chapter Five discusses the factors that will render a person not qualified for jury service found in s 5(b) of the *Juries Act*. These factors include certain criminal records, lack of understanding of English, and physical or mental incapacity.

Chapter Six discusses the categories of excuse, including the current construction of excuse 'as of right' and excuse for cause, found in the second and third schedules of the *Juries Act* respectively. This chapter also discusses the concept of deferral of jury service as a potential means of dealing with valid but temporary excuses.

Chapter Seven deals with allowances for jury duty, protection of employment and enforcement of juror obligations.

Submissions

The Commission invites interested parties to make submissions in respect of the proposals for reform contained in this Paper. Submissions will assist the Commission in formulating its final recommendations to the Western Australian Parliament for reform of the law in this area. All submissions will be considered by the Commission in its Final Report.

Submissions may be made by telephone, fax, letter or email to the address below. Alternatively, those who wish to request a face-to-face meeting with the Commission may telephone for an appointment.

The closing date for submissions is
Monday 14 December 2009

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10. VPLRC, *Jury Service in Victoria* (1994–1997).
11. NSWLRC, *Jury Service* (2006); NSWLRC, *Blind or Deaf Jurors* (2004–2006); NSWLRC, *Juror Selection* (2007).
12. NZLC, *Juries in Criminal Trials* (1998–2001).
13. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (September 2001) ch 5.
14. NSWLRC, *The Jury in a Criminal Trial,* Report No 48 (1986); Law Reform Commission of Victoria (LRCV), *The Role of the Jury in Criminal Trials* (1985).
15. Law Reform Commission of Western Australia (LRCWA), *Report on Exemption from Jury Service,* Project No 71 (1980).

Chapter One

Jury Trials in Western Australia

Contents

History of the jury trial

ORIGINS OF THE ENGLISH JURY

Following the Norman Conquest of England, the Frankish practice of inquisitions (involving sworn witnesses summoned by a judge) was combined with the existing Anglo-Saxon county court and it is in this combination that the origins of the English jury can be found.[1] The county court involved a six-monthly meeting of all the free men of the shire to adjudicate on civil and administrative issues that affected the freeholders of the shire.[2] At the consent of the parties to a dispute, a group of 12 men – literally neighbours – would be summoned to answer a question of fact from their own knowledge of the dispute. These men were selected to act as witnesses to the truth:[3] should any one of their number perjure themselves and give 'false judgment', their property was seized and the witness was placed in prison.[4]

The transition of the jury from a means of 'proof' to a form of 'trial' occurred largely in the criminal sphere, though trial by jury for serious criminal matters was unknown until at least a century after the Norman Conquest. Until that time, an accused would be subject to trial by combat, ordeal[5] or compurgation.[6] For a period, trial by jury was seen as a means of extracting information 'rather than as a way to protect the liberty of the subject' and few accused given the choice would seek it.[7] But by the mid-15th century the nature of the jury as first-hand witnesses of the truth had changed. Although the jury remained constituted by 12 men summoned from the district, they were required to be without knowledge of the dispute in question and to exercise judgment on evidence presented under oath.[8]

Developments in the Tudor period saw the role of the jury firmly established as a tribunal that would pronounce upon the facts in dispute before the law was applied.[9] Further important developments occurred in the latter half of the 17th century. It was at this time that juries were first clearly declared to be independent and free of the external pressure that was notoriously placed upon them to assist in the determination of a 'correct' verdict.[10] The critical effect of this in the development of the English common law of juries was that the jury 'began to be seen as a means of protecting the accused's liberty'.[11] This was confirmed by the English Bill of Rights of 1688, with juries gaining the power to reject the Crown's allegation and dismiss the charge.[12]

INTRODUCTION OF JURY TRIALS INTO AUSTRALIA

Although well established in England, the concept of the jury trial did not attend the settlement of New South Wales. Because New South Wales was a convict colony, the constitution of a jury of disinterested free men was impossible. It was not until 1807 that the Governor was confident that 'eligible citizens for jury service were available in sufficient numbers'.[13] Nonetheless,

1. Harding A, *A Social History of English Law* (London: Penguin Books, 1966) 27.
2. Proffatt J, *A Treatise on Trial by Jury* (New York: WS Hein Publishing, 1986) 20.
3. Ibid 21.
4. Ibid 38.
5. Trial by ordeal was by water or fire and guilt or innocence was judged by supposed intervention by God. Trial by water involved submersion in water where an accused would be acquitted if he or she survived submersion (later this changed so that survival became evidence of guilt). Trial by fire involved the accused walking on hot ploughshares or holding a hot poker. An accused would be acquitted if he or she was unhurt or, in some circumstances, if the accused's wounds had healed within three days.
6. Trial by compurgation involved each disputant petitioning neighbours as witnesses to the truth of his case. VPLRC, *Jury Service in Victoria,* Final Report (1997) vol 3, [1.36]–[1.38]; Vodanovich IM, *The Criminal Jury Trial in Western Australia* (Perth: University of Western Australia, PhD thesis, 1989) 13; Proffatt J, *A Treatise on Trial by Jury* (New York: WS Hein Publishing, 1986) 16.
7. VPLRC, ibid [1.37].
8. Ibid [1.48].
9. Baker JH, *An Introduction to English Legal History* (Bath: Butterworths, 4th ed, 2002) 82.
10. *Bushell's Case* (1670) Vaughan 135. In this case a jury trying two men accused by the Crown of being guilty of preaching to an unlawful assembly refused to convict, despite having been fined and locked up without food for two nights. Vaughan CJ held that a jury was not bound to follow the direction of the court and emphasised the importance of jurors being free from punishment and uninfluenced by external pressure: VPLRC, *Jury Service in Victoria,* Final Report (1997) vol 3, [1.39].
11. VPLRC, ibid.
12. Vodanovich IM, *The Criminal Jury Trial in Western Australia* (PhD Thesis, The University of Western Australia, 1989) 14. By the 18th century a further ground for obtaining a new trial was allowed, by showing that the trial judge had erred in his direction to the jury in ruling on the admissibility of material evidence: Baker JH, *An Introduction to English Legal History* (Bath: Butterworths, 4th ed, 2002) 85.
13. Bennett JM, *The Establishment of Jury Trial in New South Wales* (1961) 13 *Sydney Law Review* 463, 464.

inquisitorial tribunals of military officers, sitting (in various forms)[14] with a deputy judge advocate, continued to determine serious criminal matters until 1832.

The Act of 1832[15] provided for trials of criminal matters in which a member or officer of the government had an interest to be heard before a civilian jury of 12 men.[16] Eligibility for jury service followed the rules and practices of the English courts, so that only male residents aged between 21 and 60 who had real estate producing a prescribed annual income or a personal estate of a certain amount were competent to serve as jurors. They were paid a daily allowance, plus travelling fee.[17] Certain persons—such as justices of the peace, merchants and bank directors—were eligible to serve as 'special jurors' and were paid a higher rate.[18] All jurors were liable to be penalised for non-attendance.

In 1839 legislation was passed allowing for criminal issues of fact to be determined by a civilian jury of 12 more generally.[19] This development was further consolidated by provision for a right to jury trial in adjudications of crimes and misdemeanours legislated in the *Juries Act 1847* (NSW).[20] Speaking of the importance of jury trial in relation to criminal matters in Australia, Deane J has said that:

> In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government.[21]

WESTERN AUSTRALIA'S ADOPTION OF TRIAL BY JURY

Western Australia was settled as a free colony in 1829. Convicts were only transported to the colony from 1850 to 1868, and even then in limited numbers relative to other parts of Australia. Despite an Act having been passed in the United Kingdom to establish the Swan River colony,[22] Lieutenant Governor Stirling arrived in Western Australia with a set of instructions but without a formal commission.[23] Nonetheless, soon after arriving Stirling issued a proclamation declaring that British statute law and common law would apply to the new colony and within months he had appointed eight free settlers as justices of the peace to adjudicate upon criminal matters within the colony.[24] These justices, including one legally trained chairman, staffed the first criminal court of the colony, modelled on the English Court of Quarter Sessions.[25] Juries were introduced into the colony at the first sitting of the court in July 1830 under rules drawn up by the justices.[26] As Enid Russell has observed, Western Australia therefore holds the indubitable honour of having 'the first true [civilian] jury to sit in Australia'.[27]

In 1832 the newly established Legislative Council of the colony enacted legislation continuing the criminal Court of Quarter Sessions, establishing a civil court and providing for the regulation of criminal and civil juries.[28] Under the latter Act, all males aged between 21 and 60 years who owned real estate to the value of £50 or personal estate of at least £100 were liable for jury service. Court officials, civil servants, clergymen, legal practitioners, medical men, aliens, criminals and justices of the peace were excluded from service. There was no mention of women in the legislation.

14. One such form was posited in the New South Wales Act of 1823, which provided for a judge and jury of seven commissioned officers, nominated by the Governor, to try criminal issues before the Supreme Court.
15. 2 Wil IV No 3.
16. To attain a non-military jury at trial, an accused had to show that the Governor or a member of the Executive Council was the person against whom the offence was alleged to have been committed, or had a personal interest in the result of the prosecution, or that the 'personal interest or reputation of any officer' stationed in the Colony would be affected by the result of the prosecution.
17. Bennett JM, 'The Establishment of Jury Trial in New South Wales' (1961) 13 *Sydney Law Review* 463, 474
18. Ibid.
19. 3 Vic No 11. Bennett notes that it was by this Act that 'military juries were at last abolished': ibid 476.
20. 11 Vic No 20. See also Bennett, ibid 482.
21. *Kingswell v R* (1985) 159 CLR 264, 298.
22. Government of Western Australia Act of 1829, 10 Geo IV, c.22.
23. Russell E, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (Perth: University of Western Australia Press, 1980) 8–9.
24. These justices also adjudicated upon civil matters in the colony until the establishment of the Civil Court of Western Australia in 1832.
25. Hands TL, 'The Legal System of Western Australia' in Kritzer HM (ed), *Legal Systems of the World: A political, social and historical encyclopaedia* (California: ABC-CLIO, 2002) vol 4, 1776.
26. The rules provided that only persons entitled to grants of land could act as jurors and that exemptions should be the same as those in the most recent Imperial Jury Act (6 Geo IV, c 50 of 1825). The rules provided that no person was to be compelled to serve more than once each year. It appears that, although the rules were silent on the subject of payment for jurors, a practice developed of payment of seven shillings per juror per day.
27. Russell E, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (Perth: University of Western Australia Press, 1980) 15.
28. Court of Quarter Sessions Act 1832, 2 Wil IV No 4 b and c 217; Court of Civil Judicature Act 1832, Wil IV No 1 b and c 210; *Juries and Office of Sheriff Act 1832* 2 Wil IV No 3. These courts operated until the creation of the current Supreme Court in 1861.

The *Jury Act 1898*

In 1898 a Jury Act was passed by the Parliament of Western Australia to consolidate the existing law of Western Australia relating to juries. It dealt with liability and qualification to serve, exemption from service, method of selection and various procedural matters. Men between the ages of 21 years and 60 years residing within the colony who owned real estate or personal estate of a specified value were qualified and liable to serve as common jurors.[29] As with the 1832 New South Wales Act, men who held certain positions[30] or those who had real or personal estate of a significantly higher value were qualified and liable to sit as either common jurors or special jurors, the latter attracting a higher daily sitting fee.[31]

Men who were not 'natural-born subjects or naturalised subjects of Her Majesty', or who had been 'convicted of any treason or felony, or of any crime that is infamous' were, unless they had been pardoned, disqualified from jury service.[32] Among those exempted from jury service were Members of Parliament, ministers of religion, practising lawyers and their clerks, medical practitioners, town clerks, schoolmasters, journalists, bank managers, chemists and druggists, and public servants.[33] Some minor amendments were made in 1937 extending exemptions as of right to commercial pilots, navigators, radio operators and certain crew members of aircraft.[34]

While Aboriginal Western Australian men were technically British subjects, the absence of any recognition of native title at that time meant that the property qualification would inevitably have prevented them from serving.[35] Indeed, nothing in the parliamentary debates suggests that service on juries by Aboriginal people was contemplated by legislators at that time.[36]

29. *Jury Act 1898* (WA) s 5.
30. Such as justices of the peace, bank directors and merchants 'not keeping a general retail shop': *Jury Act 1898* (WA) s 6.
31. *Jury Act 1898* (WA) s 36. Special or 'expert' juries were open to be ordered by Judge or Commissioner of the Supreme Court 'where any civil issue is to be tried by jury ... upon the application of any person party to the issue desiring that the trial shall be by a special jury': s 26. 'Special juries' were abolished by the *Juries Act 1957* (WA), save for certain coronial juries. The amendment followed the Morris Committee report in England which questioned whether special juries could actually guarantee special skills or improve on the work of common juries: AF Dickey, *The Jury and Trial by One's Peers* (1974) 11 *University of Western Australia Law Review* 205, 217–18.
32. *Jury Act 1898* (WA) s 7.
33. *Jury Act 1898* (WA) s 8.
34. Act No 10 of 1937, amending the *Jury Act 1898* (WA) s 8.
35. Israel M, 'Ethnic Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 41.
36. See eg, the Second Reading Speech for the Bill: Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 July 1898, 294–299 (Hon. RW Pennefather, Attorney General).

Women

There is no mention of women being eligible to serve as jurors in the 1898 Act and, although there was debate on the matter in latter years, the views of many members of Parliament of the time were that women were temperamentally unsuited to jury duty.[37] For example, in 1924 one member of the Legislative Assembly commented:

> To my mind women are far too illogical to sit on a jury. They are apt to judge rather by intuition than by reasoning out the evidence placed before them … I doubt whether they are quite competent to carefully reason out the pros and cons put before them … numbers of women judge a man by his face. [38]

This was apparently the case even in light of women's eligibility to be appointed justices of the peace from 1919 and to be elected as Members of Parliament from 1920. As this Commission commented in its 1980 report on jury service exemption, the *Women's Legal Status Act 1923* (WA), which provided in s 2 that 'a person shall not be disqualified by sex from the exercise of any public function … any law or usage to the contrary not withstanding', appears not to have been considered in this regard.[39]

Sonia Walker has noted that, as late as 1953 concerns were expressed about the 'emotional damage' that would be caused to women by deliberating on offences of a sexual nature.[40] Moreover, it was thought that women hearing such cases would be 'so embarrassed' that their 'observations and judgment would be clouded', which would 'make the situation [in the jury room] extremely difficult'.[41] In any event, the property qualification placed upon jurors would almost certainly have disqualified most women from serving as jurors during the early 20th century. Those whom it did not disqualify would necessarily be of a 'certain class' and concerns were raised as to whether this would affect the representative nature of the jury sample.[42]

37. For an examination of the history of women and jury service in Western Australia, see Walker S, 'Battle-Axes and Sticky-Beaks: Women and jury service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law*.
38. Western Australia, *Parliamentary Debates,* Legislative Assembly, 4 September 1924, 627 (Mr Teesdale, Member for Roebourne).
39. LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 13, n 2.
40. Walker S, 'Battle-Axes and Sticky-Beaks: Women and jury service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* [8].
41. Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 1953, 1060–1061 (Mr Nulsen, Member for Ayre and Minister for Justice).
42. Walker S, 'Battle-Axes and Sticky-Beaks: Women and jury service in Western Australia 1898–1957' (2004) 11(4) *Murdoch University Electronic Journal of Law* [23].

The *Juries Act 1957*

It was not until the enactment of the *Juries Act 1957* that women were made eligible to serve as jurors; but that same Act gave women an absolute right to be excused from jury service. The Select Committee of the Legislative Council (which reported in 1956) recommended that women should be obliged to serve in the same way as men, subject only to 'whatever maternal duties they may have'.[43] However, the government of the day chose not to accept that recommendation. The only reason to be found on record for this rejection is 'simply that nature provides differently for men and women, and it is necessary for the latter to be able to judge for themselves whether they feel fit to serve at a given time or not'.[44]

The 1957 Act also had the significant reforming effect of extending liability for jury service to a much wider range of the state's population by removing any kind of requirement for the holding of property.[45] Further, it made the electoral roll the basis for the means of selection for jury service, instead of a list compiled by the police through its identification of those with property qualifications. One consequence of altering the method of selection was that Aboriginal people became legally unqualified (as opposed to being precluded, in a practical sense by reason of being unlikely to hold any property) to serve on juries. That was because Aboriginal people did not become entitled to vote in Western Australia until 1962. It was not until 1983, when voting was made compulsory for Aboriginal people, that they became, in a realistic sense, qualified and liable to serve as jurors for the first time.[46] However, as discussed in Chapter Two, a range of cultural and social circumstances have operated to reduce the frequency with which Aboriginal people do actually serve on juries in Western Australia.[47]

43. As cited in LRCWA, *Working Paper on Exemption from Jury Service,* Project No 71 (1978) 36.
44. See LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 14.
45. The Select Committee noted the then recent finding of Lord Devlin, in examining the issue in the United Kingdom, that 'the insistence on a juror being a property owner ... under 60 years of age and with the prevailing exemptions, resulted in juries being predominantly male, middle aged, middle class and middle-minded'. The Committee, similarly, considered that to draw jury lists from Legislative Assembly roles would go some way to redressing the lack of numbers on jury lists and provide a greater breadth of potential jurors.
46. McKay L, *The Decline of the Franchise and the Rise of the I-Generation: A Western Australian perspective* (Institute of Public Administration of Australia, Curtin University, Western Australia Department of Premier and Cabinet, 2006) 11; Phillips H, 'Electoral Law in the State of Western Australia: An overview' (Perth: Western Australia Electoral Commission, 2008) 136.
47. See below Chapter Two.

Late 20th century amendments to the *Juries Act*

Minor amendments were made to the *Juries Act* in 1972[48] and 1973,[49] but the most significant changes to jury eligibility in Western Australia occurred in 1984[50] as a consequence of the recommendations of this Commission.[51] The 1984 amending Act made three essential changes that are still contained in the *Juries Act* of today. First, it replaced the earlier dichotomy of jurors being 'not qualified' or 'exempt' with a tripartite approach encompassing concepts of 'eligibility', 'qualification' and 'excuse' (which in turn may be as of right or at the discretion of the court or summoning officer).

Secondly, women were obliged to serve and could no longer be excused as of right. Moreover, the wives of people exempted from serving (such as judges and clergymen) were no longer automatically exempted merely by virtue of that status.

Thirdly, the disqualification of people convicted of crimes or misdemeanours was redrafted so that the disqualification became based on the penalty imposed. An earlier approach, basing disqualification simply on the class of offence, rather than the penalty actually imposed upon conviction, was capable of working illogically and inequitably. For example, a person convicted of a crime or misdemeanour who was merely fined would previously have been ineligible, while someone imprisoned for an offence determined summarily would be eligible.

Further amendments since 1984 have made relatively minor or specific changes to the regimes of eligibility, qualification and excuse. Of particular note is the varying of the ineligibility criteria in 2000 so as to increase the age of ineligibility from 65 years to 70 years, with those jurors older than 65 but under 70 years able to be excused as of right.[52]

48. The effect of the *Age of Majority Act 1972* (WA) was that the age of eligibility of jurors was decreased to 18 years.
49. The *Juries Amendment Act 1973* (WA) added certain professions to the categories of exemptions as of right, namely registered and practising chiropractors, persons engaged in civil emergency services, the secretary and academic staff of Murdoch University and the Parliamentary Commissioner for Administrative Investigations, or Ombudsman (whose office had been created by statute in 1971).
50. *Juries Amendment Act 1984* (WA).
51. LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980).
52. *Juries Amendment Act 2000* (WA).

Role of the jury trial in Western Australia

IMPORTANCE OF THE JURY SYSTEM

The jury system in Australia has been described as the 'chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice'.[1] Sir William Deane, a former Governor-General of Australia and Justice of the High Court, has observed that:

> The institution of trial by jury … serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept the jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people.[2]

The participation of the public, as jury members, in the administration of justice in turn legitimises the criminal justice system.[3] It 'fosters the ideal of equality' and 'helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached'.[4] Indeed, it is the involvement of the community in the administration of justice that is perhaps the chief argument for retention of the jury system. While the efficiency of the jury as a tribunal of fact may be questionable,[5] the public confidence in the administration of justice that is engendered by the mere existence of the jury system is invaluable.[6]

USE OF JURIES IN WESTERN AUSTRALIA

The use of juries in Western Australia has diminished significantly over recent decades. Where once juries were empanelled regularly for civil and coronial cases, the overwhelming majority of jury trials are now criminal in nature. While a judge of the Supreme Court has discretion to empanel a six-person jury upon application in certain civil cases,[7] the Commission has been advised that no civil jury trial has occurred in Western Australia since 1994 and only about a dozen such trials have occurred in the last four decades.[8] Coroners juries—a three-person 'expert' jury used largely in relation to mining deaths—were abolished in 1996 with the passage of the *Coroners Act 1996* (WA).

Criminal trial by jury

A person who pleads not guilty to a criminal offence in a superior court of Western Australia is entitled to have the issues of fact raised by the charge tried by a judge and jury.[9] A jury in a criminal trial will consist of 12 people[10] randomly selected from 'the jurors' book in the jury district in which the trial is to take place'.[11] The role of the jury is to weigh the evidence presented in court and apply the law, as directed by the trial judge, to the facts found. The jury then delivers its verdict as to whether the accused person is guilty or not guilty of the crime charged. Juries are not required to give reasons for their verdict. The judge is responsible for regulating the trial proceedings to ensure the issues raised by the parties may be determined according to law.

In 2008 there were 579 criminal trials heard in superior courts in Western Australia, 568 of which were dealt with

1. *Brown* (1986) 160 CLR 171, 197 (Brennan J).
2. *Kingswell* (1985) 159 CLR 264, 301 (Deane J).
3. See discussion in NZLC, *Juries in Criminal Trials: Part One,* Preliminary Paper 32 (July 1998) 19.
4. *Brown* (1986) 160 CLR 171, 202 (Deane J).
5. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (September 2001) 139.
6. Gleeson M, 'Juries and Public Confidence in the Courts' (2007) 90 *Reform* 12; Auld, ibid 135.
7. A judge of the Supreme Court is empowered by s 42 of the *Supreme Court Act 1935* (WA) to order a trial by jury in cases where fraud, defamation, 'malicious prosecution, false imprisonment, seduction or breach of promise of marriage' are in issue on the application of a party, unless the judge is of the opinion that the trial requires 'any prolonged examination of documents or accounts or any scientific or local examination which cannot conveniently be made with a jury'. Section 21 of the *Defamation Act 2005* (WA) provides for a plaintiff or defendant in defamation proceedings to elect a trial by jury, subject to a similarly conferred discretion on the court to order to the contrary.
8. No records are apparently kept of civil jury trials in Western Australia. These comments constitute the recollections of jury officers conveyed to the Commission.
9. This is the effect of s 92 of the *Criminal Procedure Act 2004* (WA).
10. Up to six 'reserve' jurors may be selected under the *Juries Act 1957* (WA) s 18. Reserve jurors are usually empanelled where a case is likely to run for a long period to ensure that a full jury of 12 can retire to consider the verdict if a juror becomes incapacitated or is discharged.
11. *Juries Act 1957* (WA) s 18. The process of compiling the jurors' book for jury districts is discussed below in Chapter Two.

by a judge sitting with a jury.[12] Jury trials represent only a small fraction (approximately 0.3%) of all criminal proceedings adjudicated in Western Australia.[13] The majority of criminal charges are dealt with summarily by the Magistrates Courts and many indictable offences are finalised by guilty plea before going to trial.

Criminal trial by judge alone

Although most indictable offences that go to trial will be tried before a judge and jury, a very small number are tried by judge alone. Under s 118 of the *Criminal Procedure Act 2004* (WA) an accused (or the prosecution with the consent of the accused) may apply to the court for an order that the trial of the charge be by a judge alone without a jury. The court may make such an order if it considers it is in the interests of justice.[14] Without limiting this general discretion, s 188(4) provides that a judge may refuse an application for a trial by judge alone if 'the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness'. This provision reflects the idea that the decision of a jury, in contrast to a judge, may be more readily accepted by the community in these types of cases, thereby promoting public confidence in the justice system. Of the 579 criminal trials in superior courts in 2008, only 11 were tried by judge alone. Unlike jury trials, in the case of a trial by judge alone the judge must give reasons for his or her verdict.

12. The Supreme Court heard 65 trials and the District Court heard 514 trials in 2008. Of these, one trial in the Supreme Court and 10 trials in the District Court were heard by a judge sitting alone: figures supplied to the Commission by the Supreme Court and District Court.
13. In 2006–2007, 171,253 criminal charges were finalised in Western Australia. Only 0.376% or 644 of these charges were finalised by jury. In 2007–2008, the number of criminal charges increased to 189,533; however, the number of charges finalised by jury dropped to 0.317% or 601 charges.
14. An accused cannot elect to be tried by judge alone in a state court on a Commonwealth indictment. This is because s 80 of the *Australian Constitution* has been interpreted as guaranteeing trial by jury. See *Brown* (1986) 160 CLR 171.

Juror selection: process and principles

CURRENT SELECTION PROCESS

The *Juries Act 1957* (WA) sets out the system for selecting people for jury service in Western Australia. The process begins with the compilation of lists of potential jurors for each of Western Australia's jury districts.[1] The sheriff provides the Electoral Commissioner with an estimated number of jurors required for each district and a corresponding number of electors who are **liable** for jury duty are randomly selected by a computerised process.[2] The jury lists are then compiled into what is known as the 'jurors' book' and the Sheriff's Office undertakes a process to remove from the book the names of people who are, by law, not able to serve on a jury.[3] Some people will be **disqualified** from jury duty by reason of their criminal record or because they suffer from a physical or mental incapacity or do not understand English.[4] Others may be **ineligible** by reason of age or occupation.[5] Those who are left in the jurors' book become the potential jury pool for Western Australia for the year.

Each week the required number of potential jurors is randomly selected from the jurors' book by computer and those people are sent a summons to attend court on a specified date for jury service. A potential juror can apply to be **excused** from jury service if he or she has a right of excusal expressed under the Act. A person can be excused as of right[6] if they are a practising health professional, an emergency services staff member or a person who has taken holy orders.[7] A person also has the right to be excused if they are a full-time carer for children under 14 years, for an aged person or for a mentally or physically infirm person. Persons who are aged between 65 and 70 years and women who are pregnant may also be excused as of right.[8] A person may also apply to be excused by reason of illness; undue hardship; circumstances of sufficient weight, importance or urgency; or recent jury service. However, excuse on these bases is not 'as of right' and evidence must usually be supplied to support the excuse.[9]

Those people who are not excused by virtue of the above processes are required to attend at the court at the specified time. On arrival at the jury assembly area, the potential jurors are given a short address by the jury pool supervisor and watch an informational video. After the video, potential jurors are invited to disclose issues such as defective hearing or lack of understanding of English that may affect their service as a juror.[10] The sheriff's officer may excuse the person at that time. A ballot is then undertaken to determine the jury pool from which jurors for a particular trial or trials may be drawn. Potential jurors are then taken to the courtroom where another ballot is staged and 12 people are randomly selected from the jury pool to serve as jurors for the trial. When a potential juror's number is called, he or she may offer a reason to the presiding judicial officer as to why he or she is unable or unwilling to serve as a juror for that trial and seek to be excused.[11] Reasons may include that the juror is acquainted with the accused or a witness (which may indicate bias) or that the jury service would cause undue hardship for whatever reason. A juror may be excused by the judge (whether on the juror's application or by the court's own motion) or may otherwise be challenged[12] by counsel for the prosecution or the defence before being sworn as a juror.

1. A jury district comprises one or more electoral districts of the Legislative Assembly: *Juries Act 1957* (WA) s 10(2). The compilation of jury lists is discussed in greater detail below in Chapter Two.
2. *Juries Act 1957* (WA) s 14.
3. *Juries Act 1957* (WA) s 34A.
4. *Juries Act 1957* (WA) s 5(b). For further discussion, see below Chapter Five.
5. *Juries Act 1957* (WA) s 5(a). For further discussion, see below Chapter Four.
6. That is, people who fall into the categories listed in sch 2, pt II of the *Juries Act 1957* (WA) have the choice whether or not to do jury service when summonsed.
7. *Juries Act 1957* (WA) sch 2, pt II. For further discussion, see below Chapter Six.
8. *Juries Act 1957* (WA) sch 2, pt II. For further discussion, see below Chapter Six.
9. *Juries Act 1957* (WA) sch 3. For further discussion, see below Chapter Six.
10. *Juries Act 1957* (WA) s 32FA and s 34B.
11. Potential jurors are advised by the jury officer of the type of trials to be heard and are given the opportunity to write a note to the judge outlining why they wish to be excused from a particular type of trial. This process has been used effectively to enable people who have been victims of sexual assault to avoid the potential trauma of making a statement about previous abuse in open court: Carl Campagnoli, Jury Manager (WA), consultation (7 December 2008).
12. For discussion of challenges and the empanelment process, see below Chapter Two.

OBJECTIVES OF JUROR SELECTION

In its 2001 report on juries in criminal trials, the NZLC identified four goals of the juror selection process: competence, independence (supported by random selection), impartiality and representation of the community.[13] Another goal, advanced by the NSWLRC, is participation.[14] It is worth considering each of these interrelated objectives in the Western Australian context, beginning with the touchstone of representation.[15]

Representation

Representation is generally considered to be the principal concept guiding juror selection.[16] As discussed above, the notion of the representation of the community is the basis from which the jury—and, in turn, the criminal justice system—derives its legitimacy. Representation does not mean that the selected jury of 12 need be perfectly or proportionately representative of the community at large.[17] Rather, the goal of representation is to gain a jury of diverse composition. It is the mix of different backgrounds, knowledge, perspectives and personal experiences that 'enhances the collective competency of the jury as fact-finder, as well as its ability to bring common sense judgment to bear on the case'.[18] As Janata has observed, this encourages 'both interaction among jurors and counteraction of their biases and prejudices'.[19]

In order to facilitate the goal of representation, it is important that all ethnic and social groups in the community should have the *opportunity* to be represented on juries. Australian juries are also often criticised for the absence of Aboriginal jurors, which is especially marked in the context of a disproportionate representation of Aboriginal people in the criminal justice system.[20] Many issues (including cultural inhibitions) conspire to prevent Aboriginal people from serving more often on juries;[21] but selection processes could possibly be improved to heighten the opportunity for selection of Aboriginal jurors.[22]

In order to achieve the mix of backgrounds and experience that the objective of representation properly requires, it is necessary to limit those that are denied or discouraged from serving on juries to individuals who, as a matter of principle or capacity, cannot or should not serve.[23] The *Juries Act* in Western Australia currently denies people in certain occupations from serving on juries and gives many other groups in society an untrammelled right to be excused from jury duty. Those in the latter category include pregnant women, people with the full-time care of dependants, people aged over 65 years and people in health-related occupations such as dentists, veterinary surgeons, nurses, chiropractors, pharmacists, osteopaths and doctors.[24] To the extent that members of these groups choose not to undertake jury service, the representative nature of juries is diminished.[25]

Independence and random selection

Random selection has been identified by the High Court as an important assurance of a jury's representative and independent character.[26] Importantly, it provides protection for an accused against the potential of a jury chosen by the prosecution or the state.[27] This is the rationale behind the exemption of certain law enforcement and government-related occupations from jury duty, either permanently or within a certain timeframe of employment.[28] In Western Australia, as in all other Australian jurisdictions, exempt occupations include judges, serving police officers, lawyers and Members of Parliament.

13. NZLC, *Juries in Criminal Trials,* Report No 69 (February 2001) 55.
14. NSWLRC, *Jury Service,* Issues Paper No 28 (November 2006) 13–14.
15. In its 2007 report the NSWLRC considered the representative nature of a jury to be the essential underlying principle. It considered independence, impartiality and competence to flow as 'benefits' of a 'properly representative jury'. NSWLRC, *Jury Selection,* Report No 117 (2007) 9–10.
16. *Cheatle v The Queen* (1993) 177 CLR 541, 560.
17. NSWLRC, *Jury Selection,* Report No 117 (2007) 9.
18. NZLC, *Juries in Criminal Trials,* Report No 69 (2001) 55.
19. Janata R, 'The Pros and Cons of Jury Trials' (1976) 11 *Forum* 590, 595–6.
20. 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; Israel M, 'Ethnic Bias in Jury Selection in Australia and New Zealand' (1998) 26 *International Journal of the Sociology of Law* 35, 37.
21. For example, issues such as increased mobility of Aboriginal people, decreased likelihood of being enrolled to vote and the possibility of relevant prior criminal convictions all impact upon the opportunity for Aboriginal people to be qualified for juror selection. Those that are qualified for selection and answer a summons to serve may also be denied participation because of poor literacy skills or through the in-court challenge process. See Israel, ibid 43.
22. See discussion below in Chapter Two.
23. Such as people with recent criminal convictions of a specified type, people closely involved with the criminal justice system (such as judges and criminal lawyers) and people who have a mental or (in some cases) physical incapacity that prohibits them from discharging the duties of a juror.
24. See *Juries Act 1957* (WA) sch 2, pt II.
25. See Fordham J, 'Bad Press: Does the jury deserve it?' (Paper presented at the 36th Australian Legal Convention, Perth, 17–19 September 2009) 14.
26. *Cheatle v The Queen* (1993) 177 CLR 541, 560–1.
27. Ibid.
28. See *Juries Act 1957* (WA) sch 2, pt I.

All Australian jurisdictions have an express statutory provision requiring that the process of selection of prospective jurors be done randomly.[29] As explained earlier, selection of jurors in Western Australia is achieved through a series of random ballot processes, beginning with computerised retrieval of a specified number of people in each jury district from the electoral roll. However, systems that depend upon the electoral roll to provide the source list for juror selection have been criticised for impacting upon the representative nature of juries because there is sometimes an underrepresentation of 'those in their early 20s, ethnic minorities and more mobile sections of the community, such as those living in rented accommodation'.[30] Random selection may also be somewhat compromised by the concepts of excuse, qualification and eligibility, as well as the right of peremptory challenge.[31]

Participation

As mentioned earlier, participation by the community in the administration of justice plays an important role in engendering public confidence in the criminal justice system.[32] A comprehensive study undertaken in Victoria, New South Wales and South Australia by the Australian Institute of Criminology has shown that empanelled jurors have a higher level of confidence in the justice system than non-empanelled jurors and the community at large.[33] In Western Australia, a survey of jurors undertaken by the Sheriff's Office for the 12 months from 1 June 2008 showed that 70% of respondents found that their confidence in the justice system was enhanced by their experience as a juror.[34]

In its 1980 report on exemption from jury service the Commission emphasised that jury service is an important civic obligation that should be spread as widely and fairly as practicable throughout the community.[35] Indeed, civic responsibility is the reason most consistently cited by Western Australian jurors for wanting to perform jury duty.[36] Whether you perceive jury duty as a 'right' of citizenship or a burden, there is probably little contest to the idea that, so far as reasonably possible, people with the capacity to serve on juries should generally do so. If jury duty is a 'right' then it should not be arbitrarily removed by the operation of exemptions.[37] If it is a 'burden', then it is important that this burden is equally shared by all members of the community who are qualified to serve.[38] As Justice Michael Murray recently observed, widening the jury pool will give recognition to the 'principle that jury service is both an important civic obligation and a privilege'.[39]

Though the categories of exemption have been greatly reduced since the Commission's 1980 report, those that remain are extensive. This not only impacts upon the representative nature of the jury, but also places an unjustifiably onerous burden on those who have no claim to exemption or excuse. As the Auld review observed, avoidance of jury duty 'is unfair to those who do their jury service, not least because … they may be required to serve more frequently and for longer than would otherwise be necessary'.[40] The Commission is advised that there are four regional jury districts in Western Australia in which every eligible person who is registered on the electoral roll is automatically included in the pool of possible jurors each year.[41] Those who are not in an occupation or personal circumstance for which they can claim an excuse 'as of right' must, in these regions, be unfairly shouldering the burden of jury duty. It is the Commission's view that the opportunities for people to avoid jury duty should therefore be strictly limited.

29. *Juries Act 2003* (Tas) s 4; *Juries Act 2000* (Vic) s 4; *Jury Act 1995* (Qld) ss 16 & 26; *Jury Act 1977* (NSW) s 12; *Jury Act 1967* (ACT) s 24; *Juries Act 1957* (WA) ss 14(2) & 32C; *Juries Act 1927* (SA) ss 23 & 29; *Juries Act* (NT) s 27. The only non-random part of the selection process is the challenge process in court; although excuses, exemptions and the derivation of the 'source list' do impact upon the randomness of selection and ultimately the representativeness of juries.
30. That is, groups who are not always enrolled or who have not kept their enrolment current. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 137.
31. Ibid; NSWLRC, *Jury Service,* Issues Paper No 28 (2006) 13.
32. It also assists those who participate as jurors to understand the justice system better: Horan J & Tait D, 'Do Juries Adequately Represent the Community?' (2007) 16 *Journal of Judicial Administration* 179, 185.
33. Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (2008) 148–50.
34. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009). Seven per cent of respondents provided no response to this question.
35. LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 13.
36. Civic duty significantly outweighs all other reasons for wanting to perform jury duty. Of 1,985 respondents to the 2008–2009 survey 1,116 responded that civic duty was their primary reason; this represents more than five times any other reason cited. *Results of Juror Feedback Questionnaire 2008–2009* (2009).
37. Horan J & Tait D, 'Do Juries Adequately Represent the Community?' (2007) 16 *Journal of Judicial Administration* 179, 184.
38. See NSWLRC, *Jury Selection,* Report No 117 (2007) 14–15.
39. 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) 2.
40. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 140.
41. These districts are Kununurra, Carnarvon, Broome and Derby: Carl Campagnoli, Jury Manager (WA), email (15 February 2008).

Competence

It is perhaps self-evident that individual jurors should be 'competent in the sense that they are mentally and physically capable of acting as jurors in the trial'.[42] In Western Australia, a person is not qualified to serve as a juror if he or she is 'incapacitated by any disease or infirmity of mind or body … that affects him or her in discharging the duty of a juror'.[43] These qualifications on eligibility to serve as a juror are crucial to protect the interests of the accused, as well as the jury as a whole. However, it should be noted that many physically incapacitated people will be competent to serve as jurors if relevant facilities are provided to assist them in overcoming any physical barriers to discharging the duties of a juror.[44]

Competence can also refer to the effectiveness of the jury as a fact-finding tribunal. The NSWLRC has argued that a jury system that is 'broadly representative' has the benefit of producing more competent juries 'because of the diversity of expertise, perspectives and experience of life that is imported into the system'.[45]

Impartiality

The avoidance of bias or the apprehension of bias is an important component of a fair trial and a benefit of a randomly selected and broadly representative jury. Indeed, the VPLRC has argued that maximising the representativeness of juries should 'promote impartiality by reflecting a greater cross-section of community experience (and prejudice) so that no one view dominates'.[46]

That jurors bring an impartial mind to bear on the evidence presented in court is crucial to the proper discharge of their duties.[47] It is also vital that jurors are perceived to be impartial in order to ensure that public confidence in the jury system is maintained. Matters that might affect a juror's impartiality include acquaintance with the accused, a witness or a legal practitioner engaged in the trial or with the victim of the crime in question. The *Juries Act* therefore requires a potential juror to disclose any likelihood of bias when appearing in answer to a summons for jury duty.[48] The potential for bias is also cited as a reason for the practice of jury vetting and is usually the basis of a challenge for cause (in the rare instances that such power is relied upon).[49]

GUIDING PRINCIPLES FOR REFORM OF THE JUROR SELECTION PROCESS

The Commission has approached the task of reforming the law relating to juror selection with the aim of ensuring that the law is principled, clear, consistent and relevant to the specific conditions experienced in Western Australia. Taking into account the discussion above about the objectives of juror selection, the Commission has arrived at the following principles that it believes should guide consideration of the need for, and extent of, reform to the law relating to jury selection.

1 Principle 1 – juries should be independent, impartial and competent:

The law should protect the status of the jury as a body that is, and is seen to be, an independent, impartial and competent lay tribunal.[50]

2 Principle 2 – juries should be randomly selected and broadly representative:

The law should provide for jurors to be randomly selected from a broad and diverse cross-section of the community, both to protect the independence and impartiality of the jury and to ensure that all groups in the community have the opportunity to serve on a jury.

3 Principle 3 – wide participation in jury service should be encouraged:

The law should:

(i) recognise the obligation to serve on a jury, when selected, as an important civic responsibility to be shared by the community;

(ii) ensure only persons whose presence on a jury might compromise, or might be seen to compromise, its status as an independent, impartial and competent lay tribunal, should be prevented from serving; and

42. NZLC, *Juries in Criminal Trials,* Report 69 (2001) 55.
43. *Juries Act 1957* (WA) s 5(b)(iv).
44. For in-depth discussion of mental and physical incapacity as it relates to juror qualification, see below Chapter Five, 'Incapacity'.
45. NSWLRC, *Jury Selection,* Report No 117 (2007) 11.
46. VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 24.
47. NZLC, *Juries in Criminal Trials: Part One,* Preliminary Paper 32 (1998) 56.
48. *Juries Act 1957* (WA) sch 4.
49. The process of challenging jurors and the issue of jury vetting are discussed in more detail below in Chapter Two.
50. This important principle is underpinned by Article 14(1) of the *International Covenant on Civil and Political Rights* (ratified by Australia in 1980), which guarantees that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

(iii) ensure only persons who can demonstrate good cause or who are unable to discharge the duties of a juror are released from the obligation to serve. [51]

4 Principle 4 – adverse consequences of jury service should be avoided:

The law should seek to prevent or reduce any adverse consequences resulting from jury service.

5 Principle 5 – laws should be simple and accessible:

The law should be as simple and understandable as is practicable.

6 Principle 6 – reforms should be informed by local conditions:

In recommending reform to the law, account should be taken of Western Australia's geographic circumstances and cultural conditions.

A principled approach

The Commission has applied the above principles in its examination of the parts of the *Juries Act* that guide or impact upon juror selection. In particular, the principles have been applied to the law relating to each category of exclusion or exemption from jury duty: eligibility, qualification and excuse. The effect of these categories is loosely described earlier[52] and each will be addressed in detail in the following chapters of this Paper. For now, it is useful to summarise how the above principles are reflected in each category and to indicate how they have guided the Commission's proposed reforms.

Eligibility is a category of exclusion that applies to judicial officers, lawyers, police officers, Members of Parliament and certain government officers. It is soundly based in the concept of independence; that is, it excludes occupations that are so connected with government and the courts that they cannot be, or cannot be seen to be, properly independent of the state or the administration of justice. This category reflects both Principle 1 and Principle 2. The Commission has examined each type of occupational ineligibility with regard to the underlying rationales expressed in these principles. The Commission has approached the task of reform in this area applying Principle 3, which seeks to broaden participation in jury service and confine categories of ineligibility to those whose presence might compromise, or be seen to compromise, a jury's status as an independent, impartial and competent lay tribunal. The outcome of the Commission's examination of ineligible occupations is found in Chapter Four.

Presently the *Juries Act* includes age in the category of eligibility. In the Commission's opinion age is better understood as a characteristic rendering a person **liable** to serve as a juror. Proposed reforms in this regard are discussed in Chapter Three.

In the Commission's view the concept of **qualification** for jury duty is properly based in the concepts of competence and impartiality and is therefore an expression of Principle 1. It currently excludes people who have certain criminal convictions (impartiality) and those who do not understand English or have a permanent incapacity of body or mind (competence). However, in the Commission's view a physical disability will rarely affect a person's competency to discharge the duties of a juror, especially where facilities can be provided to overcome physical difficulties. Therefore, applying Principle 1, prospective jurors should not be disqualified from jury service on the basis of a physical disability alone.[53] This category of exclusion is explored in Chapter Five.

The category of **excuse** is currently split into two groupings under the *Juries Act:* excuse as of right (which exempts people in mainly health-related occupations and those with specified family commitments) and excuse for cause (which may apply in circumstances where a person considers he or she will suffer adverse consequences from serving as a juror). In Chapter Six the Commission advances proposals to simplify the category of excuse by abolishing excuse as of right, establishing a clearly defined excuse for 'good cause' and introducing a process of deferral of jury service. The proposed reforms in this chapter primarily reflect the Commission's Principle 3.

Principles 4, 5 and 6 are applicable to all categories of exemption and also impact strongly in the Commission's consideration of compilation of jury lists and regional issues in Chapter Two and juror allowances, protections for employment and enforcement of juror obligation in Chapter Seven.

51. Grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court are expressed in the proposed reforms to the *Juries Act 1957* (WA) sch 3. For discussion of these reforms and the proposed re-formulation of the Third Schedule, see below Chapter Six.
52. See above, 'Current selection process'.
53. Although, as explained below in Chapter Five, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason to be excused from jury service by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).

Chapter Two

The Juror Selection Process

Contents

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.

Chapter Three

Liability for Jury Service

Contents

Liability to serve as a juror

SECTION 4 of the *Juries Act 1957* ('the Act') provides that a person who is enrolled to vote at an election of members of the Legislative Assembly of the Western Australian Parliament is, subject to the exclusions in the Act,[1] liable to serve as a juror. In order to qualify to vote at a Western Australian election, one must have attained the age of 18 years and be an Australian citizen.[2]

THE REQUIREMENT OF CITIZENSHIP

The requirement of citizenship is a feature of juror liability in all Australian jurisdictions. However, recent reviews of juror selection processes in Victoria and New South Wales have raised the question whether eligibility for jury service should be extended beyond those who possess, or have attained, Australian citizenship.[3] The rationale for the inclusion of non-citizens as potential jurors is that people from culturally and linguistically diverse backgrounds might be seen to enhance the representative quality of juries and address 'any apprehension of bias held by members of minority immigrant groups' charged with a criminal offence.[4]

While the Victorian Parliamentary Law Reform Committee (VPLRC) and the New South Wales Law Reform Commission (NSWLRC) considered that there was merit in the contention that many non-citizen permanent residents had made a sufficient commitment to the community in Australia to warrant their inclusion on jury lists, there was little support from submissions to extending the basic criterion beyond citizenship.[5] The NSWLRC also observed that, in light of the high uptake of citizenship in Australia,[6] any apparent under-representation of migrant groups may be more due to 'the requirement that jurors understand English and to the exercise of the right of peremptory challenge' than to them not having enrolled as electors.[7]

Whether any apparent under-representation of migrant groups in fact exists in Western Australia is debatable. Records maintained by the Sheriff's Office in Western Australia show that at least 29% of jurors who completed an exit survey following jury duty in Perth were overseas born.[8] This compares favourably to the general Western Australian community, which at the last census recorded 27.1% of overseas-born residents (including non-citizens).[9] The Commission concedes that, while this might mean migrant groups are relatively well represented on Western Australian juries, because of the qualification that jurors understand English they may not all be from culturally and linguistically diverse backgrounds.[10] The requirement that jurors understand

1. That is, the person must not be disqualified by reason of s 5(b) or ineligible by reason of s 5(a) of the *Juries Act 1957* (WA). The concepts of qualification and eligibility are discussed in the following chapters.
2. *Electoral Act 1905* (WA) s 17. A limited exception to the requirement of citizenship applies to people who, although not Australian citizens, would, if earlier citizenship laws of the Commonwealth had continued in force, be British subjects within the meaning of that earlier citizenship law and who were at some time within the three months immediately preceding 26 January 1984, an elector of the WA Legislative Assembly or of the Commonwealth Parliament: s 17(a)(ii).
3. See eg, NSWLRC, *Jury Selection,* Report No 117 (2007); VPLRC, *Jury Service in Victoria,* Final Report (1996). Earlier consideration of this issue by the Australian Law Reform Commission (ALRC) rejected the proposition that permanent residents be eligible to serve on juries, stating that citizenship was the appropriate qualification: ALRC, *Multiculturalism: Criminal Law,* Discussion Paper No 48 (1991) 63.
4. NSWLRC, ibid 28.
5. The NSWLRC received two submissions in support of inclusion of permanent residents only on jury source lists, while the VPLRC stated that 'almost all the submissions and evidence ... supported the current criteria [for liability]': NSWLC, ibid 28; VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 28.
6. The latest figures on citizenship are found in the 2006 census, which revealed that 83.5% of persons usually resident in Western Australia at that time identified as Australian citizens. This is slightly below the national average of 86.1% but may reflect the high intake of skilled migrants into Western Australia. It is impossible to speculate how many of the remaining 15.4% (after having removed the 1.1% who were visitors from overseas on census night) were permanent residents and how many were residing in Western Australia on temporary visas. However, it is worth noting that, based on current age comparatives in Western Australia, only two-thirds of this number would be between 18 and 69 (representing the eligible age for service on a jury). See ABS, *2006 Census QuickStats: Western Australia* (2007).
7. NSWLRC, *Jury Selection,* Report No 117 (2007) 28–9. The same requirement of understanding English and rights of peremptory challenge exist in Western Australia.
8. According to the Jury Manager, the juror feedback questionnaire has a 41% response rate. Of the jurors completing the questionnaire, 8% gave no response to this question.
9. Department of Immigration and Citizenship (Cth) & Office of Multicultural Interests (WA), *The People of Western Australia: Statistics from the 2006 Census* (2008) table 2.22.1.
10. In 2008, 2.6% of jurors summonsed for jury duty in Perth were excused on the basis of lack of understanding of English: Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).

English is an important qualification on jury service and is discussed in Chapter Five. In this context, however, it is pertinent to note that there is nothing to suggest that non-citizen permanent residents from culturally and linguistically diverse backgrounds would understand English any better than Australian citizens with similar backgrounds. Indeed, it is more likely that citizens (who have necessarily lived in Australia for a longer period) would have a better understanding of the English language.

On a practical level, both the Victorian and New South Wales reviews noted the difficulty in obtaining an officially verifiable list of non-citizen permanent residents to augment the electoral roll as a source for potential jurors.[11] In light of this difficulty, the VPLRC speculated that a procedure might be established whereby non-citizen permanent residents could apply to the sheriff to be enrolled for jury service. However, after investigating the possibility, it concluded that this option was unlikely to be well utilised and would be unduly expensive.[12] Submissions to the NSWLRC on this point argued that a system of voluntary registration would seriously undermine the principle of random selection.[13] As discussed in Chapter One, random selection is fundamental to ensuring the independence of juries and, in this Commission's opinion, is a standard with which any proposed amendment to the juror selection process must conform.[14]

Like the Australian Law Reform Commission before them,[15] both the VPLRC and the NSWLRC ultimately recommended that the Australian citizenship requirement remain unaltered.[16] In view of the arguments above and, in particular, the practical difficulties associated with summoning permanent residents for jury duty in such a way that would not breach the principle of random selection, the Commission is not convinced that the basic criterion of citizenship for liability for jury service in Western Australia should be changed.

11. The LRCWA's enquiries of the Commonwealth Department of Immigration and Citizenship were also unable to uncover the existence of a suitable source list. See VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 29; NSWLRC, *Jury Selection,* Report No 117 (2007) 29.
12. Based on experience in jurisdictions overseas, in particular, the United States: VPLRC, ibid.
13. NSWLRC, *Jury Selection,* Report No 117 (2007) 29.
14. See above Chapter One, Guiding Principle 2.
15. See ALRC, *Multiculturalism: Criminal Law,* Discussion Paper No 48 (1991) 63; ALRC, *Multiculturalism and the Law,* Final Report No 57 (1992).
16. Although Victoria did recommend that 'investigations should take place to determine the administrative feasibility of establishing an accurate database of citizens and non-citizen permanent residents for jury service', no amendment has yet been made to the basic qualification requiring citizenship: VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, recommendation 4.

ITINERANT AND OVERSEAS ELECTORS

From 1 October 2009 electors enrolled and registered under the *Electoral Act 1918* (Cth) as having no fixed address (known as itinerant electors)[17] will be recognised as enrolled on the state electoral roll under the *Electoral Act 1907* (WA).[18] Overseas electors (ie, those who have notified the Commonwealth Electoral Commission that they are resident outside of Australia)[19] have been recognised as eligible to be enrolled on the state electoral roll since 2006.[20] Currently there are 1195 eligible overseas electors registered as enrolled on the state electoral roll and the Western Australian Electoral Commission expects approximately 702 electors to be enrolled as itinerant electors once that provision comes into effect.[21]

Both itinerant and overseas electors, by definition, do not reside at the address for which they are enrolled to vote. Effectively, therefore, they are not resident in any Western Australian jury district. However, on the face of s 4 of the *Juries Act* they remain liable for jury service as if they did reside in the jury district. While under s 14(8) of the *Juries Act* the sheriff has power to remove a person's name from the jury list if it appears that the person no longer resides in the relevant jury district,[22] this power only comes into effect after the jury lists are prepared by the Western Australian Electoral Commission. In practice, the sheriff exercises this power after a summons has been issued and it is returned to sender as being not known at the address[23] or where the person has mail forwarded and advises the summoning officer that he

17. A person may apply to the Commonwealth Electoral Commission to be recognised as an itinerant elector if he or she is in Australia but does not reside permanently at any fixed address. The person may retain his or her enrolment as an itinerant elector for so long as the person remains itinerant (that is, he or she does not reside in any place for longer than one month). Should the person fail to vote at the next general election, his or her enrolment as an itinerant elector will lapse. See *Electoral Act 1918* (Cth) s 96(9)(a).
18. *Electoral Amendment (Miscellaneous) Act 2009* (WA) s 6, inserting s 17B into the *Electoral Act 1907* (WA).
19. A person may apply to the Commonwealth Electoral Commission to be recognised as an eligible overseas elector if he or she has ceased to reside in Australia but intends to return within six years. However, by virtue of the *Electoral Act 1918* (Cth) ss 94(8) and 94(9), eligible overseas electors can theoretically obtain an indefinite number of one-year extensions so long as they continue to have the intention to resume their residence in Australia. Should they fail to vote at a general election, their status as an eligible overseas elector will be cancelled.
20. See *Electoral Act 1907* (WA) s 17A.
21. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, email (21 August 2009).
22. Power also exists for the sheriff to remove a name from the jurors' book for the same reason: *Juries Act 1957* (WA) s 34A(3).
23. Presently approximately 40 to 50 summons per week (ie, per 1000–1200) are returned to sender: Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).

or she no longer resides in the jury district. Sometimes the issue does not come to light until the Sheriff's Office conducts an investigation to establish why the person did not attend for jury service pursuant to the summons.[24]

The Commission has consulted with the Western Australian Electoral Commission and the Jury Manager to discuss ways to accommodate these changes to the *Electoral Act* in the jury selection process. In this Commission's view, it is an inefficient use of the sheriff's time to investigate failures to attend where they can be clearly identified as not residing in the relevant jury district from the outset. Further, the Commission is concerned that itinerant and overseas electors may be unfairly penalised for not attending pursuant to a jury summons when they have already notified the Electoral Commission of their non-resident status.

The Commission has concluded that it is appropriate for itinerant and overseas electors to be expressly identified as not being liable for jury service and that s 4 of the *Juries Act* should be amended to reflect this. The Commission is advised that this is the most practical option because it clearly authorises the Electoral Commission to leave out the names of overseas and itinerant electors during the jury list compilation process. According to the Electoral Commission, this is very simple to do because itinerant and overseas electors are already 'flagged' on their computer system. The Commission's Proposal 9—removing the liability for jury service of people registered as itinerant or overseas electors—is also subsumed into the proposed redraft of s 4 of the *Juries Act* which appears in Proposal 11 at the end of this chapter.

PROPOSAL 9

Overseas and itinerant electors not liable for jury service

That provision be made in s 4 of the *Juries Act 1957* (WA) to remove the liability for jury service of people who are registered under the *Electoral Act 1918* (Cth) as eligible overseas electors or as electors with no fixed address and are recognised as such pursuant to ss 17A or 17B of the *Electoral Act 1907* (WA).

24. Known as a 'did not attend' investigation.

AGE

As discussed above, liability for jury service is attached to registration on the electoral roll and entitlement to vote at an election of members of the Legislative Assembly of the Parliament of Western Australia.[25] Although under s 17(4a) of the *Electoral Act 1907* (WA) a person may be enrolled on the electoral roll at the age of 17 years, he or she is not entitled to vote—and therefore not liable to serve as a juror—until having attained the age of 18 years.[26] Although most Australian jurisdictions refer to an upper age limit at which a person can opt out of jury duty,[27] Western Australia and South Australia are the only Australian jurisdictions in which a person over 70 years of age is not permitted to serve as a juror. The upper age limit is treated differently in all jurisdictions: some jurisdictions attach age to liability to serve, some to eligibility to serve and others to an exemption or excuse from serving. Table A on page 54 summarises the position in the various Australian jurisdictions.

As Table A shows, New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania allow a person over a particular age (between 60 and 70 years) to claim exemption[28] from jury service as of right. In each of these jurisdictions the exemption must be claimed in writing to the relevant authority and on receipt of such written claim (and subsequent verification of age) a person is automatically excused from service for that summons.[29] Victoria permits jury service at any age but allows an excuse for a person of an undefined 'advanced age' if good reason is given.[30] In South Australia a person aged 70 years or more is not liable to serve as a juror and in Queensland a person aged 70 years or more is not eligible to serve as a juror, unless they elect to do so in writing.

Western Australia is the only jurisdiction with a two-stage system of age exemption. Under the current law in this state, a person aged 65 years or more may claim

25. *Juries Act 1957* (WA) s 4.
26. *Electoral Act 1907* (WA) s 17(4b).
27. Note that in Queensland a person over the age of 70 is required to opt in to jury service: *Jury Act 1995* (Qld) s 4(4).
28. Although in Tasmania (and Western Australia) this is known as an 'excuse as of right', exemption effectively amounts to the same thing.
29. Tasmania and the Northern Territory also allow a person over the stated age to apply to be permanently excused from serving upon request in writing. In Victoria a person may be permanently excused if they are of 'advanced age'.
30. Whether a person of advanced age is excused upon application is at the discretion of the Juries Commissioner (or judge). The concept of 'advanced age' is not defined in legislation or policy; however, applications for excuse by people over 70 years of age will often be granted, especially if accompanied by good reason such as health or mobility issues. A person who is excused from jury service on the basis of advanced age will generally be excused permanently.

Table A: Upper age limit – liability for jury service

	Age (years)	Exemption category	Legislative Provision
WA	65 to 69 70 or more	Excuse as of right (must claim) Ineligible	*Juries Act 1957* (WA) s 5(c)(i) *Juries Act 1957* (WA) s 5(a)(ii)
QLD	70 or more	Ineligible (unless has elected to serve)	*Jury Act 1995* (Qld) s 4(3)(j) & s 4(4)
NSW	70 or more	Exemption as of right (must claim)	*Jury Act 1977* (NSW) s 7
ACT	60 or more	Exemption as of right (must claim)	*Juries Act 1967* (ACT) s 11(2)
NT	65 or more	Exemption as of right (must claim)	*Juries Act* (NT) s 11(2)
SA	70 or more	Not liable to serve	*Juries Act 1927* (SA) s 11(b)
VIC	Advanced age	Excuse for cause/good reason (must claim)	*Juries Act 2000* (Vic) s 8(3)(i)
TAS	70 or more	Excuse as of right (must claim)	*Juries Act 2003* (Tas) s 11

an excuse as of right to jury service on the basis of age alone, while those aged 70 years or older are not eligible to serve.[31] In the Commission's opinion there is no good reason for retaining an excuse as of right for people aged between 65 and 70 years. Indeed, the Commission is of the view that there should be no excuses as of right on any basis. This reflects the Commission's guiding principle supporting wide participation in jury service (Principle 3) and is discussed in more detail in Chapter Six.

Should there be an age restriction and what should it be?

As the table above shows, the upper age limit for eligibility for, or excuse from, jury duty is most commonly set at between 65 and 70 years of age. The rationale for an identified age limit of 65 years appears to be that it is the commonly cited age of retirement[32] and the age at which one may qualify for the age pension, while the age limit of 70 years appears to be pegged to the compulsory retirement age of judges in most jurisdictions.[33]

There are good reasons for retaining reasonable age limits on jury service. The NSWLRC referred to the 'difficulties of old age that may accompany such activities as sitting in court for protracted periods and travelling to and from a court'.[34] Another argument for placing an upper age limit on jury duty is 'the belief that jury service is a duty that ought not be demanded of people at an age when they are entitled to the freedom that comes in retirement'.[35] While the Commission does not believe that jury service will necessarily place an undue burden on retirees, this argument does have some merit in the context of International Labour Organisation studies which place Australia's population among the hardest-working developed populations in the world judged on average working hours.[36]

On the other hand, there are also good arguments for the proposition that people over the qualification age for the age pension should be permitted to serve as jurors. An obvious benefit is that people in this age group will generally be retired and therefore will have more available time to commit to jury duty. Another is that people of an advanced age bring a wealth of life experience to the task of a juror. Further, like many other countries Australia is experiencing a rapid growth in its ageing population. In this environment, jury systems that exclude people from age 65 may be said to be less representative than those that do not have such restrictions.[37]

31. This two-stage process was introduced by the *Juries Amendment Act 2000* (WA), which increased the upper age limit from 65 years to 70 years and added an excuse as of right for persons aged 65 years and over to the second schedule.
32. Although the Seniors Australia website states that a recent Australian Bureau of Statistics (ABS) survey shows that 76% of men retire before the age of 63 and the same percentage of women retire before the age of 60: see <http://www.seniors.gov.au/internet/seniors/publishing.nsf/Content/Retirement+ages>.
33. See NSWLRC, *Jury Service,* Issues Paper No 28 (2006) 92. The compulsory retirement age for judges in Western Australia is 70 years: *Judges' Retirement Act 1937* (WA) s 3. However, under s 18A of the *District Court of Western Australia Act 1969* (WA) and s 11AA of the *Supreme Court Act 1935* (WA) a person older than the compulsory age of retirement may serve for a period of 12 months as an auxiliary judge.
34. NSWLRC, *Jury Service,* Issues Paper No 28 (November 2006) 92.
35. Ibid.
36. Lee S, McCann D and Messenger J, *Working Time Around the World: Trends in working hours, laws and policies in a global comparative perspective* (Geneva: International Labour Organisation, 2007).
37. Perhaps in recognition of this, many Australian jurisdictions have a system of voluntary excuse which recognises that while a person

The Commission acknowledges in Guiding Principle 2 that representation of the community is a fundamental tenet of juror selection, so it is important to test this last proposition. Currently the *Juries Act* offers an excuse as of right to people aged 65 to 69 years. In 2008, 2.6% of the potential jurors summonsed for Perth were excused from jury duty on this basis.[38] But of those jurors actually empanelled in Perth at least 3% were in this age bracket.[39] When compared with the Western Australian population, of which 3.6% fall within the 65–69 age bracket,[40] it can be seen that juries have a relatively proportionate representation to the wider community. The representation of this age group will be increased if the existing excuse as of right is abolished as the Commission proposes.[41]

While the Commission is of the opinion that the present age cap at 70 years is too low, it is persuaded—primarily by practical arguments—that Western Australia should retain an upper age limit for jury duty. The Commission is not convinced that an open-ended age limit with a system of excuse as of right or for cause is either efficient or fair. Such a system will create significant administrative burdens upon the sheriff's office in processing excuses and retracting summonses. It may also place an unnecessary burden upon the elderly who will be required to claim their excuse in written form and who may face an automatic penalty if they fail to attend in the absence of such a claim.[42] In contrast, an upper age limit can be applied (as is the case currently) at the time of compilation of jury lists from the electoral roll. This means that there is no increased administrative burden placed on the sheriff's office and no distress caused to very elderly people who might otherwise receive a summons for jury duty. There is also, as the NSWLRC pointed out, the possibility that a large number of elderly people may be summoned in a single pool and then seek to be excused, leaving the sheriff with insufficient numbers to meet the courts' requirements.[43] Because potential jurors are selected randomly by computer, the number of elderly people called for jury service at any one time cannot be foreseen.

Taking into account the various arguments, the Commission has formed the preliminary view that 75 years is an appropriate age cap for jury duty.[44] Because many people retire outside the metropolitan area, this small raise in age has the potential to expand the jury pool significantly in some regional areas.[45] It also has the benefit of capturing a great deal more people who are currently ineligible for jury service for a period of five years following cessation of employment in certain positions.[46] In combination with the abolition of the excuse as of right for people aged 65 years or over, this proposed reform will potentially expand the jury pool in Western Australia by approximately 140,000 people.[47] Of course, those people who are unable to perform jury duty because of illness, mental or physical incapacity (including mobility, hearing or vision impairment) or undue hardship, may still apply to be excused for good cause.

PROPOSAL 10

Raise the maximum age for jury service

1. That the excuse as of right for persons who have reached the age of 65 years currently found Part II of the Second Schedule to the *Juries Act 1957* (WA) be abolished.[48]
2. That the maximum age for liability for jury service be raised to 75 years.

who has reached a certain age may not be willing or able to serve as a juror and should on that basis be excused, the person should not be automatically deprived of the opportunity to serve as a juror. This is the system currently operating in Western Australia for people aged between 65 and 70 years.

38. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
39. Two per cent of those completing the juror feedback questionnaire for this period did not respond to this question. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009). An earlier snapshot taken from 1 July 2007 to 14 February 2008 showed an even higher representation at 4.4%.
40. ABS, *Estimated Resident Population by Single Year of Age, Western Australia* (at 30 June 2008) Cat No 3201.0, Table 5: Statistical estimate by ABS based on the last census of population and housing in 2006.
41. Proposal 1.1.
42. The VPLRC reported that 'the receipt of jury notices by elderly people is often the cause of a great deal of distress to them or their family': VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 79.
43. NSWLRC, *Jury Service,* Issues Paper No 28 (2006) 92.
44. In preliminary consultations with judges in the District Court and Supreme Court there was no support for raising the age limit above a maximum of 75 years.
45. The movement of retirees from metropolitan areas to regional areas is a key theme of the latest Statistician's Report. See ABS, *A Picture of the Nation,* Cat No 2070.0 (2009).
46. See *Juries Act 19757* (WA) sch 2, pt I, cl 2. Occupations in this category include Members of Parliament, employees or contractors of the Departments of the Attorney General or Corrective Services, officers of the Corruption and Crime Commission, police officers, and judge's associates or ushers.
47. See ABS, *Estimated Resident Population by Single Year of Age, Western Australia* (at 30 June 2008) Cat No 3201.0, Table 5: Statistical estimate by ABS based on the last census of population and housing in 2006.
48. The Commission has proposed that the entire Part II of the Second Schedule to the *Juries Act 1957* (WA) be abolished. See detailed discussion in Chapter Six.

Where should the age limit be placed?

As foreshadowed in Chapter One, the Commission is of the opinion that age is better placed as a quality rendering a person liable to serve as a juror, rather than as a factor that causes a person to be ineligible for jury service. The only other causes of ineligibility under the *Juries Act* are occupation-based, with the underlying rationale that the named occupations are so closely connected with government and the courts that they cannot be, or cannot be seen to be, properly independent of the prosecuting authority (that is, the state) or sufficiently impartial. This is a potentially disabling factor that is not similarly reflected in a person of advanced age.

Another factor that has influenced the Commission's view is that age is already a factor that is taken into account at the very first stage of the jury selection process, which is effectively the liability stage. Currently when lists of potential jurors are compiled from the electoral roll the computer program is set to only return electors in the relevant jury districts aged between 18 and 70 years. The Commission understands that the Western Australian Electoral Commission's computer program can be easily adjusted to raise the upper age limit to 75 years.[49]

PROPOSAL 11

Amend juror liability provision

That s 4 of the *Juries Act 1957* (WA) be amended to read:

Liability to serve as juror

1. Each person residing in Western Australia —

   (a) who is enrolled on any of the rolls of electors entitled to vote at an election of members of the Legislative Assembly of the Parliament of the State; and

   (b) who is not above the age of 75 years,

   is, subject to this Act, liable to serve as a juror at trials in the jury district in which the person is shown to live by any of those rolls of electors.

2. A person who is an elector who has left Australia and who is enrolled pursuant to s 17A of the *Electoral Act 1907* (WA) or an elector with no fixed address and who is enrolled pursuant to s 17B of the *Electoral Act 1907* (WA) is not liable to serve as a juror.

49. Warren Richardson, Manager Enrolment Group, Western Australian Electoral Commission, telephone consultation (15 June 2009).

Chapter Four

Eligibility for Jury Service

Contents

Eligibility for jury service

THE previous chapter discussed the concept of liability for jury service; essentially, liability for jury service is dependent on enrolment as an elector for the Legislative Assembly of the Western Australian Parliament. The Commission proposes in Chapter Three that age—which is a personal characteristic that renders someone ineligible for jury service under s 5(a) of the *Juries Act 1957* (WA)—be moved to the liability provision in s 4 and that the upper age limit be increased from 70 years to 75 years.[1] A person's current or past occupation is the only other characteristic that can render someone ineligible for jury service.

OCCUPATIONAL INELIGIBILITY

Part I of the Second Schedule to the *Juries Act* contains a list of persons that are ineligible for jury service based on their occupational status. The schedule provides as follows:

Part I

Persons not eligible to serve as jurors

1. A person who is or has been a —

(a) judge of the Supreme Court, Family Court or District Court;

(b) master or registrar of the Supreme Court, Family Court or District Court;

(c) President or commissioner of the Industrial Relations Commission established under the *Industrial Relations Act 1979*;

(d) Parliamentary Commissioner for Administrative Investigations;

(da) Commissioner appointed under the *Corruption and Crime Commission Act 2003*;

(db) Parliamentary Inspector of the Corruption and Crime Commission appointed under the *Corruption and Crime Commission Act 2003*;

(e) magistrate;

(ea) magistrate of the Children's Court;

(f) an Australian lawyer (as defined in the *Legal Profession Act 2008* section 3).

2. A person who is or has been, within a period of 5 years before being summoned to serve as a juror –

(a) member or officer of the Legislative Assembly;

(b) member or officer of the Legislative Council;

[(c) deleted]

(d) justice of the peace;

(e) Sheriff of Western Australia or officer of the Sheriff of Western Australia;

(f) bailiff or assistant bailiff appointed under the *Civil Judgments Enforcement Act 2004*;

(g) associate or usher of a judge of the Supreme Court, Family Court or District Court;

(h) police officer;

[(i) deleted]

(j) officer of the Corruption and Crime Commission under the *Corruption and Crime Commission Act 2003*;

(ja) officer of the Parliamentary Inspector of the Corruption and Crime commission under the *Corruption and Crime Commission Act 2003*;

(k) officer as defined in section 3 of the *Children and Community Services Act 2004*;

(l) member of the Mentally Impaired Accused Review Board under the *Criminal Law (Mentally Impaired Accused) Act 1996*;

(m) member of the Prisoners Review Board or honorary community corrections officer under the *Sentence Administration Act 2003*;

(n) member of the Supervised Release Review Board under the *Young Offenders Act 1994*;

(o) person who –

(i) is an officer or employee of an agency as defined in section 3(1) of the *Public Sector Management Act 1994*; or

(ii) provides services to such an agency under a contract for services; or

(iii) s a contract worker as defined in section 3 of the *Court Security and Custodial Services Act 1999* or section 15A of the *Prisons Act 1981*;

being a person prescribed or of a class prescribed by regulations.[2]

1. See Proposals 1 and 2.

2. *Juries Act 1957* (WA) sch 2.

UNDERLYING RATIONALE AND THE COMMISSION'S APPROACH

The above list dealing with occupational ineligibility is confined to persons who are or have been engaged in occupations that are closely connected to law enforcement, the administration of justice (in particular criminal justice) and the legislative arm of government. Similar lists of exempt occupations exist in all Australian jurisdictions.[3] The primary rationale underlying these exemptions is to protect the accused against the potential of a jury chosen or influenced by the state (which prosecutes offences). A jury's independence from government is not only crucial to commanding public confidence in the criminal justice system,[4] it is also a requirement of fair trial recognised by international law.[5] Another rationale for the exclusion of certain occupations from jury service is to preserve the jury's status as a lay tribunal. Both of these rationales are reflected in the Commission's Guiding Principle 1 which provides that the status of the jury as 'an independent, impartial and competent lay tribunal' must be protected.[6]

The Commission has examined each of the above occupational categories having regard to the rationales behind occupational ineligibility for jury service and to the guiding principles set out in Chapter One. In line with Principle 3, the Commission favours an approach to reform that broadens participation in jury service and limits ineligibility to those whose presence might compromise, or be seen to compromise, a jury's status as an independent, impartial and competent lay tribunal. In this regard it is useful to refer to the recent report of the New South Wales Law Reform Commission (NSWLRC), which concluded—in cognisance of the above rationales—that occupational ineligibility be confined to officers or employees who 'have an integral and substantially current connection' with:

- 'the administration of justice, most particularly criminal justice'; or
- 'the formulation of policy affecting [the administration of justice] and to those who perform special or personal duties to the state'.[7]

The Commission agrees with this conclusion. The discussion below applies this approach to the current categories of occupational ineligibility for jury service in Western Australia, taking special account of additional rationales for exclusion that are specific to a particular occupation. However, before turning to each occupation, it is important to discuss the permanence of occupational ineligibility in Western Australia and the system of 'total eligibility' currently operating in England.

Permanence of ineligibility

As will be apparent, Part I of the Second Schedule sets up a dichotomous system of ineligibility for jury service. Those in the first section of the list (eg, judges, magistrates and lawyers) are considered permanently ineligible for jury service, while those in the second section (eg, police officers, court staff, departmental staff and MPs) are ineligible while they hold that position and for five years thereafter. Some Australian jurisdictions do not make this distinction: in the Australian Capital Territory and South Australia occupational ineligibility exists only while the person holds office.[8] Once that person has left office he or she becomes liable and eligible for service as a juror. In the Northern Territory and Tasmania, occupational ineligibility extends for a period of 10 years beyond the termination of commission for judicial officers (and for police officers in Tasmania).[9] The Victorian legislation applies the 10-year ineligibility rule to all listed occupations apart from the Electoral Commissioner, the Ombudsman and employees of legal practitioners.[10]

New South Wales, Queensland and Western Australia are the only jurisdictions to feature a system of permanent ineligibility for jury service on the basis of a current or former occupation. Queensland permanently excludes judicial officers and police officers from liability for jury service. In New South Wales the exclusion extends further to encompass coroners, public prosecutors and public defenders. In Western Australia judicial officers, registrars, members of the Industrial Relations

3. *Juries Act 2003* (Tas) sch 2; See *Juries Act 2000* (Vic) sch 2; *Jury Act 1995* (Qld) s 4(3); *Jury Act 1977* (NSW) sch 2; *Jury Act 1967* (ACT) sch 2; *Juries Act 1927* (SA); *Juries Act* (NT) sch 7. It is noted that Western Australia has one of the most defined lists of ineligible occupations which, with the exception of clause 2(o), confines ineligibility to those who hold particular positions.
4. See NSWLRC, *Jury Selection,* Report No 117 (2007) 62; NZLC, *Juries in Criminal Trials: Part One,* Preliminary Paper No 32 (1998) 19; LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 16.
5. See Article 14(1) of the *International Covenant on Civil and Political Rights* (ratified by Australia in 1980), which guarantees that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. In *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, a majority of the High Court held that ratification of an international convention gave rise to a 'legitimate expectation' that government would act in accordance with its terms.
6. See above Chapter One, 'Guiding principles for reform of the juror selection process'. Indeed the notion of an independent and impartial lay tribunal is what underpinned the insertion of the schedule in 1984 following the Commission's 1980 report on exemption from jury service: LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 16.
7. NSWLRC, *Jury Selection,* Report No 117 (2007) 62.
8. *Jury Act 1967* (ACT) sch 2; *Juries Act 1927* (SA) sch 3.
9. *Juries Act 2003* (Tas) sch 2(2) & (5); *Juries Act* (NT) sch 7.
10. *Juries Act 2000* (Vic) sch 2(1).

Commission, the Ombudsman, the Corruption and Crime Commissioner[11] and admitted lawyers are permanently ineligible for jury service; however, police officers are only ineligible while employed as a police officer and for five years after termination of employment. Having regard to the primary underlying rationale for occupational ineligibility for jury service—that jurors be, and be seen to be, independent of government and of the administration of justice—the Commission considers there is no ground for permanent occupational ineligibility. The Commission draws support for this view from the fact that only three of the nine Australian jurisdictions (including the Commonwealth) feature permanent ineligibility. It also notes that the most recently enacted 'jury service' legislation[12] and the most recent review of legislation[13] in this area have rejected the concept of permanent ineligibility.

PROPOSAL 12

Permanence of occupational eligibility

That no occupation or office should render a person permanently ineligible for jury service.

Period of ineligibility

In order to preserve public confidence in the impartiality of the criminal justice system and to ensure that the independence of the jury is not compromised, the Commission considers that some occupations should be ineligible for jury duty for a period of five years following termination of the potential juror's employment in that occupation. The Commission examines each relevant occupation in some detail below and provides justification for extended exclusion from jury service, but for present purposes it is useful to note that the Commission considers that the following occupations fall into this category:

- judges, masters and magistrates (including acting judges or magistrates, auxiliary judges and commissioners of courts);
- the State Coroner;
- the Commissioner of Police and police officers;
- members of Parliament;
- the Commissioner and Parliamentary Inspector of the Corruption and Crime Commission;
- officers, employees and contracted service providers of the Corruption and Crime Commission and of the Parliamentary Inspector of the Corruption and Crime Commission who are involved in the detection and investigation of crime, corruption and misconduct or the prosecution of charges;
- the Sheriff of Western Australia and sheriff's officers;
- members of the Mentally Impaired Accused Review Board, the Prisoners Review Board and the Supervised Release Review Board; and
- officers, employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services whose work is integrally connected with the administration of criminal justice.[14]

THE ENGLISH SYSTEM: TOTAL OCCUPATIONAL ELIGIBILITY

In 2004 amendments were made to the *Juries Act 1974* (Eng),[15] which made all occupations that were previously excluded or exempted from jury duty eligible. No Australian jurisdiction has yet followed this lead.[16] Although the English approach was discussed by the NSWLRC, it was not considered appropriate in relation to any justice-related occupational category and was rejected. Nonetheless, the Commission considers that the reasons behind the English amendments should be examined to determine whether such an approach is appropriate or required in the Western Australian context.

The English amendments followed the Auld Review of the English criminal justice system in 2001. One of the concerns expressed by Auld was that professionals were too often able to avoid jury service on the basis of work commitments.[17] To overcome this Auld recommended that existing statutory excuses as of right (which applied to health professionals and others) be removed and that those for whom jury service was costly or burdensome could apply to be excused or defer their service.[18] Auld also made the quite radical recommendation that all statutory occupational exclusions—including those

11. And the Parliamentary Inspector of the Corruption and Crime Commission.
12. *Juries Act 2003* (Tas); *Juries Act 2000* (Vic).
13. NSWLRC, *Jury Selection,* Report No 117 (2007).
14. The Commission seeks submissions on whether registrars and legal practitioners should also be excluded for a period of five years beyond employment in those occupations.
15. *Criminal Justice Act 2003* (Eng) sch 33 amended the *Juries Act 1974* (Eng). The amended Act commenced on 5 April 2004.
16. Other United Kingdom jurisdictions of Scotland and Northern Ireland are currently enquiring into whether they will follow the English approach.
17. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 140.
18. Ibid.

for police, judges and lawyers—be abolished.[19] Auld supported his recommendation by reference to a similar practice adopted by several US states, where it appears that jury service by police, lawyers and judges is a routine occurrence.[20]

The Commission's view

While the Commission agrees that professional commitments are not sufficient excuse for avoiding jury service and that there is no reason to retain 'as of right' statutory excuses,[21] it is important to point out that there are good reasons for the exclusion of justice-related occupations. As the Commission notes above and in Chapter One, the integrity of the jury system depends upon its independence from government and impartiality and it is this that inspires public confidence in the criminal justice system. While it is true that some US states have abolished occupation-based exclusions, these jurisdictions also have established and rigorous jury vetting practices to ensure that juries are as impartial and independent as possible.[22] Such practices exist neither here nor in England.[23]

The failure of the Auld review (and the subsequent Criminal Justice White Paper)[24] to properly appreciate the importance of the rationales underlying justice-related occupational exclusions has left the jury system in England vulnerable to criticism that it is not properly independent or impartial. A number of appeals have been advanced on the basis of apparent bias in cases where police officers and prosecutors have served on juries[25] and several have succeeded.[26] Practical difficulties have also emerged, with some barristers called for jury service being continuously rejected because they know the judge or barristers in the case.[27] The Commission observes that if this is the case in England where there is a relatively large legal profession, then it will be enormously difficult in Western Australia to find cases where potential judge-jurors and lawyer-jurors are not at all known to those involved in the case.

These issues and other concerns will be explored further below in relation to each of the relevant occupations. However, for now it is important to make clear that the Commission does not consider total occupational eligibility for jury service to be appropriate to the conditions in Western Australia. It is the Commission's strongly held view that, even without the attendant practical difficulties, the underlying rationale of juror independence from the justice system and the status of the jury as an impartial lay tribunal preclude adoption of the English approach in this jurisdiction. The Commission notes that various English judges and commentators have expressed the view that the fair trial of the accused is potentially at risk where judicial officers, police officers and lawyers can sit on juries.[28] More importantly, the English House of Lords has found that the potential of bias in some cases where police officers and prosecutors have served on juries is such that the jury's verdict must be considered unsafe and the conviction quashed.[29]

In addition, the Commission considers that the English approach is not *required* in Western Australia. The primary reason advanced by Parliament for the English amendments was that potential jurors were being excused at such a rate that juries were considered to be 'dominated by housewives and the unemployed' and no longer

19. Ibid 149. Auld was, however, somewhat hesitant in recommending that judges be eligible for jury service. See discussion below under 'Judicial officers'.
20. Ibid 141.
21. The Commission proposes the abolition of all excuses as of right (including occupational excuses) in Chapter Six.
22. See above Chapter Two, 'Jury Vetting: The alternative challenge for cause'. The voir dire jury selection process in the United States allows jurors to be cross-examined and questioned extensively to establish their background and potential biases. Jury questioning is lengthy (and therefore costly) and can be very intrusive. Lawyers are generally advised by specialist jury selection teams about which jurors should be challenged.
23. For the extent of jury vetting in Western Australia, see discussion above in Chapter Two.
24. The Home Office, *Criminal Justice White Paper: Proposals on jury exemptions and excusals* (2002) only looked at the cost impact to professions that were previously excluded from jury duty; it did not consider other practical impacts resulting from the reforms, such as the potential for apparent bias with police-jurors.
25. See *R v Khan* [2008] EWCA Crim 531, which constituted six conjoined appeals raising issues of apparent juror bias on account of a juror's occupation.
26. See, for example, *R v Pintori* [2007] EWCA Crim 1700 where an appeal against conviction was upheld on the basis that one of the jurors worked as a civilian employee of the police and was acquainted with the police giving evidence. See also *R v I* [2007] ECWA Crim 2999 where an appeal was allowed on the basis that a police officer-juror knew each of the four officers giving evidence at the trial. The court found that the judge should have excluded the police officer-juror once this became known. See also *R v Abdroikov; R v Green, R v Williamson* [2007] UKHL 37 where appeals against convictions of two accused were upheld by a majority of the House of Lords because of the apparent bias found in the presence of a police officer and a crown prosecutor on their respective juries.
27. 'Barrister told to turn up for jury despite rejections', *The Independent* (17 June 2004); 'Judge and jury', *The Lawyer* (23 August 2004).
28. See, for example, the comments of Judge George Bathurst-Norman who dismissed a Queen's Counsel from jury service because of his specialist knowledge of trial procedure. He added 'where do you draw the line? It deeply troubles me. ... At the end of the day I have to ensure a fair trial. I just don't know how this legislation is going to work intelligently if judges are to sit on juries': 'Barrister told to turn up for jury despite rejections', *The Independent* (17 June 2004). See also 'Case comment: Police officers and CPS lawyers as jurors' (2007) 9(2) *Archbold News* 2; Lord Bingham and Baroness Hale's comments in the House of Lords appeal in *R v Abdroikov*, *R v Green, R v Williamson* [2007] UKHL 37.
29. *R v Abdroikov*, *R v Green, R v Williamson* [2007] UKHL 37.

representative of the community.[30] Although a similar criticism has been made of Western Australian juries in the popular press,[31] an analysis of data maintained by the Sheriff's Office reveals that this criticism cannot be sustained. Of the 1,985 people who responded to the juror survey in 2008–2009 only 2% were Centrelink recipients and only 3% listed their employment status as 'home duties'.[32] A further 25% of respondents were employed in the public sector with 3% self-funded retirees and 2% students.[33] The majority (57%) of respondents were employed in the private sector[34] representing an extremely diverse occupational cross-section of the community including professionals,[35] managers,[36] supervisors and administrators, tradespersons,[37] technicians,[38] salespeople and apprentices.[39]

It is also worth noting that, unlike other Australian jurisdictions, employers in Western Australia are reimbursed for any loss of income incurred by an employee performing jury duty. There is no limit to the amount an employer (or self-employed juror) can claim, so long as the loss can be substantiated.[40] This means that jurors or their employers, including professionals, are never out of pocket; as a consequence, financial hardship is rarely considered to be a satisfactory excuse for avoiding jury service.

Currently less than 1% of people summonsed for jury service in Perth are excused on the basis of occupational ineligibility, while 18% are excused as of right and 28% for time-specific excuses (such as work or study pressures and booked holidays).[41] By removing the excuse as of right for health professionals, clergy, people with care of dependants and emergency service workers, by reducing the categories of occupational ineligibility, and by introducing a system of deferral of jury service,[42] the Commission expects that the number of excusals will dramatically decrease and representation of the community will correspondingly increase. Importantly, these improvements can be achieved without implementing total occupational eligibility, which will unnecessarily prejudice an accused's right to a fair and impartial trial before a lay jury that is independent of the state.[43]

30. 'Jury Service: Should the government turn the clock back?', *The Times* (24 October 2007).
31. 'DPP Backs Overhaul of Jury Selection System', *The West Australian* (24 March 2009).
32. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009).
33. Four per cent of respondents responded 'other' in relation to their employment status and 3% provided no response: ibid.
34. Including those self-employed.
35. For example, architects, engineers, scientists, accountants, geologists, news editors, conveyancers, environmental planners, teachers and librarians. Some health professionals also served as jurors including radiographers, veterinary nurses, nursing assistants, phlebotomists, pharmacy assistants, occupational therapists and psychologists.
36. Including a chief executive officer, an executive officer and a managing director.
37. For example, carpenters, plumbers, mechanics, electricians, drivers, welders, cabinet-makers, drilling contractors and boilermakers. Food productions trades were also well represented including bakers, chefs, butchers and kitchen hands.
38. For example, sterilising technicians, laboratory technicians, geotechnicians, IT and software engineers, surveyors, draftspersons and graphic designers.
39. Sheriff's Office (WA), *Juror Reimbursement Claims Occupation Breakdown: January–March 2009* (2009).
40. For discussion of juror allowances and reimbursement of loss of income, see below Chapter Seven.
41. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009). It is worth noting that almost 20% of jurors summonsed for Perth were not qualified for jury service (because of criminal convictions or inability to understand English) or did not receive their summons.
42. See discussion of abolition of Part II of the Second Schedule to the *Juries Act 1957* (WA) and the introduction of a system enabling deferral of jury service in Chapter Six below.
43. The Commission also notes the significant savings to the justice system by circumventing the unnecessarily high level of excuses that must be assessed should a total eligibility regime be introduced.

Categories of occupational ineligibility

JUDICIAL OFFICERS

Judges and magistrates

Judges and magistrates in all Australian jurisdictions are ineligible for jury service while holding office.[1] In Western Australia, New South Wales and Queensland a person who has been a judge or magistrate is permanently ineligible for jury service, while in the Northern Territory, Tasmania and Victoria a former judge or magistrate becomes eligible for jury service 10 years after his or her last judicial appointment.

There are many arguments justifying the exclusion of judges and magistrates from jury service. The most often cited argument for excluding judicial officers is that they have special knowledge of the conduct of trials and the administration of justice (in particular criminal justice) in the courts. It is said that this close connection with court practice may allow judicial officers to 'deduce from the lack of reference to a defendant's good character, that he has previous criminal convictions'.[2] While this may indeed be able to be deduced by any juror with knowledge of the system, judicial officers (and criminal trial lawyers) are unusually well equipped to identify when certain evidence usually admitted in criminal trials has been withheld from the jury and this may lead to speculation as to why.[3] Other concerns are that judge-jurors may 'unduly influence their fellow jurors'[4] or be unable to divorce themselves from their judicial role, such that if they disagree with the trial judge's summing up they may be tempted (whether consciously or unconsciously) to correct it in the jury room.[5] Such possibility has been openly accepted by the Lord Chief Justice of England and Wales where, as discussed above, judges are currently eligible for jury service. In his guidance to judicial officers called for jury service, he says:

> Judges who serve as jurors should be mindful of the fact that jurors play a different role in the trial from the judge … Judges should avoid the temptation to correct guidance they perceive to be inaccurate as this is outside the scope of their role as jurors. They should also have in mind the fact that they have not been party to all the legal argument and may not therefore have all the information available as to the correct legal position.[6]

As noted earlier, the Commission agrees with the proposition advanced by the New South Wales Law Reform Commission (NSWLRC) that those who have an 'integral and substantially current connection with the administration of justice, most particularly criminal justice',[7] should be excluded from jury service. Judges and magistrates certainly fall within this definition and in the Commission's opinion should continue to be ineligible for jury service.[8] In coming to this conclusion the Commission notes that to enable judges and magistrates to serve on juries would compromise the nature of the jury as being comprised of lay people, which is recognised as a 'fundamental characteristic'[9] of juries and is highlighted by the Commission's Guiding Principle 1.

1. *Juries Act 2003* (Tas) sch 2; *Juries Act 2000* (Vic) sch 2; *Jury Act 1995* (Qld) s 4(3); *Jury Act 1977* (NSW) sch 2; *Jury Act 1967* (ACT) sch 2; *Juries Act 1957* (WA) sch 2; *Juries Act 1927* (SA); *Juries Act* (NT) sch 7.
2. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 146. The same argument applies to criminal trial lawyers and court staff such as judges' associates.
3. In England a Queen's Counsel was discharged from a jury for precisely this reason. The judge warned that to allow someone on the jury with such specialist knowledge might prejudice the accused's right to a fair trial. See 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).
4. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 146; NSWLRC, *Jury Selection,* Report No 117 (2007) 64. Auld also noted that depending on the judge-juror's seniority or personality he or she may inhibit the trial judge or advocates in their conduct of the case: 148.
5. VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 50.
6. Lord Chief Justice Woolf, *Observations for Judges on Being Dalled for Jury Service* (15 June 2004) <http://www.judiciary.gov.uk/publications_media/general/juryservice.htm>.
7. NSWLRC, *Jury Selection,* Report No 117 (2007) 62. See above 'Underlying rationale and the Commission's approach'.
8. Although judicial officers of the Family Court have very limited criminal jurisdiction, the Commission considers they should remain ineligible for jury service. Such officers have sufficient knowledge of trial and court procedure to speculate as to evidence and because of the small size of the judiciary in Western Australia they are likely to be known to trial judges and lawyers. Further, many family court specialists (including some judicial officers) have jointly practised in the criminal courts during their legal careers. As with other judicial officers and lawyers, permitting Family Court judges to serve on juries would compromise the lay nature of the jury.
9. *Report of the Departmental Committee on Jury Service* (Morris Committee), Cmnd 2627 (1965) 34.

The Commission also notes the significant practical difficulties that attend making judicial officers eligible for jury service. To avoid the possibility of the jury's independence being compromised, in the few jurisdictions where judicial officers are eligible for jury service they must seek to be excused where they have knowledge of the case or where they know or are known to the parties or their lawyers.[10] This has proven to be a problem in England, where judges who are not excused completely from jury service (usually after several attempts)[11] are referred to a court where they are less likely to be known.[12] But in Western Australia, where the judiciary and legal profession is significantly smaller, finding a trial where the judge-juror is unknown to the trial judge or the barristers and solicitors involved in the trial would be very slim. This would not only waste the trial court's time, but also that of the judge-juror who would be unable to perform his or her judicial duties while waiting to be selected on a trial, which in all likelihood he or she would be excused from. It is also possible that a judicial officer may be called for jury service on a particular trial without realising that he or she had dealt with the accused in the past. Discovery of such dealing may leave the verdict open to appeal for being unsafe. To suggest that judicial officers should nonetheless be eligible for jury service in the face of these realities would be to condone unnecessary interruption to the administration of justice in this state.

However, as discussed above, it is the Commission's view that no occupation should render a person permanently ineligible for jury service and this includes judicial officers. The Commission therefore proposes that judges and magistrates remain ineligible for jury service while holding office and for a period of five years after the termination of their last commission as a judicial officer. It is considered that a period of five years is sufficient to enable judges and magistrates to be sufficiently removed from their direct role in the administration of justice (in particular, criminal justice) such that their presence on a jury will not threaten public confidence in the impartiality of the criminal justice system. In making this proposal the Commission notes that the compulsory retirement age for judges in Western Australia is currently 70 years. The Commission's proposed increase of the age limit for liability for jury service to 75 years would mean that only judges who retired before the compulsory retirement age would have the opportunity to serve as a juror following the five-year exclusion period if selected.[13] Although not currently mentioned in the *Juries Act 1957* (WA),[14] the Commission is of the opinion that the same ineligibility should extend to acting and auxiliary judges and commissioners[15] of the Supreme Court, District Court and Family Court of Western Australia and to acting magistrates (including acting magistrates of the Children's Court of Western Australia). The Commission notes that judges and magistrates of federal courts who are resident in Western Australia are exempted from jury service by virtue of the *Jury Exemption Act 1965* (Cth) and *Jury Exemption Regulations 1987* (Cth).[16]

PROPOSAL 13

Ineligibility for jury service – judicial officers

1. That judges and magistrates should remain ineligible for jury service while holding office and for a period of five years from the date of the termination of their last commission as a judicial officer.
2. That this same ineligibility should extend to those holding acting or auxiliary judicial commissions in any of the state's courts and to commissioners of the Supreme Court and District Court.

Masters

Under the *Juries Act* a 'master … of the Supreme Court, Family Court or District Court' is permanently ineligible for jury service. There is currently only one master of the Supreme Court of Western Australia and there is no legislative provision to appoint masters in other Western Australian courts. Although masters do not engage in any work in the criminal field, they are judicial officers who are generally well known to counsel and other judicial officers. Like judges, they also have a sufficiently high degree of knowledge of trial and court procedure

10. Lord Chief Justice Woolf, *Observations for Judges on Being Called for Jury Service* (15 June 2004) <http://www.judiciary.gov.uk/publications_media/general/juryservice.htm>; NSWLRC, *Jury Selection,* Report No 117 (2007) 64.
11. See 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).
12. Her Majesty's Courts Service, *Guidance for Summoning Officers when Considering Deferral and Excusal Applications* (2004). Paragraph 18 deals specifically with applications made by members of the judiciary. It states that 'members of the judiciary or those involved in the administration of justice who apply for excusal or deferral on grounds that they may be known to a party or parties involved in the trial should normally be deferred or moved to an alternative court where the grounds for exclusion may not exist. If this is not possible, then they should be excused.'
13. It is noted that the compulsory retirement age for magistrates is 65 years under the *Magistrates Court Act 2004* (WA) sch 1, cl 11.
14. This is likely not mentioned because such people would be necessarily caught by the permanent ineligibility of all lawyers under sch 2, pt I, cl 1(f). Under the Commission's proposals, however, this ineligibility will be confined to practising lawyers and will not extend beyond the term in actual practice.
15. Appointed under the *Supreme Court Act 1934* (WA) s 49 or *District Court of Western Australia Act 1949* (WA) s 24.
16. However, it appears that the Commonwealth exemption only applies whilst the person holds office as a judge or magistrate.

to speculate as to why certain evidence may have been omitted in a criminal trial. Given the high likelihood that a master would be excused from jury service if called[17] and the fact that there is currently only one master (and rarely more than two), the Commission does not see any benefit in making masters eligible for jury service. Further, the Commission is of the opinion that, because of a master's status within the judicial hierarchy and to preserve the lay nature of a jury, masters should, like judges and magistrates, be ineligible for a period of five years following the date of termination of their last commission as a master. The Commission considers that five years is adequate time to enable a master to be sufficiently removed from the administration of justice such that his or her presence on a jury will not threaten public confidence in the impartiality of the criminal justice system.

PROPOSAL 14

Ineligibility for jury service – masters

That masters of the Supreme Court and those holding acting commissions as masters of the Supreme Court should remain ineligible for jury service while holding office and for a period of five years from the date of the termination of their last commission as a master.

State Coroner

The state coroner does not hold office as a judge or magistrate[18] and is therefore not covered by the above proposal, though the deputy state coroner (who is a magistrate) would remain ineligible. Currently the state coroner would be ineligible to serve on the basis that he has been admitted as a lawyer; however, the Commission proposes below that this exclusion be confined to practising lawyers. The Commission has therefore considered the position of the state coroner separately.

The coroner's functions are to investigate 'reportable'[19] deaths and make findings as to the identity of the deceased; how death occurred; the cause of death; and the particulars required to register the death.[20] A coroner may comment on any matter connected with the death including matters relating to public safety and the administration of justice.[21] Where the death is in care (eg, a death of an involuntary mental patient or of a ward of the state) or custody (eg, in prison or police custody) a coroner must comment on the 'quality of the supervision, treatment and care of the person'.[22]

While a coroner will infrequently deal with open homicide cases,[23] some deaths under coronial investigation will involve or uncover evidence to support a criminal conviction; for example, where a person has been killed in a high-speed crash previously thought to be accidental or where a baby has died in circumstances unknown. Although coroners can no longer commit to trial and are precluded from framing a comment or finding in a way that suggests that a person is guilty of an offence, they can refer a matter to prosecuting authorities where they believe that an offence has been committed in connection with the death which the coroner has investigated.[24]

A coroner may also be called upon to investigate certain cases that are clearly homicide but where the person responsible for the death cannot be pursued in the criminal courts. For example, in the case of a murder-suicide, where the person is unfit to stand trial or where the person has died prior to or during criminal proceedings.[25] Coroners may also hold inquests in cases where, for example, a police officer has killed a person but the relevant police investigation has found that the officer's actions were in self-defence.[26] In such a case the coroner will have to make a coronial determination on the facts and to do so he or she must have sufficient knowledge of criminal law and defences.

In all the circumstances, the Commission is of the opinion that the state coroner is close enough to the administration of criminal justice to warrant his or her exclusion from jury service on the same terms as a judicial officer.

17. Either because of knowledge of the trial judge or lawyers, or because the position is so integral to the proper daily functioning of the Supreme Court that he or she would be excused for undue hardship or substantial inconvenience to the public under the Third Schedule.
18. The state coroner is, however, entitled to the same salary and is entitled to hold office on the same terms as the Chief Magistrate of the Magistrates Court: *Coroners Act 1996* (WA) s 6.
19. Not all deaths are required to be reported to the coroner. Deaths that are reportable include deaths that are 'unexpected, unnatural or violent' or which appear to result from injury; deaths during anaesthetic or as a result of anaesthetic; deaths in custody or care; deaths that involve members of the police; and cases where the identity of the deceased is unknown.
20. *Coroners Act 1996* (WA) s 25 (1).
21. *Coroners Act 1996* (WA) s 25 (2).
22. *Coroners Act 1996* (WA) s 25 (3).
23. Sometimes an inquest will be held at the request of police or prosecutors in a 'cold case' where investigations have unearthed insufficient evidence to charge or identify a suspect with a known homicide. In these cases an inquest may be undertaken to uncover systemic problems with the administration of a particular investigation, to identify a deceased or to confirm a suspected death by homicide where a body has not been found.
24. *Coroners Act 1996* (WA) s 27(5).
25. In such cases, if sufficient evidence is uncovered, the coroner will bring down a verdict of unlawful homicide.
26. See, for example, the coronial findings in relation to the investigation into the death of Daniel Paul Rolph (7 July 2008).

PROPOSAL 15

Ineligibility for jury service – state coroner

That the state coroner should be ineligible for jury service while holding office and for a period of five years from the date of the termination of his or her commission as state coroner.

President or Commissioner of the Industrial Relations Commission

The *Juries Act* excludes the president or a commissioner of the Industrial Relations Commission established under the *Industrial Relations Act 1979* (WA). The Industrial Relations Commission has jurisdiction to deal with any matter affecting, relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein including:

- wages, salaries, allowances, remuneration;
- hours of employment, leave of absence, sex, age, qualification, or status of employees and conditions of employment;
- employment of children or young persons, or of any person or class of persons, in any industry;
- dismissal or refusal to employ any person or class of persons;
- relationship between employers and employees; and
- privileges rights and duties of any organisation or association or any officer or member thereof in or in respect of any industry.[27]

Offences against the *Industrial Relations Act* are determined by industrial magistrates. These magistrates are drawn from the general magisterial ranks and are, therefore, ineligible for jury service as judicial officers. Appeals from decisions of industrial magistrates lie to the full bench of the Industrial Relations Commission[28] with further appeal to the Western Australian Industrial Relations Court, which is constituted by three Supreme Court judges. The Industrial Relations Commission, therefore, has very limited criminal or prosecution jurisdiction.

Given the exclusive nature of the industrial relations jurisdiction and its very limited role in the administration of criminal justice, the Commission does not believe that the same arguments that apply to render judges and magistrates ineligible for jury service necessarily extend to the president and commissioners of the Industrial Relations Commission. In particular, applying Guiding Principle 3 the Commission does not immediately see how the independence of a jury might be comprised by the presence of an industrial relations commissioner among its number. However, the Commission concedes that there may be functions in this unique jurisdiction that support the ineligibility of its president and commissioners of which it is not aware. For this reason the Commission seeks submissions about whether or not the president and commissioners of the Industrial Relations Commission should remain ineligible for jury service.

INVITATION TO SUBMIT E

Ineligibility for jury service – industrial relations commissioners

Taking into account the desire for broad participation in jury service and the proposition that occupational ineligibility should be confined to those occupations that have an integral connection to the administration of justice, most particularly criminal justice, should the president and commissioners of the Industrial Relations Commission remain ineligible for jury service while holding office? If so, why?

Justices of the Peace

The *Juries Act* provides that justices of the peace are excluded from jury service while they hold that commission and for a period of five years after termination of the commission.[29] Justices of the peace are volunteer officers appointed by the Governor who authorises them to carry out a wide range of official administrative and judicial duties in the community. They are not required to have any legal training but must undertake a 10-week justice of the peace training course. There are currently approximately 3,300 justices of the peace in Western Australia many of whom perform solely administrative duties such as witnessing wills, statutory declarations and other documents for community members. Some justices of the peace are also called upon to perform criminal justice-related administrative duties such as signing search warrants, approving sureties to admit people to bail, and witnessing complaints and summonses. Whilst justices of the peace do have authority to preside in the Magistrates Court,[30] the Commission is advised that less

27. *Industrial Relations Act 1979* (WA) s 7.
28. *Industrial Relations Act 1979* (WA) s 84(2). The full bench is constituted by at least two commissioners and the President: s 15(1).
29. *Juries Act 1957* (WA) sch 2, pt I, cl 2(d).
30. Generally justices of the peace will preside over very minor matters such as bail applications (where police bail cannot be given), restraining order application and minor traffic offences.

than 10% of justices of the peace perform court duties.[31] The Commission understands that approximately 100 justices of the peace are called upon to perform court duties in the metropolitan area,[32] while regional areas may rely on justices of the peace for these duties more regularly.[33]

Only Western Australia and South Australia expressly exclude justices of the peace from jury service and the South Australian provision is confined to 'justices of the peace who perform court duties'.[34] On balance, the Commission does not believe that the presence of a justice of the peace on a jury would compromise the independence of the jury or threaten public confidence in the impartiality of the criminal justice system. However, applying the proposition that occupational ineligibility should be confined to those who have an 'integral and substantially current connection with the administration of justice, most particularly criminal justice', the Commission considers that there is a reasonable case for excluding from jury service those justices of the peace who have exercised the jurisdiction of the Magistrates Court at any time within a period of five years before being summoned to serve as a juror. Of course, should any current or former justice of the peace selected for jury service in a particular trial have knowledge of any party or witness through their work as a justice of the peace (or otherwise) they should, like any prospective juror, seek to be excused from service in that trial.

PROPOSAL 16

Ineligibility for jury service – justices of the peace

That the exclusion of justices of the peace from jury service be confined to justices of the peace who have exercised the jurisdiction of the Magistrates Court at any time within a period of five years before being summoned to serve as a juror.

Justices of the peace may also act as 'visiting justices' determining offences by prisoners against prison regulations.

31. Peter Scotchmer, Acting Manager, Justices of the Peace Branch, Department of the Attorney General, telephone consultation (May 2009).
32. Justices of the peace are used daily at the Central Law Courts in Perth to deal with violence restraining orders and there is a regular twice-weekly list dealing with minor traffic offences that is presided over by justices of the peace.
33. Under regulation 10 of the *Magistrates Court Regulations 2005* (WA), justices of the peace in country Magistrates Courts have broader jurisdiction than justices of the peace sitting in metropolitan Magistrates Courts.
34. *Juries Act 1927* (SA) sch 3, cl 2.

LAWYERS

All Australian jurisdictions exclude lawyers from jury service; however, they vary as to the length of time. Some jurisdictions exclude lawyers while in practice,[35] some extend the exclusion for a 10-year period beyond practice[36] and others render lawyers permanently ineligible for jury service.[37] Western Australia falls into the latter category: under the *Juries Act* an 'Australian lawyer' is permanently ineligible for jury service. The term Australian lawyer is defined under s 3 of the *Legal Profession Act 2008* (WA) as 'a person who is admitted to the legal profession under this Act or a corresponding law'.[38]

The traditional justification for excluding lawyers from jury service is that they 'possess legal knowledge and experience that could possibly result in them exercising undue influence on other jurors, and even usurping the role of the judge'.[39] However, this argument is difficult to substantiate and has been rejected by some commentators.[40] For example, Auld argued that a lawyer's status counts for nothing in the jury room because 'people no longer defer to professionals or those holding particular office in the way they used to do'.[41] He called in support the experience of the United States where lawyers are permitted to serve on juries in some state jurisdictions.[42] It has also been argued that allowing lawyers to serve on juries may in fact assist other jurors to clarify issues.[43]

35. *Juries Act 2003* (Tas) sch 2; *Jury Act 1995* (Qld) s 4; *Jury Act 1967* (ACT) sch 2; *Juries Act 1927* (SA) sch 3; *Juries Act* (NT) sch 7.
36. *Juries Act 2000* (Vic) sch 2.
37. *Jury Act 1977* (NSW) sch 2; *Juries Act 1957* (WA) sch 2. New South Wales expressly permanently excludes lawyers in particular positions, such as the prosecutors and 'public defenders'. All other lawyers are excluded if they are 'an Australian lawyer, whether or not an Australian legal practitioner'. This has the effect of excluding anyone who has ever been admitted to legal practice permanently, whether practising or not.
38. That is, admitted under the laws of another Australian jurisdiction.
39. NSWLRC, *Jury Selection,* Report No 117 (2007) 72. See also the comments of the UK Criminal Bar Association in Robins J, 'Judge and jury', *The Lawyer* (23 August 2004).
40. NSWLRC, ibid 74.
41. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 147.
42. Ibid. Though it should be noted that in the United States, where jurors are permitted to speak about their jury service, lawyers have suggested that they did get some deference because of their professional status and were required to advise fellow jurors on process. See eg, Adina G, 'Lawyers Can Gain Unique Perspective by Serving Jury Duty", *Long Island Business News* (4 November 2005); Nossiter A, 'Sitting Judge Chosen for Jury Panel', *The New York Times* (13 June 1996).
43. LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 20; NSWLRC, *Jury Selection,* Report No 117 (2007) 73.

Leaving aside the United States where there is greater scope for challenging jurors and an established culture of meticulous jury vetting,[44] it is worth examining the experiences of two jurisdictions that permit, or have sought to permit, lawyers to serve as jurors: England and Queensland. As discussed above, lawyers have been eligible to serve on English juries since 2004.[45] It is difficult to say how often lawyers have in fact been empanelled on English juries because Her Majesty's Court Service does not retain juror occupation data;[46] however, media reports suggest that there have been difficulties empanelling lawyer-jurors. Generally, this is because the lawyer is known to the advocates or trial judge,[47] but at least one lawyer has been dismissed by a judge because of 'specialist knowledge of legal matters that could be prejudicial' to the accused.[48] At the time of the amendments, the Chairman of the Criminal Case Review Commission in England warned that allowing lawyers to serve on juries would lead to 'challenges and appeals'.[49] Although the mere presence of a lawyer on a jury is unlikely to be enough to ground an appeal, appeals have succeeded where the potential for bias is apparent. Following a recent appeal against conviction where a lawyer from the Crown Prosecution Service was empanelled as foreman of a jury,[50] summoning officers have been instructed that prosecutors can only serve on a jury where the prosecution is brought by another authority.[51]

When it was passed in 1995, Queensland's *Jury Act* allowed lawyers to serve on juries. This amendment was made despite a recommendation by the Queensland Litigation Reform Commission that practising lawyers should remain ineligible for jury service.[52] Six months later an amending Bill was passed to restore the exclusion of lawyers from jury service.[53] Unfortunately, there is no evidence of difficulties or otherwise with lawyers being permitted to serve on juries in Queensland because the relevant provision had not come into effect by the time the amending Bill was introduced into Parliament. However, the decision to restore the exclusion was explained by the Queensland Government in the following way:

> [T]he presence of practising lawyers on a jury may potentially, even unwittingly, have an undesirable effect on the outcome of a jury's deliberations. The possibility of having lawyers exert such an influence on their fellow jury members could produce a perception, if not an actual situation, in which jury verdicts are liable to be tainted. Further, persons who are admitted to practise as barristers or solicitors possess the status of officers of the court. This relationship places certain ethical and professional responsibilities on them. While it is not likely that jury service eligibility will lead to conflicts of interest arising out of the two roles, it has the potential to unnecessarily complicate the position of lawyers in respect of their professional relationship with the court system. The same situation does not apply as far as other professions are concerned.[54]

The Commission notes the Queensland Government's argument that the professional relationship between lawyers and the courts may be compromised if practising lawyers are permitted to serve on juries.[55] However, it is important to remember that jurors serve as private persons and not as representatives of their professions. A more persuasive argument is that permitting practising lawyers to serve as jurors goes against the fundamentally lay nature of a jury. While the Commission is not convinced that a lawyer-juror would necessarily dominate a jury's deliberation, there is a real danger that fellow jurors may seek a lawyer-juror's guidance on legal issues rather than that of the judge.[56] Because juries are not required to give reasons and cannot speak publicly about their participation in a particular trial,[57] it is impossible to know whether a jury has been unduly influenced by an interpretation of the law provided by a lawyer-juror.

It is the Commission's opinion that, on balance, the risk of prejudice to an accused by allowing lawyers to serve as jurors is too high. Although it is noted that when the NSWLRC considered this question it recommended

44. It is worth noting here that reports state that even though the occupational exemption for lawyers in New York was abolished over a decade ago, very few lawyers have been chosen for jury service. Most are apparently challenged off 'because they don't want a third lawyer influencing the jury': Adina G, 'Lawyers Can Gain Unique Perspective by Serving Jury Duty", *Long Island Business News* (4 November 2005).
45. See above, 'The English System: Total occupational eligibility'.
46. Ian Norrish, Jury Summoning Officer, Her Majesty's Court Service (England and Wales), email (30 June 2009).
47. 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).
48. 'No Escaping Jury Duty, Lawyers Told', *The Guardian* (17 June 2004).
49. Professor Graham Zellick, Chairman Criminal Cases Review Commission, quoted in 'Barrister Told to Turn Up for Jury Despite Rejections', *The Independent* (17 June 2004).
50. *R v Williamson* [2007] UKHL 37.
51. Her Majesty's Courts Service, *Guidance for Summoning Officers When Considering Deferral and Excusal Applications* (2004) [18]. In practice this is a rare occurrence and is generally limited to prosecutions brought by customs services. A prosecutor cannot be directly referred to a non-CPS prosecuted case because that would undermine the principle of random selection.
52. Supreme Court of Queensland, Litigation Reform Commission, *Reform of the Jury System in Queensland: Report of the Criminal Procedure Division* (1993) 8.
53. Jury Amendment Bill 1996 (Qld) introduced on 16 May 1996. The *Jury Act 1995* (Qld) was assented to on 9 November 1995.
54. Queensland, *Parliamentary Debates,* Legislative Assembly, 16 May 1996, 1192 (Mr DE Beanland, Attorney General).
55. Under s 29 of the *Legal Profession Act 2008* (WA) lawyers in Western Australia become officers of the Supreme Court upon admission to practice.
56. VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 53; Robins J, 'Judge and Jury', *The Lawyer* (23 August 2004).
57. *Juries Act 1957* (WA) s 56B.

that lawyers without any association to the criminal law should be permitted to serve as jurors,[58] the Commission is not persuaded that the risk of prejudice is any less with non-criminal lawyers. Indeed, the Commission believes that the risk of prejudice to an accused may well increase should a lawyer-juror give advice or guidance to fellow jurors on an area of law that is not within his or her specialty.

The Commission has argued above that permanent ineligibility of any occupation is unjustified and that it should be abolished.[59] However, even if permanent ineligibility is removed, the current wording of the exclusion for lawyers has the effect of rendering ineligible anyone who has ever been admitted to legal practice in any Australian jurisdiction, regardless of whether the lawyer is still in practice or left the profession immediately after admission. The Commission believes that the exclusion as it currently stands is unjustifiably wide. It is noted that these days many people qualify as lawyers for the purposes of pursuing other career paths, such as in business, finance or government: the Commission can see no reason in principle that such people should be excluded from jury service.[60] Having regard to the terminology of the *Legal Profession Act* the Commission believes that the exclusion should be confined to 'Australian legal practitioners';[61] that is, those people holding current practising certificates. This would include practising government lawyers (who are not necessarily certificated practitioners) by virtue of the operation of s 36(3) of the *Legal Profession Act*.

PROPOSAL 17

Ineligibility for jury service – practising lawyers

That the exclusion of lawyers from jury service be confined to Australian legal practitioners, within the meaning of that term in the *Legal Profession Act 2008* (WA) s 5(a).

58. NSWLRC, *Jury Selection,* Report No 117 (2007) recommendations 14, 15 & 16.
59. Proposal 3.
60. The Commission recognisees that an argument could be made for exclusion of others with some knowledge or experience of the law and court procedure, such as academics in law and related fields (eg, criminology), expert witnesses and employees of legal practitioners; however, the line must be drawn somewhere. It is noted that while law clerks were exempt from service in Western Australia's first *Jury Act 1898* (WA) s 8, the exemption was removed when the Act was modernised in 1957. Currently only the Australian Capital Territory and the Northern Territory exclude people who are not qualified as lawyers but who have a direct connection to legal practice and this is limited to law clerks, graduate clerks and, in the ACT, employees of legal practitioners.
61. *Legal Profession Act 2008* (WA) s 5(a).

The Commission has not reached a firm view about whether lawyers should be excluded from jury service for a period of time (notionally five years) after they cease to practise or whether they should be eligible for jury service immediately. The Commission seeks submissions on this issue. As noted earlier, the Commission believes that masters and registrars should be treated in the same way as legal practitioners in respect of the period of exclusion from jury service. This should be kept in mind when considering submissions on this issue.

INVITATION TO SUBMIT F

Length of lawyers' ineligibility for jury service

Should lawyers remain ineligible for jury service for a five-year period after they cease practising law? If so, why?

COURT OFFICERS

Registrars

Under the *Juries Act* a registrar of the Supreme Court, Family Court or District Court is permanently ineligible for jury service.[62] Registrars are the official taxing officers of the court and are responsible for many aspects of the administration of civil matters through the court process. It was once the case that registrars had very little interaction with the administration of criminal justice. However, pressures on the justice system have caused more and more judicial and quasi-judicial functions in the criminal sphere to be delegated to registrars.

Section 124(5) of the *Criminal Procedure Act 2004* (WA) permits delegation of jurisdiction to a registrar of the Supreme Court or District Court 'to deal with applications and other matters that do not involve the final determination of a prosecution'. Under this delegation, Supreme Court registrars currently settle criminal appeal books and are involved in listing and case management of criminal appeals. District Court registrars are also involved in case management of criminal matters and may perform all criminal functions of a judge of the District Court that do not involve trial or sentencing (pre- and post-committal). The latter functions are currently performed under commission from the Governor[63] as a temporary measure while any legislative provisions

62. Registrars of the Magistrates Court are not excluded from jury service. This is probably because they are designated as administrative staff under s 26 of the *Magistrates Court Act 2004* (WA).
63. Two registrars, including the Principal Registrar have been appointed as Commissioners of the District Court of Western Australia for this purpose for a period of 18 months from 20 May 2008.

that may unintentionally inhibit the full delegation of powers under the *Criminal Procedure Act* are corrected. Once this is done the delegated criminal jurisdiction of all registrars in that court (and most likely also in the Supreme Court) will expand.[64]

It is also worth noting that since October 2007 two Supreme Court registrars have been permanently commissioned as magistrates to constitute the Stirling Gardens Magistrates Court.[65] In this capacity these officers perform pre-committal functions on a weekly basis for indictable matters that attract the jurisdiction of the Supreme Court. Where matters are downgraded to the Magistrates Court jurisdiction or where there are unrelated summary charges, these officers will also sentence an accused. Because these officers hold permanent commissions as magistrates, they would be excluded under the Commission's proposals while in office and for a period of five years thereafter.

In view of the current criminal functions of registrars in the Supreme Court and District Court and the realistic potential for further delegation of criminal jurisdiction to these court officers under the *Criminal Procedure Act*, the Commission believes that registrars of these courts should be excluded from jury service while they hold office as a registrar. Because registrars are not involved in the trial or final determination of criminal matters (unless under separate commission as a judicial officer), the Commission does not believe it is necessary to extend the exclusion period beyond the period in which they hold office. However, the Commission does see the attraction in dealing with registrars in the same way as legal practitioners. The Commission will therefore base its final recommendation as to length of exclusion period on the submissions received in relation to Invitation to Submit B above.

PROPOSAL 18

Ineligibility for jury service – Supreme Court and District Court registrars

That registrars, and those holding acting commissions as registrars, in the Supreme Court or District Court should remain ineligible for jury service while holding office.

64. Michael Gething, Principal Registrar of the District Court, telephone consultation (14 July 2009); Keith Chapman, Principal Registrar of the Supreme Court, telephone consultation (14 July 2009).
65. Matters that attract the jurisdiction of the Supreme Court will be remanded by a magistrate in the general Magistrates Court to the Stirling Gardens Magistrate Court. Serious indictable matters where concurrent jurisdiction lies with the Supreme Court and District Court will also often be referred to the Stirling Gardens Magistrate Court for committal

The Commission does not see the same arguments applying to registrars of the Family Court who do not exercise any criminal jurisdiction. For this reason, the Commission proposes that the exclusion should not extend to Family Court registrars; however, should there be any reason that a registrar of that court not serve as a juror in a particular matter, they may seek to be excused or defer their jury service.

PROPOSAL 19

Eligibility for jury service – Family Court registrars

That Family Court registrars be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(b) of the *Juries Act 1957* (WA).

Judges' associates and ushers

The *Juries Act* currently excludes judges' associates and ushers of the Supreme Court, Family Court or District Court from jury service. The rationale behind this exclusion is that these officers, who are personal staff of the judge,[66] are so intimately involved in the criminal trial process as to call into question the independence or impartiality of the jury should they be permitted to serve. Judges' associates and ushers (or orderlies as they are sometimes known) have important roles in criminal trials. Associates act as the Clerk of Arraigns in a criminal trial and their functions include arraigning the accused, selecting the jury using a random ballot process, recording and handling exhibits, taking the jury's verdict and signing warrants.[67] Ushers' functions in a criminal trial include announcing the judge, calling witnesses, swearing jurors and witnesses, and keeping order in the court.

Western Australia is the only Australian jurisdiction that *expressly* excludes judges' personal staff from jury service. However judges' staff are rendered ineligible for jury service in all other jurisdictions (except Queensland) under wide general exclusions covering court staff or public sector employees engaged in the administration of justice.[68] Taking into account the standard of 'integral and substantially current connection with the administration of justice, most particularly criminal justice', the Commission considers that judges' associates

66. Appointed under the *Supreme Court Act 1935* (WA) s 155A.
67. Although there are many career associates, often an associate (especially in the Supreme Court) will be legally trained and will occupy that position for only one or two years following graduation from university.
68. See eg, *Juries Act 2003* (Tas) sch 2, cl 4; *Juries Act 2000* (Vic) sch 2, cl 1(f); *Jury Act 1977* (NSW) sch 2, cl 8; *Jury Act 1967* (ACT) sch 1, cl 16; *Juries Act 1927* (SA) sch 3(2); *Juries Act* (NT) sch 7.

and ushers have sufficient connection with the criminal justice system during the period of their employment to support their continuing ineligibility for jury service. Further, the Commission notes that many associates and ushers will be acquainted with counsel regularly appearing in criminal trials and such acquaintance may be seen, under Principle 3, to compromise the jury's status as an impartial and independent lay tribunal.

However, while the Commission sees merit in retaining the exclusion for judges' staff who are employed in the criminal trial jurisdictions of the Supreme Court or District Court, the Commission sees no reason to extend this exclusion to staff of the Family Court of Western Australia. Further, the Commission does not see any reason to maintain the exclusion beyond the period of employment. While the duties of judges' associates and ushers are important in the criminal trial context, they are largely administrative and would be unlikely to be seen to compromise the jury's independence outside the context of current employment. Should any former judge's associate or usher selected for jury service in a particular trial have knowledge of any party or witness as a consequence of their former employment (or otherwise) they should seek to be excused from service in that trial.

PROPOSAL 20

Ineligibility for jury service – judges' associates and ushers of the Supreme Court and District Court

That associates and ushers of judges of the Supreme Court or District Court should remain ineligible for jury service during their term of employment.

PROPOSAL 21

Eligibility for jury service – judges' associates and ushers of the Family Court

That judges' associates and ushers of the Family Court be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(g) of the *Juries Act 1957* (WA).

Sheriff and sheriff's officers

The *Juries Act* excludes the Sheriff of Western Australia or any officer of the sheriff from serving as a juror. The exclusion extends beyond the period of employment to five years after termination of employment. The sheriff and his or her deputies are officers of the Supreme Court and contemporaneously the District Court and Magistrates Court.[69] Under the *Supreme Court Act 1935* (WA), the sheriff is 'charged with the service and execution of all writs, applications, summonses, rules, orders, warrants, [jury] precepts, process and commands of the court'.[70] The sheriff is also required, under the *Supreme Court Act,* to take, receive and detain all persons who are committed to his or her custody by the court and to discharge all such persons when directed by the court.[71] The sheriff is also charged with recovery of debts and execution of warrants under the *Fines, Penalties and Infringement Notices Enforcement act 1994* (WA). Importantly, in the current context, the sheriff is the designated summoning officer under the *Juries Act* and all jury management functions fall under the auspices of the Sheriff's Office.[72]

Because of the sheriff's overt law enforcement duties, the Commission is satisfied that the sheriff and his or her officers or deputies should remain ineligible for jury service while holding office. The Commission is further of the opinion that because the office is responsible for summoning jurors and managing the jury system in Western Australia this exclusion from jury service should extend for a period of five years following termination of employment as sheriff, deputy sheriff or sheriff's officer to ensure sufficient independence from this role.

PROPOSAL 22

Ineligibility for jury service – Sheriff and sheriff's officers

That the Sheriff of Western Australia and deputies or officers of the Sheriff of Western Australia should remain ineligible for jury service during their term of employment and for a period of five years following termination of their employment as Sheriff or deputy sheriff.

Bailiffs

A bailiff or assistant bailiff appointed (by the sheriff) under the *Civil Judgments Enforcement Act 2004* (WA) is currently ineligible to serve as a juror. The exclusion extends beyond the period of employment to five years after termination of employment.

The sheriff may delegate to a bailiff the performance of any function under s 156(1) of the *Supreme Court Act.*

69. *Supreme Court Act 1935* (WA) s 156. The powers of the Sheriff extend to his or her deputies appointed under s 158.
70. *Supreme Court Act 1935* (WA) s 156(1).
71. Ibid.
72. The Commission is aware that there is a current proposal to move the management of the jury system in Western Australia under the umbrella of the Higher Courts Directorate.

These functions include the service and execution of writs and warrants and the detention of persons committed to custody by the court. Because of this potential for delegation of sheriff's law enforcement duties, the Commission is persuaded that exclusion from jury duty should extend to bailiffs and assistant bailiffs. However, because bailiffs are divorced from jury management, the Commission sees no reason to extend the exclusion for a period beyond termination of employment as a bailiff or assistant bailiff.

PROPOSAL 23

Ineligibility for jury service – bailiffs and assistant bailiffs

That a bailiff or assistant bailiff appointed under the *Civil Judgments Enforcement Act 2004* (WA) should remain ineligible for jury service during their term of employment.

MEMBERS AND OFFICERS OF PARLIAMENT

Members

All Australian jurisdictions exclude Members of Parliament from jury service. Under the *Juries Act*, 'a member or officer' of the Legislative Assembly or Legislative Council of the Parliament of Western Australia is excluded from jury service for the term of their parliamentary appointment and for a further five years. The Commission considers that the current exclusion of Members of Parliament from jury service is appropriate to preserve public confidence in the independence and impartiality of the criminal justice system. In this regard the Commission's view remains unchanged from its 1980 report on this matter where it said:

> The Commission considers it inappropriate that a person who is involved in the making of laws should be able to serve on a jury which may be called upon to decide whether there has been a breach of any such law.[73]

The Commission also made the point in its 1980 report that in the exercise of Parliament's power to punish for contempt, members held a 'judicial or quasi-judicial' function that further justified their exclusion from jury service.[74] Recognising that political influence may exist (or be seen to exist) beyond a member's term of office, the Commission believes that it is prudent, in the interests of preserving public confidence, to extend the exclusion of members of Parliament from jury service for a period of five years following the termination of their elected office.

PROPOSAL 24

Ineligibility for jury service – Members of Parliament

That a duly elected member of the Legislative Assembly or Legislative Council should remain ineligible for jury service during their term of office and for a period of five years thereafter.

Officers

The Commission does not believe that the above exclusion should extend, as it currently does, to 'officers' of either House of Parliament. There is no clear definition of an officer of Parliament[75] and the Commission is concerned that this may unnecessarily extend the exclusion beyond those properly excluded by virtue of their legislative role. The Commission believes that its proposal to permit deferral of jury service[76] will ensure that Parliament is not unduly inconvenienced or delayed should an officer who is integral to the running of Parliament (eg, the sergeant-at-arms and the usher of the black rod) be called for jury service. These officers may seek deferral of their jury service to a month when Parliament is not sitting.

PROPOSAL 25

Eligibility for jury service – officers of Parliament

That officers of the Legislative assembly and Legislative Council be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(a) and 2(b) of the *Juries Act 1957* (WA).

OCCUPATIONS INVOLVED IN LAW ENFORCEMENT AND INVESTIGATION OF CRIME

Police officers

Police officers are excluded from jury service in all Australian jurisdictions. Some jurisdictions have made police permanently ineligible for jury service,[77] while others extend ineligibility to 10 years following termination of employment from the police service.[78] In Western Australia, the *Juries Act* expressly excludes police

73. LRCWA, *Report on Exemption from Jury Service,* Project No 71 (1980) 17.
74. Ibid.
75. Section 4(2) of the *Salaries and Allowances Act 1975* (WA) defines an Officer of the Parliament for the purposes of that Act, but it only extends to elected members.
76. See below Chapter Six, Proposal 48.
77. *Jury Act 1995* (Qld) s 4; *Jury Act 1977* (NSW) sch 2.
78. *Juries Act 2003* (Tas) sch 2; *Juries Act 2000* (Vic) sch 2.

officers from jury service during their employment and for five years thereafter. There are important justifications for excluding police officers from jury service. First, police officers are intimately involved with enforcement of laws and criminal investigation and are an integral part of the prosecution process. As such their presence on a jury would seem to militate against the underlying rationale that a jury be independent from government as the prosecuting authority. Secondly, because of their role in the prosecution process, police officers might be seen to have a bias toward the prosecution case. Although they may not have a demonstrable or actual bias, the perception of bias is enough to unduly threaten public confidence in the impartiality and fairness of the criminal justice system.

While the Auld review in England played down the potential bias of police-jurors (comparing their potential bias to that possibly held by jurors who had been victims of crime), developments in that jurisdiction since Auld's recommendations were implemented show that problems of partiality (whether apparent or real) cannot be ignored.[79] In particular, there have been a number of successful appeals against conviction in cases where police officers have been empanelled on juries and it has later come to light that they had some connection with a police officer who was on the prosecution team or somehow connected to the case.[80] Concern has also been raised that if, during a trial, police evidence is subject to challenge or if it forms an integral part of the prosecution case, a police-juror's partiality (or perceived partiality) toward a fellow officer may put in doubt the safety of the conviction and render the trial unfair.[81] In the absence of legislative amendment to reinstate police officers' exclusion, the English Court of Appeal has instructed that trial judges must be made 'aware at the time of juror selection if any juror in waiting is, or had been, a police officer or a member of a prosecuting authority, or is a serving prison officer'.[82]

79. 'Trial judges must be told if police are on jury', *The Times* (7 April 2007); 'Should the Police be Reporting for Jury Duty?', *The Times* (24 July 2007); 'Jury Service: Should the government turn the clock back?', *The Times* (24 October 2007).
80. See, for example, *R v Pintori* [2007] EWCA Crim 1700 where an appeal against conviction was upheld on the basis that one of the jurors worked as a civilian employee of the police and was acquainted with the police giving evidence. See also *R v I* [2007] ECWA Crim 2999 where an appeal was allowed on the basis that a police officer-juror knew each of the four officers giving evidence at the trial. The court found that the judge should have excluded the police officer-juror once this became known. See also *R v Abdroikov; R v Green, R v Williamson* [2007] UKHL 37 where appeals against convictions of two accused were upheld by a majority of the House of Lords because of the apparent bias found in the presence of a police officer and a crown prosecutor on their respective juries.
81. *R v Khan and Ors* [2008] *ECWA Crim* 531; 'Trial Judges Must be Told if Police Are on Jury', *The Times* (7 April 2007).
82. *R v Khan and Ors* [2008] ECWA Crim 531.

Taking into account the experience in England, the Commission is strongly of the view that the current exclusion of police officers from jury service during the term of their employment and for five years thereafter should remain in place. In coming to this conclusion, the Commission finds the following points to be persuasive:

- the integral role that police officers play in the detection and investigation of crime and prosecution of criminal charges;
- the fact that police officers have ready access to information that may concern an accused or witness and that is not available to lay jurors and may not be adduced in evidence;
- the potential for partiality of police-jurors toward the prosecution or the evidence of fellow officers, whether real or apparent;
- the risk of unsafe verdicts should a police-juror know or be known to a witness or prosecutor or an accused in a trial;
- the appearance to an accused that he or she would not receive a fair trial where a police-juror was empanelled; and
- the need to preserve public confidence in the impartial administration of criminal justice.[83]

Interestingly, it is observed that the Commissioner of Police, who does not come under the general designation of 'police officer' under the *Police Act 1892* (WA),[84] is not expressly excluded from jury service under the current *Juries Act*. The Commission believes that this is an oversight that should be corrected by the addition of the Commissioner of Police to the list of ineligible persons in the Second Schedule.

PROPOSAL 26

Ineligibility for jury service – Commissioner of Police and police officers

1. That the Commissioner of Police should be ineligible for jury service during his or her term as Commissioner of Police and for a period of five years thereafter.
2. That a police officer should remain ineligible for jury service during his or her term of employment as a police officer and for a period of five years thereafter.

83. Similar arguments have been made in the following reports considering this matter: NSWLRC, *Jury Selection,* Report No 117 (2007) 80–5; VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 59–60; *Report of the Departmental Committee on Jury Service* (Morris Committee), Cmnd 2627 (1965) 34–5.
84. While 'police officer' is not generally defined in the *Police Act 1892* (WA) it is defined for the purposes of Part III and Part IIIA to exclude the Commissioner of Police: see ss 34 & 38A.

Corruption and Crime Commission

The Corruption and Crime Commission was established in 2004 to combat organised crime[85] and reduce the incidence of corruption and misconduct in the public service. The Corruption and Crime Commission also has extensive investigative powers, including the power to compel a witness to attend a hearing, to produce documents, to obtain a search warrant on application to a judge, to intercept telecommunications and use surveillance devices, to use assumed identities and to conduct integrity tests. The Office of the Parliamentary Inspector of the Corruption and Crime Commission is responsible for auditing the operations of the Corruption and Crime Commission and dealing with any misconduct of its officers.[86]

The *Juries Act* excludes the following officers of the Corruption and Crime Commission and the Office of the Parliamentary Inspector of the Corruption and Crime Commission from jury service:

- the Commissioner of the Corruption and Crime Commission;
- the Parliamentary Inspector of the Corruption and Crime Commission;
- officers of the Corruption and Crime Commission; and
- officers of the Parliamentary Inspector of the Corruption and Crime Commission.

The Commissioner and Parliamentary Inspector of the Corruption and Crime Commission are permanently ineligible for jury service, while officers of the Corruption and Crime Commission and its parliamentary inspector are ineligible while holding office and for five years thereafter.

The term 'officer' is defined in s 3 of the *Corruption and Crime Commission Act 2003* (WA) and includes all staff, seconded staff and contracted service providers of the Corruption and Crime Commission and the parliamentary inspector's office. As such, the exclusion extends beyond investigations staff to general administrative staff (such as receptionists and human resources staff) and contracted service providers (which include office cleaners and external providers such as proofreaders). In the Commission's opinion, the exclusion net is cast too wide. In the interests of increasing participation in jury service pursuant to Guiding Principle 3, the Commission proposes that the exclusion be confined to officers of the Corruption and Crime Commission whose presence on a jury might compromise, or be seen to compromise, the jury's status as an independent, impartial and competent lay tribunal.

The Commission can see good sense in maintaining the exclusion of officers, seconded employees and contracted service providers of the Corruption and Crime Commission who are directly involved in the detection and investigation of crime, corruption and misconduct or prosecution of relevant charges.[87] Like police, such officers may have access to potentially prejudicial information about an accused or the circumstances of a case or may be biased toward a prosecution case.[88] The Commission is also of the view that the exclusion of the Commissioner and Parliamentary Inspector of the Corruption and Crime Commission (and any person acting in those roles) should be maintained as such officers cannot properly be seen to be independent of the state and its interests.

However, the Commission acknowledges that the Corruption and Crime Commission is somewhat unique because of the various secrecy and confidentiality provisions under the *Corruption and Crime Commission Act* that bind its officers, employees and service providers.[89] In particular, these provisions may prevent such persons from divulging the nature of the work they do within the Corruption and Crime Commission if summoned for jury service. Thus, unlike the other categories of exclusion discussed in this chapter, it may not be possible for an officer of the Corruption and Crime Commission to disclose to the sheriff the nature of his or her work in order to demonstrate ineligibility for jury service. In these circumstances the Commission proposes that consideration of eligibility for jury service should, in this instance, be judged internally by the Commissioner of the Corruption and Crime Commission applying the standard discussed above of direct involvement in the detection and investigation of crime, corruption and misconduct or prosecution of relevant charges.

85. While the Corruption and Crime Commission does not investigate organised crime itself, it can grant the Commissioner of Police exceptional powers not normally available to police to investigate organised crime. The use of these powers is authorised and monitored by the Corruption and Crime Commission Commissioner.
86. *Corruption and Crime Commission Act 2003* (WA) s 195.
87. Classes of officers meeting this definition would include officers within the investigations unit, including financial investigators, investigatory assistants and intelligence analysts. There is also cause to exclude officers in the investigation review and complaints assessment area who monitor and assess complaints to the Corruption and Crime Commission.
88. It is also noted that some investigations staff employed by the Corruption and Crime Commission are former police officers.
89. See, in particular, *Corruption and Crime Commission Act 2003* (WA) pt 9.

PROPOSAL 27

Ineligibility for jury service – Corruption and Crime Commission

That the following officers of the Corruption and Crime Commission be ineligible for jury service during their term of employment, secondment or contract for services and for a period of five years thereafter:

- the Commissioner of the Corruption and Crime Commission (or any person acting in this role);
- the Parliamentary Inspector of the Corruption and Crime Commission (or any person acting in this role); and
- officers, seconded employees and contracted service providers of the Corruption and Crime Commission and of the Parliamentary Inspector of the Corruption and Crime Commission who are, in the opinion of the Commissioner of the Corruption and Crime Commission, directly involved in the detection and investigation of crime, corruption and misconduct or the prosecution of charges.

OCCUPATIONS INVOLVED IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Members of review boards

Under the *Juries Act* members of the following boards are excluded from jury service while holding commission as a member and for a period of five years thereafter:

- the Mentally Impaired Accused Review Board under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);
- the Prisoners Review Board under the *Sentence Administration Act 2003* (WA);
- the Supervised Release Review Board under the *Young Offenders Act 1994* (WA).

These boards are involved in the preparation for release and the release of prisoners, detainees or mentally impaired accused in Western Australia. As such, members of these boards cannot be said to be independent of the criminal justice system. The Commission is satisfied that members of the above boards have sufficient connection to the administration of criminal justice to warrant their exclusion from jury service and that such exclusion should extend for a period of five years after their membership of the relevant board.

PROPOSAL 28

Ineligibility for jury service – members of review boards

That members of the Mentally Impaired Accused Review Board, the Prisoners Review Board and the Supervised Release Review Board should be ineligible for jury service for the term of their membership of the relevant board and for a period of five years thereafter.

Officers and employees of the Department of the Attorney General and the Department of Corrective Services

Clause 2(o) of Part I of the Second Schedule of the *Juries Act* excludes for the term of their employment and for five years thereafter a person who:

> (i) is an officer or employee of an agency as defined in section 3(1) of the *Public Sector Management Act 1994*; or
>
> (ii) provides services to such an agency under a contract for services; or
>
> (iii) is a contract worker as defined in section 3 of the *Court Security and Custodial Services Act 1999* or section 15A of the *Prisons Act 1981*;
>
> being a person prescribed or of a class prescribed by regulations.

The *Jury Pools Regulations 1982* (WA) provide that a 'person is prescribed for the purposes of the Second Schedule, Part I, clause 2(o) of the Act if the person':

> (a) is employed in a department of the Public Service that principally assists the Attorney General to administer Acts administered by the Attorney General, other than a person employed for the purposes of —
>
> (i) the *Births, Deaths and Marriages Registration Act 1998* section 7; or
>
> (ii) the *Public Trustee Act 1941* section 6,
>
> or provides services to such a department under a contract for services; or
>
> (b) is employed in a department of the Public Service that principally assists the Minister for Corrective Services to administer Acts administered by the Minister, or provides services to such a department under a contract for services; or
>
> (c) is a person referred to in the Second Schedule Part I clause 2(o)(iii) of the Act.[90]

90. *Jury Pools Regulations1982* (WA) reg 10 (inserted 3 April 2007).

It can be seen that by referring in such general terms to employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services the exclusion net is again cast unnecessarily wide. Such exclusion picks up employees such as receptionists, IT specialists and graphic designers who may have no involvement whatsoever in any activity that could threaten the independence or impartiality of a jury. Likewise, external service providers such as cleaners, proofreaders and conference organisers may also be swept up in this broad exclusion.

Applying the principle that occupational exclusions should be confined to those whose presence on a jury might compromise, or be seen to compromise, the jury's status as an independent, impartial and competent lay tribunal, the Commission believes that the current provision should be significantly narrowed. It is the Commission's opinion that the provision should be confined to those employees and service providers whose work is integrally connected with the administration of criminal justice including (but not limited to) the detection, investigation or prosecution of crime; the management, transport or supervision of offenders; the security or administration of criminal courts or custodial facilities; the direct provision of support to victims of crime; and the formulation of policy or legislation pertaining to the administration of criminal justice. The exclusion of these people is justified because their connection to the administration of criminal justice and their potential access to information as a consequence of their employment suggests that a reasonable person might not perceive them to be sufficiently independent or impartial in a criminal trial.

PROPOSAL 29

Ineligibility for jury service – officers and employees of the Department of the Attorney General and the Department of Corrective Services

That those officers, employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services, other than clerical, administrative and support staff, whose work involves:

- the detection, investigation or prosecution of crime;
- the management, transport or supervision of offenders;
- the security or administration of criminal courts or custodial facilities;
- the direct provision of support to victims of crime; and
- the formulation of policy or legislation pertaining to the administration of criminal justice

should be ineligible for jury service during the term of their employment or contract for services and for a period of five years following termination of their employment or contract for services.

OTHER EXEMPT OCCUPATIONS

Ombudsman

The *Juries Act* provides that the 'Parliamentary Commissioner for Administrative Investigations' (that is, the ombudsman) is permanently excluded from jury service. Officers of the ombudsman are not excluded from jury service. The ombudsman is an independent and impartial parliamentary commissioner whose office investigates complaints from individuals about Western Australian government agencies, statutory authorities, local governments and public universities that are administrative in nature. The ombudsman also has the authority to initiate an inquiry or investigation about these public bodies where no specific complaint has been received.

While the ombudsman's duties bear little relationship to criminal justice, the ombudsman can investigate complaints about the administration of Western Australian prisons and the police service. However, the ombudsman can only make recommendations to agencies as the outcome of its investigation; the office is not involved in the prosecution of matters and cannot direct that action be taken. It is the Commission's preliminary view that the ombudsman has insufficient connection to the administration of justice, and in particular criminal justice, to warrant his or her exclusion from jury service. The Commission recognises that the ombudsman is a parliamentary commissioner;[91] however, given the ombudsman's role as 'an independent and impartial person'[92] investigating public complaints, the Commission does not believe that the ombudsman's presence on a jury would necessarily compromise a jury's status as an independent, impartial and competent lay tribunal.

PROPOSAL 30

Eligibility for jury service – ombudsman

That the Parliamentary Commissioner for Administrative Investigations (the ombudsman) be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(d) of the *Juries Act 1957* (WA).

91. *Parliamentary Commissioner Act 1971* (WA).
92. Ombudsman (WA) <http://www.ombudsman.wa.gov.au>.

Officers of the Department for Child Protection

The *Juries Act* presently excludes officers 'as defined in s 3 of the *Children and Community Services Act 2004*' (WA).[93] This Act in turn defines officer as:

> A person employed in, or engaged by, the Department [for Child Protection] whether as a public service officer under the *Public Sector Management Act 1994*, under a contract for services, or otherwise.

The Department for Child Protection provides social services to meet the needs of vulnerable children and families. Officers 'authorised' under s 25 of the *Children and Community Services Act* can 'conduct investigations into whether a child may be in need of protection,'[94] and may search and restrain a child,[95] and move a child to a 'safe place'.[96] While an authorised officer's investigation may be used to support a charge of abuse or neglect in relation to a child, the officer has no power to arrest or apprehend a person suspected of offending in this way.

In the Commission's opinion, the current exclusion for officers of the Department for Child Protection is unnecessarily wide. It excludes all officers and contracted service providers whether or not they have any investigative function (which lies only with officers authorised under s 25). On balance, the Commission does not believe that there is sufficient connection to the administration of criminal justice or the investigation of crime to warrant exclusion of officers of the Department for Child Protection, whether authorised or otherwise. In particular, the Commission cannot see how such an officer's presence on a jury might compromise, or be seen to compromise, the jury's status as an independent, impartial and competent lay tribunal. In the interests of increasing participation in jury service pursuant to Guiding Principle 3, the Commission proposes that the exclusion for officers of the Department for Child Protection be removed.

PROPOSAL 31

Eligibility for jury service – officers of the Department for Child Protection

That officers of the Department for Child Protection be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(k) of the *Juries Act 1957* (WA).

93. *Juries Act 1957* (WA) sch 2, pt I, cl 2(k).
94. *Children and Community Services Act 2004* (WA) s 32(1)(d).
95. *Children and Community Services Act 2004* (WA) ss 114, 115 & 116.
96. *Children and Community Services Act 2004* (WA) s 41.

COMMONWEALTH EXEMPTIONS

Certain occupations are exempted from jury service by the operation of the *Jury Exemption Act 1965* (Cth) and *Jury Exemption Regulations 1987* (Cth). Generally these exemptions relate to occupations involved in the administration of justice, the creation of legislation, law enforcement and defence. However, exemptions extend to occupations considered to be integral to the executive public service, to the smooth running of federal Parliament and to national security. Exempted occupations include Members of federal Parliament and people holding specific positions in support of Ministers and departments of the Senate;[97] federal judicial officers; court and tribunal staff; members of the defence forces; Australian Federal Police officers; senior members of the Australian Public Service; officers or employees of the Commonwealth whose duties involve the provision of legal professional services; employees in the Department of Primary Industries and Energy whose duties relate to exotic diseases; and certain other positions relating to public administration. These provisions, while beyond the scope of what may be recommended for reform by the Commission, nevertheless comprise a small component of the present regime against which any recommendations must be considered.

97. For a full list, see *Jury Exemption Regulations 1987* (Cth) reg 7.

Chapter Five

Qualification for Jury Service

Contents

Qualification for jury service

IN the preceding two chapters the Commission has considered the legislative provisions that determine liability and eligibility for jury service. This chapter examines a third category: those people who are otherwise liable and eligible but who are considered not qualified for jury service. Section 5 of the *Juries Act 1957* (WA) provides that people are not qualified for jury service if they have specified criminal records, do not understand the English language, or are incapacitated by any disease or infirmity of the mind or body that affects their ability to discharge the duties of a juror.

As explained in Chapter One of this paper, the category of disqualification is an expression of the Commission's Guiding Principle 1: that juries should be, and should be seen to be, independent, impartial and competent. The exclusion of people from jury service who are unable to discharge the duties of a juror—because of a lack of understanding of English or because of incapacity—reflects the concept of competence. The exclusion of people with criminal histories reflects the view that juries should be impartial. In this chapter, the Commission closely examines the disqualification categories in order to ensure that they properly reflect the Commission's first guiding principle. In other words, people who may be biased or incapable of discharging the duties of a juror should be disqualified. Clear legislative criteria for these categories enables those who are not qualified for jury service to be more easily identified and removed from the relevant jury lists at the earliest possible stage. Thus, such people will not unnecessarily be summoned for jury service.[1]

1. There will still be some people who are not qualified for jury service but are nonetheless summoned for jury service. These people can be excused from further attendance if the relevant circumstances are presented to the Sheriff's Office or the trial judge.

Criminal history

ALL Australian jurisdictions disqualify people with criminal convictions from jury service. In essence, the scope of any exclusionary category based on criminal history requires a balancing exercise between maintaining public confidence in the jury system (by excluding people who are perceived as lacking impartiality) and recognising the principle of rehabilitation (by ensuring that reformed offenders can participate in ordinary civic duties).[1] Because it is difficult to know where to draw the line between these two competing principles, the applicable legislative provisions in each Australian jurisdiction vary substantially.[2]

The appropriateness of the current Western Australian criminal history disqualification categories has recently been called into question following the acquittals in the McLeod case.[3] As noted earlier, in this case a police officer was seriously injured following a violent incident outside a Perth tavern. In Parliament it was stated that one juror in this case had a criminal conviction but the nature of that conviction has never been publicly disclosed.[4] On 26 May 2009 the Attorney General stated in Parliament that he favoured

> a system that decreases the number of people with criminal records who appear on jury pools. That is a delicate balancing act because I do not want to unfairly exclude people from an important civic duty based on minor convictions of one type or another.[5]

In this section, the Commission carefully examines the legislative provisions in Western Australia and elsewhere to determine whether the current categories of exclusion based on criminal history are appropriate and fair.

CATEGORIES OF DISQUALIFICATION BASED ON CRIMINAL HISTORY

Under s 5(b) of the *Juries Act 1957* (WA) a person who is otherwise liable to serve as a juror is not qualified to serve as a juror if he or she

(i) has been convicted of an offence in Western Australia or elsewhere and sentenced to —

  (I) death whether or not that sentence has been commuted;[6]

  (II) strict security life imprisonment referred to in section 282 or 679 of *The Criminal Code*;[7]

  (III) imprisonment for life; or

  (IV) imprisonment for a term exceeding 2 years or for an indeterminate period, unless he or she has received a free pardon

  or, where sub-subparagraph (IV) applies, the conviction in respect of which the sentence of imprisonment was imposed is a spent conviction within the meaning in section 3 of the *Spent Convictions Act 1988*;

(ii) has at any time within 5 years in Western Australia or elsewhere —

  (I) been the subject of a sentence of imprisonment or been on parole in respect of any such sentence;

  (II) been found guilty of an offence and detained in an institution for juvenile offenders; or

  (III) been the subject of a probation order, a community order (as defined in the *Sentencing Act 1995*), or an order having a similar effect, made by any court.

Thus, the Western Australian provisions contain two categories of criminal history disqualification: permanent disqualification and temporary disqualification.

THE PROCESS FOR IDENTIFYING PEOPLE WITH DISQUALIFYING CONVICTIONS

Pursuant to s 18 of the *Electoral Act 1907* (WA) a person who is serving (or is yet to serve) a sentence of imprisonment or detention is disqualified from voting. In practice, prisoners or detainees are 'flagged' in the system and will therefore not be included in the jury lists sent by the Electoral Commission to the Sheriff's Office.[8]

1. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.23].
2. See NSWLRC, *Jury Selection*, Report No 117 (2007) [3.14].
3. Banks A, 'Keep Criminals Off Juries: AG', *The West Australian*, (21 March 2009) 8.
4. Western Australia, *Parliamentary Debates*, Legislative Council, 19 March 2009, 2141 (Hon Simon O'Brien)
5. Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 May 2009, 162–78 (Christian Porter, Attorney General).
6. Capital punishment was abolished in Western Australia in 1984. However, there may be people who were sentenced to death before 1984 but that sentence was commuted to strict security life imprisonment or life imprisonment.
7. The penalty of strict security life imprisonment was abolished in 2008 by the *Criminal Law Amendment (Homicide) Act 2008* (WA). Again, there will be people in Western Australia who were previously sentenced to strict security life imprisonment before these amendments took effect.
8. Warren Richardson, Manager, Enrolment Group, Western Australian Electoral Commission, telephone consultation

Presently, the Western Australian Sheriff's Office checks each person who is included in the jury lists against an online criminal record database to determine if anyone is disqualified under the *Juries Act*. If so, they are removed from the list and will not be summoned for jury service. The Commission understands that usually between 6 and 10 people in every 1000 are removed from the jurors' books during this process.[9] Of course, this process is not foolproof because a person might have been sentenced for an offence after the Sheriff's Office has checked the criminal records but before he or she actually attends court in response to the summons. The Commission understands that the number of people who are excused from jury service on the basis of disqualifying convictions after a summons has been issued is relatively small. For example, in the 2008 calendar year less than 1% of the total excusals in Perth were a result of disqualifying convictions.[10]

Further, although the legislation disqualifies people with relevant convictions in other Australian jurisdictions, the Sheriff's Office does not yet have access to an Australia-wide criminal record database. Thus, it is possible that Western Australian juries have included people with disqualifying criminal convictions in other jurisdictions. The Commission understands that the Sheriff's Office is working towards obtaining access to *CrimTrac* (an Australia-wide database) and this will enable the sheriff to check for relevant criminal convictions in other states and territories.[11]

UNDERLYING RATIONALE AND THE COMMISSION'S APPROACH

Generally, it is argued that people with criminal histories should not serve as jurors because they are more likely than those without criminal histories to be biased against the police or prosecution case.[12] The Queensland Criminal Justice Commission (QCJC) observed that convicted people are disqualified because they may be 'biased', 'dishonest' or 'resentful of authority'.[13] It has also been argued that some offenders (or accused) may be so closely connected to the criminal justice system that they may be incapable of properly discharging the duties of a juror. For example, the New South Wales Law Reform Commission (NSWLRC) concluded that people awaiting trial or sentence should be excluded because it is 'difficult to see how they could give a completely detached consideration to the question of the guilt of others'.[14] In addition, it has been suggested that convicted criminals may be prone to undue influence[15] (eg, predisposed to jury tampering[16]). On the other hand, it is contended that certain offenders who have since reformed should not be precluded from jury service.[17] As mentioned at the outset, when determining who should be excluded from jury service it is necessary to take into account 'the desirability of not applying unnecessary restrictions on those who have paid their debt to society'.[18]

In order to maintain impartiality it could be argued that anyone with a criminal conviction should be disqualified from jury service. However, this view assumes that all offenders are biased against police and this is clearly not always the case. The New Zealand Law Commission (NZLC) observed that:

> Convicted offenders are thought more likely to have criminal associates and a criminal 'lifestyle', with a correspondingly biased view towards the criminal justice system. It is less likely, but nonetheless arguable, that a reformed former offender may judge more harshly. Neither of these views appears to have been justified empirically.[19]

In fact, a person wrongfully charged and subsequently acquitted may be far more prejudiced against the police than a person who has since reformed.

On the other hand, to facilitate rehabilitation and ensure that reformed offenders are not unfairly precluded from participating in civic responsibilities, it could be argued that anyone who has not reoffended for a specified period of time should be qualified for jury service. It is noted in Western Australia that a person is only disqualified from being a Member of Parliament if he or she has been convicted on indictment (ie, by a higher court) for an offence which carries a penalty of more than five years' imprisonment.[20] It has recently been observed that the 'standard set for the nomination or election of legislators is [arguably] equally appropriate for the selection of

(15 June 2009). Section 18 also provides that a person attainted of treason is ineligible to vote.

9. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
10. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
11. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
12. See eg, VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.15]; NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper No 32 (1998) [320]; Tasmanian Department of Justice, *Review of Juries Act 1899*, Issues Paper (1999) 4; NSWLRC, *Jury Selection*, Report No 117 (2007) [3.3]–[3.5].
13. QCJC, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 11.
14. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.66].
15. Ibid [3.3]–[3.5].
16. Western Australia, *Parliamentary Debates*, Legislative Council, 15 August 1983, 783 (Hon John Williams).
17. See eg, QCJC, *The Jury System in Criminal Trials in Queensland*, Issues Paper (1991) 11; NSWLRC, *Jury Selection*, Report No 117 (2007) [3.3]–3.5].
18. Tasmanian Department of Justice, *Review of Juries Act 1899*, Issues Paper (1999) 4.
19. NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper No 32 (1998) [320].
20. *Constitution Acts Amendment Act 1899* (WA) s 32(1).

jurors'.[21] While the Commission acknowledges that a person with known convictions may not be elected, it is important not to lose sight of the fact that some offenders can be rehabilitated and resume a productive life (including as a Member of Parliament).

Nonetheless, some people are convicted of offences that are so serious that public confidence in the jury system would be undermined if such people were entitled to serve as jurors. The Commission is of the view that maintaining public confidence in the jury system is the strongest argument for excluding people with criminal convictions from jury service.[22] The jury is arguably 'the last remaining feature of the criminal justice process in which the public at large has confidence'[23] so it is justifiable to exclude people with certain criminal convictions from jury service in order to maintain the integrity of the jury system.

Furthermore, the Commission emphasises that people should only be disqualified from jury service on the basis of clear legislative criteria. In Chapter Two, the Commission explains why the practice of vetting and challenging jurors in order to exclude people from jury service who have *non-disqualifying* criminal records is inappropriate.[24] It has been argued that jury vetting reduces the risk of inappropriate people being selected for jury service;[25] however, the Commission has concluded that the degree of past criminality that renders a person unqualified for jury service should be determined by Parliament, not by the prosecution. Therefore, it is imperative that the legislative criteria are sufficiently broad to maintain public confidence in the jury system (because under the Commission's proposals it will not be possible for the prosecution to check the criminal records of prospective jurors before the trial).[26]

Structuring disqualifying categories

There are different ways to judge the seriousness of an offence and, therefore, determine whether the seriousness of an offence justifies exclusion from jury service. Offence seriousness can be established by its categorisation as either an indictable or summary offence.

Some indictable offences are considered too serious to be dealt with summarily by a Magistrates Court and, therefore, must be dealt with by a superior court. Other indictable offences (sometimes described as 'either way' offences) can be dealt with by either the Magistrates Court or a superior court.[27] Summary offences are less serious offences, which are dealt with by the Magistrates Court.[28] The seriousness of an offence is also determined by reference to the maximum penalty available and from consideration of the actual sentence imposed.

All Australian jurisdictions (other than the Australian Capital Territory) base their disqualification categories, at least in part, by reference to the actual sentence imposed. As observed by the Victorian Parliament Law Reform Committee (VPLRC), the actual sentence imposed is a practical way of determining offence seriousness.[29] The actual sentence imposed takes into account the nature and circumstances of the offence and the maximum penalty available. However, relying solely on the sentence imposed may result in anomalies. For example, if only people who are sentenced to imprisonment are disqualified, a person sentenced to imprisonment for a driving offence will not be able to serve on a jury but a person fined or given a community-based order for aggravated burglary would qualify for jury service.

Likewise, basing disqualification categories on the nature of the offence will also result in inconsistencies. In 1980 a person convicted of a crime or a misdemeanour was disqualified from serving as a juror for life. At that time, the Commission observed that this provision was too wide because it did not take into account the severity of the penalty imposed (eg, a person could be sentenced to imprisonment for a summary offence but fined for a crime).[30] Currently, in the Australia Capital Territory a person who has been convicted of an offence punishable by imprisonment for one year (or more) is disqualified from jury service.[31] This legislation does not distinguish between those offenders who are sentenced to imprisonment for lengthy periods and those offenders who are fined or given some form of community-based disposition.

21. Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.25].
22. See NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [179]; NSWLRC, *Jury Selection*, Report No 117 (2007) [3.3]–[3.5]; Law Reform Commission of Hong Kong, ibid [5.24].
23. Findlay M, 'Juries Reborn' (2007) 90 *Reform Journal* 9.
24. See above Chapter Two, 'Jury vetting'.
25. VPLRC, *Jury Service in Victoria*, Final Report,(1997) vol 1, [3.24].
26. This stance appears to be supported by Robert Cock (the former Director of Public Prosecutions) who reportedly stated that the previous practice of checking jurors' criminal records should not be reinstated: Banks A, 'Juror Challenge Limits Planned', *The West Australian*, 13 May 2009, 13.
27. Section 3(5) of the *Criminal Code* (WA) provides that if 'a person is convicted by a court of summary jurisdiction of an indictable offence, the conviction is to be regarded as being a conviction of a simple offence only unless the person is convicted of the offence by the Children's Court under section 19B(4) of the *Children's Court of Western Australia Act 1988* (WA) or another written law provides otherwise.'
28. A superior court can deal with pending summary offences at the same time as sentencing a person for an indictable offence: *Sentencing Act 1995* (WA) s 32.
29. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.30].
30. LRCWA, *Exemption from Jury Service*, Report, Project No 71 (1980) [3.59].
31. *Juries Act 1967* (ACT) s 10.

The Commission believes that the best way to ensure that the disqualifying provisions operate fairly and maintain public confidence in the jury system is to use a combination of offence-based and sentenced-based classifications. Further, the legislative criteria should continue to distinguish between those convictions that are so serious as to justify permanent disqualification and those which only demand temporary exclusion from jury service. In other words, there should be graduated categories: the most-serious convictions resulting in permanent disqualification, other convictions resulting in disqualification for a specified period, and less-serious convictions resulting in disqualification for a lesser period of time.[32]

Permanent disqualification

In general terms, a person is permanently disqualified from serving on a jury if he or she has ever been sentenced to imprisonment (in Western Australia or elsewhere) for longer than two years. The only exception is when a conviction has been spent under the *Spent Convictions Act 1988* (WA). In order to obtain a spent conviction for an offence that resulted in a sentence of more than two years' imprisonment (including indefinite imprisonment) it is necessary to apply to a judge of the District Court.[33] The person must generally wait at least 10 years from the time the sentence is completed before becoming eligible to apply for a spent conviction and the judge has discretion whether or not to make the order.[34]

Other than New South Wales, all Australian jurisdictions permanently disqualify people from jury service on the basis of their criminal history. Queensland and the Australian Capital Territory are the most stringent. Section 10 of the *Juries Act 1967* (ACT) provides that a person who 'has been convicted of an offence punishable by imprisonment for one year or longer is not qualified for jury service'. Therefore, a person will be permanently disqualified even if he or she has not in fact been sentenced to imprisonment. In Queensland anyone who has been convicted of an indictable offence or who has been sentenced to imprisonment is permanently disqualified.[35]

However, most jurisdictions are more relaxed than Western Australia in terms of permanent disqualification. In New South Wales, no one is permanently disqualified.[36] In Victoria and Tasmania, a person must have been sentenced to three years' imprisonment (or more) for an indictable offence in order to be permanently disqualified from jury service.[37] In the Northern Territory, only those people who have been subject to a mandatory sentence of life imprisonment are permanently disqualified.[38] Also, it is noted that in New Zealand to be permanently disqualified a person must have been sentenced to at least three years' imprisonment[39] and in England the person must have been sentenced to five years' imprisonment (or more).[40]

The Commission is of the view that some past convictions justify permanent disqualification. Selecting a person for jury service who has been sentenced to imprisonment for life (usually for murder but also possibly for other offences such as armed robbery and attempted murder) would seriously undermine public confidence in the jury system and the ultimate verdict. Similarly, people sentenced to relatively lengthy periods of imprisonment for serious crimes should be permanently disqualified from jury service.

The current cut-off for permanent disqualification in Western Australia is a sentence of more than two years' imprisonment. A two-year cut-off period was recommended by this Commission in its 1980 report[41] and the *Juries Act* was amended in 1984 to reflect this recommendation.[42] Bearing in mind that in many other

32. Some Australian jurisdictions adopt a 'sliding differential scale': NSWLRC, *Jury Selection*, Report No 117 (2007) [3.16].
33. Under s 6 of the *Spent Convictions Act 1988* (WA) an application for a spent conviction must be made to a judge of the District Court if the conviction is a 'serious conviction'. A serious conviction is defined under s 9 as a conviction in respect of which the sentence imposed is 'imprisonment for more than one year or for an indeterminate period' or 'a fine of $15,000 or more'.
34. The Commission notes that in November 2008 the Standing Committee of Attorneys-General released a draft Model Spent Convictions Bill. This proposed legislation appears to be more restrictive than the current Western Australia law. For example, it provides that a conviction resulting in imprisonment for more than 12 months cannot be spent: Standing Committee of Attorneys-General, *Model Spent Convictions* Bill, Draft Consultation Paper (2008) 2. If this Bill is enacted in Western Australia, the number of people permanently disqualified from jury service would rise.
35. *Jury Act 1995* (Qld) s 4.
36. Schedule 1 of the *Juries Act 1977* (NSW) disqualifies people from jury service if at any time in the last 10 years they have been served a sentence of imprisonment. Others are disqualified if they are currently subject to specified court orders or on awaiting sentence or trial.
37. In Victoria a person is also permanently disqualified if they have ever been convicted of treason: *Juries Act 2000* (Vic) sch 1. See also *Juries Act 2003* (Tas) sch 1.
38. *Juries Act* (NT) s 10. South Australia is similar to Western Australia – those people who have been convicted of an offence that carries life imprisonment or who have been sentenced to a term of imprisonment greater than two years are permanently disqualified: *Juries Act 1927* (SA) s 12.
39. This includes life imprisonment and preventative detention: see *Juries Act 1981* (NZ) s 7.
40. This includes life imprisonment and indefinite detention: see *Juries Act 1974* (UK) sch 1, pt II and the *Criminal Justice Act 2003* (UK) sch 33, pt 2.
41. LRCWA, *Exemption from Jury Service*, Report, Project No 71 (1980) [3.61].
42. *Juries Amendment Act 1984* (WA) s 6.

jurisdictions people are not permanently disqualified from jury service unless they have been sentenced to at least three years' imprisonment, the Commission invites submissions about whether the current two-year cut-off period should be increased.

In this regard, the Commission notes that people who have been sentenced to more than two years' imprisonment may become qualified for jury service if they apply and are granted a spent conviction. However, as previously observed by the Commission, an application to the District Court may be difficult for some people (in particular, Aboriginal people) because of remoteness, language and communication barriers, and because the application may be cost-prohibitive.[43] Therefore, extending the permanent disqualification cut-off will enable some reformed offenders to participate in jury service without the need to first apply for a spent conviction.

INVITATION TO SUBMIT G

Permanent disqualification from jury service

The Commission invites submissions about whether s 5(b)(i)(IV) of the *Juries Act 1957* (WA) (which currently provides that a person is not qualified for jury service if he or she has been convicted of an offence in Western Australia and sentenced to imprisonment for a term exceeding two years) should be amended and the period of two years increased (eg, to three years).

Temporary disqualification

In Western Australia anyone who has, within the past five years, been the subject of a sentence of imprisonment (or been on parole), been detained in a juvenile detention centre following conviction, or been subject to probation or a community order (or an order having a similar effect) is disqualified from jury service. A community order is defined under the *Sentencing Act 1995* (WA) as a Community Based Order or an Intensive Supervision Order. Consequently, not all people with criminal histories are excluded from jury service. For example, a person who was sentenced eight years ago to two years' imprisonment is qualified for jury service. Further, irrespective of the seriousness of the offence or how recent the conviction, an adult who has been sentenced to a fine, community service[44] or a Conditional Release Order is qualified to serve.

It is also not entirely clear on the face of the legislation whether offenders sentenced to suspended imprisonment (or conditional suspended imprisonment) are qualified, although the Commission understands that in practice these sentences are treated in the same way as a sentence of immediate imprisonment.[45] Also, the provision disqualifying a person who has (in the past five years) been the subject of a probation order or a community order does not expressly apply to young offenders. However, the Commission has been advised that young offenders who have in the last five years been subject to a Youth Community Based Order or an Intensive Youth Supervision Order are routinely disqualified.[46]

The Commission is of the view that the current categories of temporary disqualification produce anomalies because not all sentencing orders result in disqualification and because adults and young offenders are—contrary to Western Australia's legislated principles of juvenile justice—treated in the same way.[47] In 1986 the NSWRLC recognised that young offenders should be treated differently to adult offenders in relation to jury service. Then, both adult and young offenders were disqualified from jury service if at any time in the last 10 years they had served a sentence of imprisonment or detention. The NSWLRC concluded that young offenders should only be disqualified if they had served a sentence of detention in the last five years.[48] Likewise, in 2007 the NSWLRC stated that:

43. LRCWA, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report, Project No 94 (2006) 103. An information kit produced by Legal Aid WA states that in order to make an application for a spent conviction it is necessary to fill out the appropriate paperwork and pay the court filing fee. As at August 2008 the filing fee was $475. Further, an unsuccessful application may result in an order to pay the costs of the Commissioner of Police: Legal Aid WA, *How to Apply to Have Your Serious Old Conviction Removed From Your Record: An information kit* (August 2008).

44. It is the Commission's understanding that a person sentenced to a Community Based Order with a community work requirement only is treated as qualified to serve: Teresa Sullivan, Sheriff's Office, consultation (25 August 2009).

45. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).

46. Teresa Sullivan, Sheriff's Office, consultation (25 August 2009).

47. Under the *Young Offenders Act 1989* (WA) there is a strong emphasis on rehabilitation and integrating young offenders back into the community. Further, s 189 of the *Young Offenders Act 1989* (WA) provides that certain convictions are not to be regarded as a conviction for any purpose. In summary, if two years has expired since the discharge of any sentence imposed the conviction is to be treated as a spent conviction. This provision reflects the principle of rehabilitation and encourages young offenders to reform without the stigma of a criminal record. Arguably, this provision does not effect the disqualification categories because s 5(b)(ii)(III) of the *Juries Act 1957* (WA) does not refer to a conviction but simply that the person has been subject to a specified order.

48. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.16] & [4.21]. Schedule 1 of the *Juries Act 1977* (NSW) now provides that adults are disqualified from jury service if they have in the last 10 years served a sentence of imprisonment. Young offenders are only disqualified if they have served detention in the last three years.

> We recognise the force of the argument that the rehabilitation of young offenders, and their reintegration into society as quickly as possible, and with full rights, is important.[49]

The Commission agrees that the young offenders should not be disqualified from jury service for as long as adult offenders. Furthermore, the omission of accused and unsentenced offenders from the current temporary disqualification categories also creates problems (discussed further below).

Table B (at the end of this section) provides some hypothetical examples to illustrate the anomalies that are produced under the current legislative criteria. For example, a person could have been fined for fraud in the District Court and be qualified for jury service the following day, while a person who was sentenced to a Community Based Order for disorderly conduct four years ago is disqualified from serving as a juror. Further, an adult offender convicted and sentenced in 2002 for sexual assault would qualify for jury service, while a young offender sentenced to a Youth Community Based Order in 2005 for stealing would be disqualified.

Unconvicted accused

Whether an unconvicted accused should be entitled to serve on a jury is a difficult question. Under the current legislative criteria, anyone who is awaiting trial is qualified to serve. However, four Australian jurisdictions disqualify unconvicted accused persons from jury service. New South Wales disqualifies from jury service a person who is awaiting trial (on bail or in custody).[50] In Victoria, anyone who has been charged with an indictable offence and released on bail or anyone who is remanded in custody in relation to any alleged offence is disqualified from jury service.[51] In South Australia a person who has been charged with an offence that carries imprisonment as a penalty is disqualified,[52] and in Tasmania an accused who is remanded in custody is disqualified.[53]

It is arguable that it is inappropriate to exclude unconvicted accused from jury service because they are presumed innocent until proven guilty. In 1997 the VPLRC was, for this reason, persuaded that people who have been charged with an offence should be eligible for jury service.[54] The NZLC agreed that accused should be eligible noting that the prosecution could always exercise its peremptory challenges to exclude an accused in a particular trial.[55] However, as explained in Chapter Two, the Commission does not support prosecution jury vetting practices that would facilitate such an approach.

In contrast, it has been argued that accused should not be eligible for jury service because of the 'currency of their association with the criminal justice process'.[56] In 2007 the NSWLRC concluded that people awaiting trial or sentence should continue to be excluded from jury service because they may not be objective.[57] Further, it was recently observed by the Law Reform Commission of Hong Kong that people charged with a serious offence should be disqualified from serving on a jury in order to maintain public confidence in the justice system.[58]

The Commission agrees that in order to maintain public confidence in the jury system accused people should not be qualified to serve. This approach does not mean that an unconvicted accused is presumed guilty but rather recognises that people charged with criminal offences may be perceived to be biased against the police or the prosecution (irrespective of their guilt or innocence).[59] It is vital that the public has confidence in the jury's verdict. If, for example, a person was on trial for sexual assault and a juror was also awaiting trial for a similar offence it would be difficult for that juror to remain objectively detached from the process.[60] Furthermore, the community would lack confidence in any verdict delivered in these circumstances. Accordingly, the Commission has concluded that an accused on bail or remanded in custody[61] should not be qualified for jury service.[62]

49. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.36].
50. *Juries Act 1977* (NSW) sch 1.
51. *Juries Act 2000* (Vic) sch 1.
52. *Juries Act 1927* (SA) s 12.
53. *Juries Act 2003* (Tas) sch 1. Also, in England, a person on bail in any criminal proceedings is disqualified: *Criminal Justice Act 2003* (UK) sch 33, pt 2.
54. VPLRC, *Jury Service in Victoria*, Final Report (1997) vol 1, [3.59]. However, the Victorian Government did not support this recommendation because it was of the view that there may be a perceived conflict if accused were required to serve on a jury: Victorian Government, *Response to the Recommendations of the Law Reform Committee Final Report Vol 1: Jury service* (1997) 6.
55. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) [185]–[186].
56. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.19]–[4.20].
57. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.66].
58. Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) [5.30].
59. In this sense, an unconvicted accused would not meet the requirement of impartiality set out in the Commission's Guiding Principle 1.
60. Justice McKechnie suggested that people charged with an offence who are awaiting trial should be ineligible for jury service because they may find it difficult to concentrate and adjudicate another's guilt or innocence: Justice McKechnie, consultation (19 December 2007).
61. In any event, there is an obvious practical impediment to anyone who is remanded in custody from participating in jury service.
62. It is acknowledged that this proposal will require administrative changes. The Sheriff's Office will need access to information about pending charges in order to delete accused from the jury lists.

PROPOSAL 32

Qualification for jury service: unconvicted accused

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that an accused who is currently remanded on bail or in custody awaiting trial is not qualified for jury service.

Unsentenced offenders

Currently, convicted offenders who have not yet been sentenced are qualified for jury service. It is incongruous that a person who has been convicted of, but not yet sentenced for, an extremely serious offence can serve as a juror while a person placed on a Community Based Order for a minor offence four years ago is disqualified. In New South Wales, it is expressly provided that a person awaiting sentence (irrespective of whether they are on bail or in custody) is disqualified from jury service.[63] The legislative provisions in Victoria, South Australia and Tasmania that disqualify certain accused who have been charged with an offence may also capture some unsentenced offenders.

In Western Australia, sentencing can be deferred for up to six months and, in cases where imprisonment is warranted, an offender can be placed on a Pre-Sentence Order for up to two years.[64] A Pre-Sentence Order can be imposed by the District Court and the Supreme Court for serious offences. The Commission is of the view that unsentenced offenders should not be qualified to serve on a jury. Again, even in the case of less serious offences the fact that unsentenced offenders are currently being dealt with by the criminal justice system is sufficient reason to exclude them from jury service. For both this (and the above proposal) the Sheriff's Office will need access to court records to determine if people who are included in the jury lists and jurors' books have been convicted of an offence but not yet sentenced.

PROPOSAL 33

Qualification for jury service: unsentenced offenders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a convicted accused who is currently on bail or remanded in custody awaiting sentence is not qualified for jury service.

63. *Juries Act 1977* (NSW) sch 1.
64. In a recent report this Commission has recommended that sentencing should be able to be deferred for up to 12 months and has also recommended the introduction of a pre-sentence Drug Treatment Order: see LRCWA, *Court Intervention Programs*, Final Report, Project No 96 (2009) Recommendations 13 & 20.

Current court orders

The Commission is also of the view that anyone who is currently subject to a court order should be disqualified from jury service because of the currency of their association with the criminal justice system. As discussed above, not all sentencing orders are included in the current legislative criteria. The NSWLRC observed that the main reason for excluding people subject to current sentencing orders is that 'while these orders are in force, the offender is very close to the criminal justice system' and, in some cases, subject to ongoing supervision by justice agencies and liable to be brought back to court in the event of a breach.[65] The Commission therefore proposes that s 5(b) of the *Juries Act* should be amended to create a category of disqualification that covers people who are currently subject to an ongoing court-imposed order (following conviction for an offence and excluding compensation or restitution) and who are not otherwise disqualified under the legislation.

PROPOSAL 34

Current orders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she is currently subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution but) including any of the following orders:

(a) a Conditional Release Order or a Community Based Order (with community work only) under the *Sentencing Act 1995* (WA);

(b) a Pre-Sentence Order under the *Sentencing Act 1995* (WA);[66] and

(c) A Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA).

Traffic matters

Traffic and vehicle offences constitute the largest proportion of matters dealt with by the Magistrates Court (27.4% of all offences in 2005).[67] The majority of these are driving offences such as driving without a licence or

65. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.43].
66. If the Commission's recent recommendation to introduce a pre-sentence Drug Treatment Order (in its report on court intervention programs) is implemented this list will need to include a Drug Treatment Order under the *Sentencing Act 1995* (WA).
67. Loh N et al, *Crime and Justice Statistics for Western Australia: 2005* (Perth: Crime Research of Western Australia, 2007) 80.

driving under suspension. The most common penalty imposed for driving offences is a fine (over 87% of all driving offences in 2005 resulted in a fine). Nonetheless, 5.9% of all driving offences resulted in imprisonment and over 10% in a non-custodial sentence.[68] Under the current disqualification categories for jury service, traffic offenders who have been fined are qualified to serve but those who have been subject to imprisonment, suspended imprisonment or a community order in the last five years would be disqualified from serving.

There are many different types of traffic offences, some carrying a penalty of a fine only (eg, driving without a valid licence, careless driving, driving with excess 0.08% or excess 0.02% blood alcohol) and others carrying a possible penalty of imprisonment and disqualification from driving (eg, driving under suspension, driving under the influence of alcohol, dangerous driving, reckless driving, dangerous driving causing bodily harm). In those cases where offenders are disqualified from driving in addition to the imposition of a fine or imprisonment, the length of the disqualification period usually reflects the seriousness of the offence and the offender's prior traffic history.[69]

In considering the suitability of people with past traffic convictions for jury service, it is noted that there are very few driving-related offences that can be dealt with in the District Court.[70] Thus, jury trials will not often involve the consideration of driving behaviour. Further, more-serious traffic offenders are now disqualified from jury service if they have served imprisonment or have been subject to a community order in the past five years. Under the Commission's proposal above, traffic offenders who are currently subject to an ongoing court order will not be qualified. However, there are traffic offenders who have been repeatedly fined and disqualified from driving for multiple and repeat offences and it may be inappropriate for such people to serve on juries (especially if the trial involves a driving offence such as dangerous driving causing death).

In this regard, it is noted that in New South Wales a person is not qualified for jury service if he or she is currently bound by an order disqualifying the person from driving.[71] In 2007 the NSWLRC recommended that this provision be amended so that a person is only disqualified from jury service if currently subject to a disqualification of 12 months or more.[72] While New South Wales only disqualifies from jury service those traffic offenders who are currently disqualified from driving, South Australia disqualifies from jury service those offenders who have been disqualified from holding a drivers licence for a period greater than six months at any time within the last five years.[73] No other Australian jurisdictions refer to drivers licence disqualification.

In the same way that the penalty imposed for an offence is a useful guide to the seriousness of an offence, the period of disqualification from driving is a good indicator of the offence seriousness and the person's history of traffic offending. The Commission is of the view that it would be unduly harsh to exclude from jury service a person who has been convicted, fined and disqualified from driving on only one occasion in the previous five years. Instead, excluding those traffic offenders who are currently subject to a drivers licence disqualification should capture the most serious and repeat traffic offenders (especially if the disqualification period is set at 12 months). Of course, traffic offenders who have been imprisoned in the past five years will also be disqualified from jury service.

PROPOSAL 35

Traffic offenders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she is currently subject to a drivers licence disqualification for a period of 12 months or more.

The Commission's proposal

Bearing in mind the above discussion, the Commission has concluded that there is a compelling case for reform of the current criminal history disqualification criteria. All of the above proposals are subsumed into the proposed redraft of s 5(b) of the *Juries Act* which appears below. The Commission emphasises that it is impossible to structure the criteria in such a way as to exclude every person who might be considered unsuitable as a juror and, at the same time, include every person who is considered suitable for jury service.[74] However, the Commission

68. Ibid 85–6.
69. For example, a person convicted of reckless driving is liable to be disqualified from driving for no less than six months for a first offence, no less than 12 months for a second offence and for life for a third or subsequent offence: *Road Traffic Act 1974* (WA) s 60.
70. For example, dangerous driving causing death/grievous bodily harm; offences relating to the failure to render assistance or report an accident where someone has been injured; and offences relating to the failure to provide a breath sample for analysis where there has been an accident resulting in injury: *Road Traffic Act 1974* (WA) ss 55, 56, 59 & 67.
71. *Juries Act 1977* (NSW) sch 1.
72. NSWLRC, *Jury Selection*, Report No 117 (2007) [3.9]–[3.10].
73. *Juries Act 1927* (SA) s 12.
74. Table B, below p 91, includes a number of hypothetical examples and shows how these examples would be dealt with under the Commission's proposals.

believes that its proposal strikes an appropriate balance between the need to maintain public confidence in the jury system and the need to ensure that less serious and rehabilitated offenders are not unfairly excluded from the important civic duty of jury service.

PROPOSAL 36

Disqualification from jury service on the basis of criminal history

That ss 5(b)(i) and 5(b)(ii) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she:

1. Has *at any time* been convicted of an indictable offence (whether summarily or on indictment) and been sentenced to death; strict security life imprisonment; life imprisonment; or imprisonment for a term exceeding 2 years[75] or for an indeterminate period.[76]
2. Has in the *past 10 years* been convicted of an indictable offence (dealt with either summarily or on indictment) and been the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment).[77]
3. Has in the *past 5 years*:
   (a) been convicted of an offence on indictment (ie, by a superior court);
   (b) been the subject of a sentence of imprisonment (including parole or another early release order, suspended imprisonment or conditional suspended imprisonment); or
   (c) been subject to a sentence of detention (including a supervised release order) of 12 months or more in a juvenile detention centre.[78]
4. Has in the *past 3 years*:
   (a) been subject to a community order under the *Sentencing Act 1995* (WA); or
   (b) been subject to a sentence of detention (including a supervised release order).
5. Has in the *past 2 years* been convicted of an offence and been subject to a Youth Community Based Order, an Intensive Youth Supervision Order or a Youth Conditional Release Order under the *Young Offenders Act 1994* (WA).
6. Is *currently*:
   (a) on bail or in custody in relation to an alleged offence;
   (b) on bail or in custody awaiting sentence;
   (c) subject to imprisonment for unpaid fines;[79] or
   (d) subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution) but including:
      (i) a Conditional Release Order or a Community Based Order (with community work only) under the *Sentencing Act 1995* (WA);
      (ii) a Pre-Sentence Order under the *Sentencing Act 1995* (WA);
      (iii) a Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA); or
      (iv) a drivers licence disqualification for a period of 12 months or more.

Taking into account convictions, sentences and court-imposed orders in other Australian jurisdictions

That a new s 6 of the *Juries Act 1957* (WA) be inserted to provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia

1. if he or she has been sentenced to or placed on an order that is of a similar nature to any one of the sentences or orders referred to in s 5(b) provided that the person was subject to that similar sentence or order in the relevant time period as set out above;
2. if he or she has been convicted of an offence on indictment in the past five years in another Australian jurisdiction; or
3. if he or she is currently on bail in relation to an alleged offence or awaiting sentence in another Australian jurisdiction.

75. The Commission has invited submissions as to whether this period should be extended: see Invitation to Submit G.
76. Unless he or she has received a free pardon; the conviction and/or sentence has been overturned on appeal; or the conviction is a spent conviction within the meaning of the *Spent Convictions Act 1988* (WA).
77. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.
78. Unless he or she has received a free pardon or the conviction and/or sentence has been overturned on appeal.
79. The Commission notes that a person serving imprisonment for unpaid fines would not be practicably able to serve as a juror in any event.

Table B: Criminal history disqualification examples

Sentence imposed	Sentence type	Qualified status as at 1 September 2009	Qualified status as at 1 September 2009 under Commission's proposals
31 August 2002	2 years' imprisonment for sexual assault imposed by District Court	Qualified	Not qualified
31 August 2003	18 months' imprisonment for driving under the influence of alcohol imposed by Magistrates Court	Not qualified	Not qualified
31 August 2003	12 months' detention for armed robbery and grievous bodily harm imposed by Children's Court	Qualified	Qualified
31 August 2004	1 week detention for stealing imposed by Children's Court	Not qualified	Qualified
31 August 2005	6-month Youth Community Based Order for stealing imposed by Children's Court	Not qualified	Qualified
31 August 2005	6-month Community Based Order for disorderly behaviour imposed by Magistrates Court	Not qualified	Qualified
31 August 2005	100 hours' community work for disorderly behaviour imposed by Magistrates Court	Qualified	Qualified
31 August 2006	Fine of $1000 for disorderly behaviour by Magistrates Court	Qualified	Qualified
31 August 2007	12 months' imprisonment for driving under suspension imposed by Magistrates Court	Not qualified	Not qualified
31 August 2008	12-month Conditional Release Order for aggravated burglary imposed by District Court	Qualified	Not qualified
31 August 2009	2-year Pre-Sentence Order for armed robbery imposed by Supreme Court	Qualified	Not qualified
31 August 2009	Fine of $10,000 for fraud imposed by District Court	Qualified	Not qualified
31 August 2009	Released on bail with surety of $100,000 for conspiracy to sell heroin	Qualified	Not qualified

Lack of understanding of English

SECTION 5(b)(iii) of the *Juries Act 1957* (WA) provides that a person is not qualified to serve as a juror if he or she 'does not understand the English language'. The reason for this condition is clear: jurors must be able to understand the evidence presented in court and to communicate with other jurors during deliberation. In other words, as stipulated by the Commission's Guiding Principle 1, jurors must be competent to discharge their duties.[1] In addition, non-English speaking people may be excluded from serving as a juror because they are not liable for jury service under the *Juries Act*. As explained in Chapter Three, liability for jury service is attached to the entitlement to vote. In order to be enrolled to vote, a person must be 18 years or over and an Australia citizen. To be eligible to apply for Australian citizenship,[2] a person must 'possess a basic knowledge of the English language'.[3] However, eligibility for citizenship does not depend on the ability to read or write English.[4] There will be people who are liable for jury service who do not understand English to a sufficient level to properly discharge the duties of a juror (eg, a person who automatically attained citizenship or a citizen who only has basic understanding of English). In this section the Commission considers the current formulation of the English language requirement, the processes for identifying jurors who do not understand English and the impact of the English language requirement on the representative nature of juries.

THE APPROPRIATE FORMULATION OF THE ENGLISH LANGUAGE REQUIREMENT

An English language requirement for jury service exists in every state and territory; however, the formulation of the test varies between jurisdictions. The Northern Territory has the strictest formulation, disqualifying from jury service those people who are 'unable to read, write and speak the English language'.[5] A literacy requirement also exists in Queensland.[6] In New South Wales a person is ineligible for jury service if he or she 'is unable to read or understand English'.[7] Similarly, in the Australian Capital Territory a person is not qualified for jury service if he or she is 'unable to read and speak the English language'.[8] The Victorian and Tasmanian legislative provisions do not refer to the ability to read; instead it is stated that in order to be eligible for jury service a person must be able to adequately communicate in and understand English.[9] The formulation of the English language test in South Australia is expressly related to the duties of a juror – a person is ineligible for jury service if he or she 'has insufficient command of the English language to enable him or her properly to carry out the duties of a juror'.[10]

Because the Western Australian provision only refers to an ability to understand English, it is arguably broad enough to encompass both understanding of spoken and written English. However, in practice prospective jurors are not tested for literacy and the obligation that exists under the Fourth Schedule for people who have been summoned for jury service to disclose a lack of understanding of English does not refer to any literacy requirements.

Is a literacy requirement necessary?

Only two jurisdictions require jurors to be able to write English and four jurisdictions refer to the requirement to be able to read English. A number of law reform bodies have supported a literacy requirement for jury service. The principal reason is that jurors are often required to consider documentary evidence and other written material (and jurors may wish to make notes about important aspects of the evidence).[11]

1. See Chapter One, Guiding Principle 1.
2. There are a number of ways in which a person automatically becomes an Australian citizen (eg, being born in Australia and having one or more parents who are Australian citizens or permanent residents; or being adopted under an Australian law by an Australian citizen).
3. *Australian Citizenship Act 2007* (Cth) s 21(2)(e).
4. Generally, an applicant must pass a citizenship test. The Department of Immigration and Citizenship offers assistance to those people who are unable to read English (staff can read the questions and answer options aloud for the person): see <http://www.citizenship.gov.au/test/eiligibility.htm>.
5. *Juries Act* (NT) s 10(3)(c).
6. *Jury Act 1995* (Qld) s 4(k).
7. *Juries Act 1977* (NSW) sch 2.
8. *Juries Act 1967* (ACT) s 10.
9. *Juries Act 2000* (Vic) sch 2; *Juries Act 2003* (Tas) sch 2.
10. *Juries Act 1927* (SA) s 13(b).
11. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.141]; NSWLRC, *Criminal Procedure: The Jury in a criminal trial*, Report No 48 (1986) [4.30]; NSWLRC, *Jury Selection*, Report No 117 (2007) 98 & Recommendation 23. At the time of the Commission's 1980 report the Western Australian legislation provided that anyone who could not read or understand English was not qualified for jury service: LRCWA, *Exemption from Jury Service*, Report, Project No 71 (1980) [3.65]. The Commission

Traditionally, criminal trials have predominantly consisted of oral evidence, oral submissions and oral directions; however, in more recent years different practices have evolved to assist jurors in their understanding of the evidence and legal issues. For example, jurors may be provided with a transcript of proceedings and written directions from the judge. It has been noted that in Queensland it is common for jurors to be provided with chronologies, lists of witnesses, outlines of evidence and glossaries of legal terms.[12] Further, in some jurisdictions deliberation aids (such as 'step directions' and flow-charts) are being used.[13] The New South Wales Law Reform Commission (NSWLRC) recently observed that one Western Australian judge has used PowerPoint presentations to supplement oral jury directions.[14]

The Commission recognises that these types of practices are increasing. As the Queensland Law Reform Commission noted, in modern times, information is often processed in written or visual form and the 'oral tradition of criminal trials originated in times well before these modern developments, indeed well before general literacy'.[15] However, the Commission emphasises that written and visual aids do not replace oral submissions and directions. Some jurors may be assisted by these aids but others (including those who cannot read) may be accustomed to and prefer processing information orally.

The NSWLRC noted that 'some people who have become Australian citizens, but who have come from communities adopting a different alphabet or writing style, may be able to speak and communicate in English but have only a limited ability to read it'.[16] The Commission agrees and considers that a literacy requirement across the board would exclude people from jury service who are capable of discharging their duties as jurors.[17] In those cases where written aids are provided, it is also possible for one juror to read relevant parts of the material to other jurors if necessary.

However, for trials involving a significant amount of written evidence (as distinct to written aids) the Commission believes that it is necessary for jurors to be able to read. In such cases, there needs to be a process to identify and exclude any members of the jury panel who cannot read. The Auld review in England observed that

> The present system of leaving the judge as the final filter during the process of jury selection is probably the best that can be achieved. By then the nature of the case for trial and its likely demands on the literacy of potential jurors can be assessed. The judge should give the panel of potential jurors an ample and tactfully expressed warning of what they are in for, and offer them a formula that would enable them to seek excusal without embarrassment.[18]

Similarly, the New Zealand Law Commission (NZLC) concluded that in cases with large amounts of documentation, the judge could conduct a literacy test.[19]

In Western Australia, once the jury panel is assembled in the courtroom the trial judge advises the panel of the nature and probable duration of the trial (as well as the name of the accused and witnesses). It is at this stage that prospective jurors are entitled to seek to be excused from serving for reasons associated with the nature and length of the trial. For example, a juror might seek to be excused from a sexual assault trial if he or she was previously a victim of a sexual crime. Or a juror might seek to be excused if they have holidays booked during the trial. Jurors are told that they can write down their reasons if those reasons are of a private nature. This process can accommodate literacy requirements on a case-by-case basis.[20] The trial judge can advise the panel that, if selected, they will be required to read large amounts of documentary evidence and if they do not believe that they are capable of this task they should seek to be excused and can confidentially write a note for the judge.

In order to make the minimum requirements for jury service clear, the Commission has concluded that the current formulation should be amended to stipulate that jurors must be able to understand and communicate in

did not recommend any changes to this formulation but the current provision (ie, omitting a requirement to be able to read) was inserted by s 6 of the *Juries Amendment Act 1984* (WA). It appears from the parliamentary debates that this amendment might have been made to reduce the number of people from different cultural backgrounds being excluded from jury service: Western Australia, *Parliamentary Debates*, Legislative Council, 15 August 1984, 782 (John Williams).

12. QLRC, *A Review of Jury Directions*, Working Paper No 66 (2009) 178.
13. See NSWLRC, *Jury Directions,* Consultation Paper No 4 (2008) [10.36]–[10.42].
14. Ibid [10.27].
15. QLRC, *A Review of Jury Directions*, Working Paper No 66 (2009) 177.
16. NSWLRC, *Jury Service*, Issues Paper No 28 (2006) [7.3]
17. During preliminary consultations for this reference, three Western Australian judges agreed that literacy was not required for every trial: Justice McKechnie, consultation (19 December 2007); Judge Yeats, consultation (20 December 2007); Chief Judge Kennedy, consultation (17 January 2008).
18. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 155.
19. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 82.
20. The Juries Commissioner in Victoria has advised that issues surrounding literacy are dealt with on a case-by-case basis by the judge. In cases where there is a lot of documentary evidence the judge makes the panel aware of this and advises that if they are 'uncomfortable' about dealing with a lot of documentary evidence then they should seek to be excused from the trial. This works quite effectively in practice: Rudy Monteleone, Juries Commissioner (Vic), telephone consultation (16 June 2009).

English. This reflects the need to be able to understand the evidence and court proceedings and to be able to discuss the case with the other jurors during deliberation.

PROPOSAL 37

English language requirement

That section 5(b)(iii) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified to serve as a juror if he or she is unable to understand and communicate in the English language.

IDENTIFYING PEOPLE WHO DO NOT UNDERSTAND ENGLISH

Obviously there is no way of identifying from the jury lists those people who are not qualified for jury service because of insufficient understanding of the English language. The system essentially relies on self-identification. A person summoned for jury service is required under the Fourth Schedule of the *Juries Act* to disclose a lack of understanding of the English language. Attached to the summons is a Juror Information Sheet which explains that if the person summoned does not understand English he or she should complete the statutory declaration and return it to the Sheriff's Office. In the 2008 calendar year approximately 2.6% of people (1500 people) summoned for jury service in Perth were excused from attendance because they were disqualified on the basis of a lack of understanding of English.[21]

People who cannot read or write English will clearly need assistance in responding to the summons and completing the statutory declaration. The Juror Information Sheet includes an instruction in four languages (Italian, Vietnamese, Cantonese and Mandarin) to take the summons to an interpreter. An information booklet provided to prospective jurors in New South Wales contains a similar instruction in six languages (Chinese, Arabic, Vietnamese, Greek, Italian and Spanish).[22] In South Australia information is provided in Chinese, Greek, Italian, Pitjantjatjara, Polish, Serbian and Vietnamese.[23] The Commission notes that information for people applying for citizenship is provided in 29 different languages.

The Commission is concerned that non-English speaking people may be unfairly penalised as a consequence of failing to complete the statutory declaration or failing to attend court. Although there is a process for investigating why a person failed to respond to a summons,[24] this process may disadvantage those who cannot understand English. If phone contact is not possible, a letter is sent asking the person to explain within 14 days why they did not respond. If there is no response to this letter the person may be fined.[25]

In 1991 the Australian Law Reform Commission (ALRC) suggested that the jury summons should note that translations are available in other languages.[26] The Commission agrees and prefers this approach than the current advice to simply attend an interpreter. Online access to translated versions of the juror summons and the Juror Information Sheet would enable non-English speaking people (and people who cannot read English) to easily access the necessary information. For those people who do not have access to the internet, a hard copy of the translated documents should be available on request by telephoning the Sheriff's Office. The Commission proposes that the jury summons and the Juror Information Sheet should state—in a number of different languages—that translations are available on the website or by telephoning the Sheriff's Office. This will ensure that non-English speaking people and people who cannot read English are aware of the requirement to respond to the summons as soon as possible.[27] Based on 2006 census data, the 10 most commonly spoken languages in Western Australia (other than English) are Italian, Mandarin, Cantonese, Vietnamese, Arabic, German, Indonesian, Polish, Croatian and Spanish.[28] The Commission suggests that, as a starting point, the juror summons and the Juror Information Sheet should be updated to include relevant information in these more common languages.

21. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009). Figures for regional areas are significantly lower: in Bunbury 0.1% of people summoned were disqualified due to a lack of understanding of English, in Geraldton the figure was 0.3% and in Kalgoorlie the figure was 0.6%: Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Bunbury, Geraldton & Kalgoorlie Jury Districts 2008* (2009).
22. New South Wales Attorney General's Department, *Jury Service: A rewarding responsibility* (2008).
23. 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) 31.
24. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
25. For further discussion, see Chapter Seven, 'Process for dealing with non-compliance'.
26. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 63.
27. See NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1986) [4.30].
28. Office of Multicultural Interests (WA), *Top 30 Overseas Language Groups Western Australia: 2006 Census*.

PROPOSAL 38

Provision of information in different languages

That the jury summons and the Juror Information Sheet be updated to provide that if the person summoned does not understand or cannot read English, translated versions are available online or by telephoning the Sheriff's Office and that this information should be provided in at least the 10 most commonly spoken languages in Western Australia.

While people who claim to be not qualified for jury service on the basis of a lack of understanding of English usually respond by completing a statutory declaration, some respond by telephoning the Sheriff's Office or when they attend the jury assembly room. The Commission has been told that the summoning officer determines these claims on a case-by-case basis. For example, the summoning officer might ask the person if they understood the Juror Induction DVD or ask the person about the nature of their employment.[29] However, this process is subjective: there are no guidelines to assist staff from the Sheriff's Office or the court to evaluate a person's English ability.

Census information for 2006 shows that 1.7% of people in Western Australian (34,962 people) indicated that they did not speak English well or at all.[30] However, 2.6% of people summoned are being excused because of a lack of understanding of English. It appears therefore that people from culturally and linguistically diverse backgrounds may too readily be self-identifying as lacking the ability to understand English. Jury awareness raising strategies (as proposed in Chapter Two[31]) should specifically target people from culturally and linguistically diverse backgrounds to ensure that they are encouraged to participate in jury service. For example, these strategies should include information that the ability to read English is not necessarily a requirement for jury service and that if the ability to read English is necessary for a specific trial there will be an opportunity to disclose any issues in a confidential manner.

29. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
30. A further 4,297 people did not specify their proficiency in English.
31. Proposal 8.

PROPOSAL 39

Jury service awareness raising – people from culturally and linguistically diverse backgrounds

That the Western Australian government provide resources for the Sheriff's Office to conduct regular jury service awareness raising strategies specifically targeted to people from culturally and linguistically diverse backgrounds.

Further, the Commission proposes that the sheriff should develop guidelines[32] with standardised procedures and questions to assist staff and judges to assess English language ability so that people are only excluded from jury service if absolutely necessary. In this regard, it is noted that the Commission proposes in Chapter Six that the grounds on which a person may be excused by the summoning officer or by the court from jury service include circumstances where a person is unable to discharge the duties of a juror because of an inability to understand and communicate in English.[33]

PROPOSAL 40

Guidelines for assessing English language requirements

1. That the sheriff develop guidelines to assist staff and judges in assessing whether prospective jurors can understand and communicate in English to a sufficient degree to enable them to discharge their duties as jurors.
2. That these guidelines include standardised questions to be asked if a person self-identifies as not understanding English; circumstances where further inquiries might be warranted (eg, juror appears unable to follow verbal instructions from jury officers); and specific processes to be used in cases involving a significant amount of documentary or written evidence.

32. NSWLRC concluded that the sheriff's officers and the judge should be able to excuse a prospective juror who appears to not be able to read or understand English and that guidelines should be developed for this purpose: NSWLRC, *Jury Selection*, Report No 117 (2007) 97.
33. Currently, the *Juries Act 1957* (WA) sch 3 provides that the grounds for excusing a person from jury service are illness; undue hardship; circumstances of sufficient weight, importance or urgency; or recent jury service. See Chapter Six, Proposal 46.

REPRESENTATIVENESS

The Commission noted above that people from culturally and linguistically diverse backgrounds should be encouraged to participate in jury service. One potential consequence of the English language requirement is that people from culturally and linguistically diverse backgrounds may be underrepresented on juries. In 1991 the ALRC observed that '[j]uries do not reflect the cultural diversity of the community because persons who do not have an adequate command of the English language are excluded'.[34]

In 2006 in Western Australia, 11.4% of the population reported speaking a language other than English at home and 81.8% of Western Australians spoke only English at home.[35] Of those Western Australians who reported speaking a language other than English at home (and hence likely to come from a culturally and linguistically diverse background) the vast majority stated that they spoke English well or very well (84.1%). Only 1.7% of Western Australians aged over 5 years (34,962 people) were recorded as not speaking English well or at all.

In assessing the representativeness of Western Australian juries, the available evidence is limited because statistics are not collected on a statewide basis. As noted in Chapter Three, the proportion of overseas-born jurors appears similar to the proportion of overseas-born residents in Western Australia; however, this does not necessarily mean that people from culturally and linguistically diverse backgrounds are adequately represented. The only available information in this regard is found from an exit survey conducted with jurors who served in Perth from 1 June 2008 until 4 June 2009. Of those jurors who completed the survey, 95% stated that their 'preferred' language spoken at home was English. Only 2% stated that their preferred language was a language other than English and the remaining 3% did not respond to this question. The proportion of jurors who stated that they preferred speaking a language other than English at home (2%) is lower than the proportion of Western Australians who reported speaking a language other than English at home in the 2006 census (11.4%). However, it is difficult to compare these statistics because the juror feedback questionnaire asks jurors to specify their 'preferred' language while census data refers to the language spoken at home. Furthermore, the 11.4% of people who speak a language other than English at home includes people who are not liable for jury service because they are not Australian citizens, are otherwise not eligible to vote, or because they are under 18 years or over the age limit for jury service (currently 70 years). The Commission is of the view that the juror feedback questionnaire should be amended to enable a proper assessment to be made whether people from culturally and linguistically diverse backgrounds are adequately represented on juries.

PROPOSAL 41

Statistics in relation to jurors from culturally and linguistically diverse backgrounds

That the Sheriff's Office should revise its juror feedback questionnaire to ensure that data is recorded in relation to the number of jurors who state that they speak a language other than English at home. For those people who respond that they do speak a language other than English at home, there should be an additional question asking if the other language is their first language.

To the extent that people from culturally and linguistically diverse backgrounds are underrepresented on juries, it is important to consider if there are any other ways to increase their participation in jury service. The ALRC considered the option of providing interpreters and installing translation facilities in all courtrooms so that non-English speaking Australians could undertake jury service. However, this option was ultimately abandoned because of the large number of different languages spoken and the obvious cost that would be involved.[36] Similarly, the NZLC rejected the option of providing Maori interpreters principally because of the high cost and likely delays involved.[37] The NSWLRC, which recommended that interpreters and 'other reasonable accommodation' should be provided for blind and deaf jurors, declined to examine the option of interpreters for non-English speaking jurors.[38]

As the Commission notes in the following section, if sign language interpreters are provided for deaf jurors these interpreters would be required to be accredited, to swear an oath to faithfully interpret proceedings and to comply with requirements pertaining to the secrecy

34. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 61.
35. The proportion of people who reported only speaking English at home was 78.4% nationally, 74% in Victoria and New South Wales; 66% in the Northern Territory; 86% in Queensland; 83% in South Australia; 80.9% in the Australian Capital Territory; and 91.9% in Tasmania: ABS, *2006 Census QuickStats: Western Australia* (2007).
36. ALRC, *Multiculturalism: Criminal law*, Discussion Paper No 48 (1991) 63.
37. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 81. See also Horan J & Tait D, *Do Juries Adequately Represent the Community? A case study of civil juries in Victoria* (2007) 16 *Journal of Judicial Administration* 179, 195 where it is noted that in New Mexico, interpreters are provided for non-English speaking jurors.
38. NSWLRC, *Jury Selection*, Report No 117 (2007) 97.

of jury deliberations. Nevertheless, the Commission acknowledges that the provision of language interpreters for non-English speaking Western Australians involves quite different practical considerations to the provision of sign language interpreters for deaf jurors. Deaf Australia Inc notes that the estimated number of deaf users of sign language in Australia is 15,400[39] while the number of people who do not understand English well or at all in Western Australia is 34,962. Moreover, because there are so many different languages spoken in Western Australia, the provision of interpreters for jurors in criminal trials would be extremely cumbersome. For instance, there could be four non-English speaking jurors and the proceedings may need to be interpreted in four different languages. This would cause significant and inappropriate delays. The Commission cannot see a realistic way of providing interpreters for non-English speaking jurors; however, the Commission is interested to receive submissions about the best way to increase the opportunity for people from culturally and linguistically diverse backgrounds to participate in jury service.

INVITATION TO SUBMIT H

Participation in jury service by people from culturally and linguistically diverse backgrounds

That Commission invites submissions about the best way to increase the opportunity for people from culturally and linguistically diverse backgrounds to participate in jury service.

39. <http://www.deafau.org.au/info/deafcomm.php>.

Incapacity

SECTION 5(b)(iv) of the *Juries Act 1957* (WA) provides that a person is not qualified to serve as a juror if he or she 'is incapacitated by any disease or infirmity of mind or body, including defective hearing, that affects him or her in discharging the duty of a juror'. As discussed in Chapter One, the Commission has established a principled approach as to who should be excluded from jury service. Qualification for jury service in relation to incapacity reflects the principle that potential jurors must be competent in order to discharge their duties as a juror.[1] In other words, jurors must be able to understand the evidence given in court, discuss the evidence as a group and arrive at a verdict based on that evidence.

The number of people disqualified each year for incapacity is reasonably low. In the 2008 calendar year only 2.5% of people summoned for Perth were disqualified on this basis,[2] while figures for regional areas such as Geraldton and Kalgoorlie were significantly lower at 0.2%.[3] Although the sheriff must remove people who appear to be not qualified before the jury lists become jurors' books for each district,[4] it is impossible to identify from the jury lists those prospective jurors who may have a mental or physical incapacity that affects their ability to serve as a juror. In practice, therefore, s 5(b)(iv) works similarly to excuse. That is, people summoned for jury service who consider themselves not qualified by reason of incapacity must state the grounds on which they claim to be disqualified[5] and sign the statutory declaration attached to the summons.[6] In most cases, they will be asked to provide medical certification or other supporting evidence of their 'disease or infirmity'. Decisions to exclude people from jury service for incapacity are made on a case-by-case basis by the summoning officer taking into account the evidence supplied.

1. See above Chapter One, Guiding Principle 1.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
3. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Geraldton and Kalgoorlie Jury Districts 2008* (2009).
4. *Juries Act 1957* (WA) s 14(8).
5. The summons states that a person is not qualified if they 'have any disease or infirmity of mind or body that will affect [their] ability to be a juror'.
6. In some cases the potential juror's family or carers will contact the Sheriff's Office to explain the nature of the incapacity. In these cases, again, a medical certificate will be sought to support the claim.

In the Commission's view, case-by-case consideration is an appropriate approach to dealing with incapacity. The only question is whether a decision to exclude for incapacity should be made on the basis of disqualification by reason of incompetence or on the basis of excuse by reason of a temporary or permanent disability that affects the person's capacity to discharge the duties of a juror.

As discussed earlier, not having sufficient understanding of spoken English can render a person incompetent in relation to discharging the duties of a juror because they cannot adequately understand the court proceedings. Similarly, a mental or cognitive impairment may render a person incompetent to discharge the duties of a juror; in particular, where the impairment impacts upon the person's decision-making ability or the capacity to properly evaluate information. However, in the Commission's view, a physical disability will rarely affect a person's competency to discharge the duties of a juror, especially where facilities can be provided to overcome physical difficulties. The Commission has therefore determined that prospective jurors should not be automatically disqualified from jury service on the basis of a physical disability. However, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason for that person to be excused from jury service by the summoning officer or the trial judge under the proposed changes to the Third Schedule to the *Juries Act 1957* (WA).[7]

For this reason the Commission proposes that the current legislative formulation under s 5(b)(iv) of the *Juries Act* be repealed and replaced. New legislative provisions to deal with incapacity of mind or body that will assist the summoning officer to more easily distinguish between those people whose incapacity should disqualify them from jury service and those whose incapacity may support their release from the obligation to serve as a juror are discussed in more detail below. It is important to note that mental, intellectual or physical incapacity may also support a valid excuse (whether temporary or permanent)[8] from jury service on the application of the prospective juror on the basis of undue hardship or extreme inconvenience as discussed in Chapter Six.

7. See below Proposal 43, 'Physical incapacity'.
8. *Juries Act 1957* (WA) s 34A(2).

MENTAL INCAPACITY

People of 'unsound mind' are disqualified or disentitled from voting in every Australian jurisdiction.[9] This can impact upon a person's liability to serve as a juror because in order to be liable for jury service a person must be entitled to vote. In Western Australia s 18 of the *Electoral Act 1907* (WA) relevantly provides that:

> (1) Every person, nevertheless, shall be disqualified from voting at any election, who —
>
> (a) is of unsound mind; or
>
> …
>
> (cd) is, or is taken to be, a mentally impaired accused as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996*.

While mentally impaired accused are 'flagged' in the Western Australian Electoral Commission's computer system and would usually be excluded from the random process that generates a jury list, it is less easy to identify people of 'unsound mind' (a term that is not defined in the *Electoral Act*). In practice, a person may be removed from the electoral roll for being of unsound mind if they do not understand the concept of voting and they have medical certification to that effect.[10] But unless the Electoral Commission is advised[11] that a person is of unsound mind (and relevant documentary evidence is provided), the person will remain on the electoral roll and will still be liable for jury service.

All Australian jurisdictions exclude from jury service people suffering from mental impairment[12] where the impairment renders the person incapable, unable or unfit to perform the functions of a juror.[13] Mental impairment can range significantly from short-term anxiety or depressive disorders[14] to long-term psychotic and delusional disorders[15] and includes cognitive deficits such as those caused by intellectual disability,[16] acquired brain injury,[17] senility or dementia.[18] These conditions may impair a person's perception, thought processes, memory retention, reasoning, problem-solving skills or decision-making capacity. In the Commission's view it is appropriate that people suffering these conditions are excluded from jury service where their mental impairment impacts upon their ability to discharge the duties of a juror.

Under the current formulation in s 5(b)(iv) of the *Juries Act,* if a mentally impaired person is summoned for jury service he or she must essentially self-identify[19] to claim disqualification on the basis of mental incapacity and medical evidence is required to support that claim.[20] This is the only way that the summoning officer can practically assess whether the person is incapable of discharging the duties of a juror and should be disqualified from serving. If the person attends for jury service and fails to disclose a relevant mental impairment, there is little that

9. *Electoral Act 2004* (Tas) s 31; *Electoral Act 1992* (ACT) s 72; *Electoral Act 1992* (Qld) s 64; *Electoral Act 1985* (SA) s 29; *Constitution Act 1975* (Vic) s 48; *Commonwealth Electoral Act 1918* (Cth) s 93; *Parliamentary Electorates and Elections Act 1912* (NSW) s 21; *Electoral Act 1907* (WA) s 18(1(a); *Electoral Act* (NT) s 21.
10. Warren Richardson, Manager Enrolment Group, Electoral Commission (WA), telephone consultation (15 June 2009).
11. Usually by a person's doctor, a family member or by a guardian of the person appointed under the *Guardianship and Administration Act 1990* (WA) s 43.
12. Australian juries legislation variously refers to 'mentally unfit', 'mental disability', 'disease or infirmity of the mind' and 'unsound mind'. The Commission uses the term 'mental impairment' to encompass all these phrases.
13. *Juries Act 2003* (Tas) sch 2(9); *Juries Act 2000* (Vic) sch 2; *Jury Act 1995* (Qld) s 4(3)(l); *Jury Act 1977* (NSW) sch 2(12); *Jury Act 1967* (ACT) s 10; *Juries Act 1957* (WA) s 5(b)(iv); *Juries Act 1927* (SA) s 13; *Juries Act* (NT) s 10(2)(d).
14. The most prevalent mental disorders are anxiety disorders (eg, social phobias, obsessive-compulsive disorder and post-traumatic stress disorder), followed by affective disorders (eg. depression, bipolar affective disorder and hypomania): Australian Bureau of Statistics, *Mental Health and Wellbeing: Profile of adults 1997* (Canberra: ABS, 1998) 18.
15. Psychotic and delusional disorders, such as schizophrenia and substance-induced psychoses, are considered to be low prevalence disorders: Jablensky A et al, *People Living with Psychotic Illness: An Australian study 1997–1998* (Canberra: National Survey of Mental Health and Wellbeing, 1999).
16. Intellectual disability describes a condition of arrested development of the mind, which is characterised by impairment of cognitive, language, motor and social skills. Generally, the term 'intellectually disabled' refers to an individual with below average cognitive functioning (indicated by an IQ of 70 or less) and associated deficits in adaptive behaviour (the practical, conceptual and social skills of daily living). Clinical definitions of intellectual disability require the onset of the disability to have occurred during the developmental period; that is, before the age of 18 years.
17. Acquired brain injury is a term used to describe an injury caused by severe head trauma, substance abuse, stroke, brain infections, brain tumours or other causes that lead to deterioration of the brain or reduced oxygen supply to the brain. Acquired brain injury may manifest in intellectual and adaptive deficits similar to intellectual disability.
18. 'Dementia' is a term used to describe loss of cognitive skills and intellectual functioning, including memory loss, loss of emotional control, and impairment of perception, reasoning or problem solving capacity. Common causes of dementia include Alzheimer's disease, organic or acquired brain injury, meningitis or substance abuse. Although it is usually found in adults, dementia (particularly from disease, poisoning or infection) can occur in children. The term 'senility' is associated with similar mental impairment occurring in old age.
19. If a family member or other interested person contacts the summoning officer to advise of the prospective juror's mental condition, supporting evidence pertaining to the condition must still be supplied to the summoning officer's satisfaction.
20. It should be noted that under the Fourth Schedule to the *Juries Act 1957* (WA) 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'.

the summoning officer can do to disqualify the person from jury service, even where a family member has telephoned to alert the summoning officer of the relative's mental impairment or where a mental impairment is apparent.[21]

Several jurisdictions have sought to ameliorate problems stemming from total reliance on self-identification of relevant mental impairments by tying the concept of mental incapacity to definitions contained in mental health legislation.[22] For example, the *Juries Act 2000* (Vic) refers to relevant definitions under a number of Acts[23] to exclude from jury service mental health patients, people with intellectual disabilities, mentally impaired accused and people the subject of guardianship orders (who generally have decision-making disabilities). This approach assists potential jurors, their family members and summoning officers to more clearly define when a person is not *qualified* to serve by reason of mental incapacity. It also ensures that people who do not meet these criteria are not unfairly disqualified (as opposed to excused) from serving as jurors. The Commission favours this approach for Western Australia and makes the following proposal to amend s 5(b)(iv).

PROPOSAL 42

Disqualification for mental incapacity

That s 5(b) be amended to read:

Notwithstanding that a person is liable to serve as a juror by virtue of section 4 that person –

…

(b) is not qualified to serve as a juror if he or she –

…

(iv) is an involuntary patient within the meaning of the *Mental Health Act 1996* (WA);[24]

(v) is a mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);[25] or

(vi) is the subject of a Guardianship Order under s 43 of the *Guardianship and Administration Act 1990* (WA).[26]

Excusing mentally impaired jurors

It should be noted that under the Commission's proposals in Chapter Six it is open for a person with a mental impairment, who does not fit within the definitions under the relevant Acts, to apply to be *excused* from jury service or to be excused on the motion of the summoning officer or the trial judge. Under ss 27(1) and 32 of the *Juries Act,* both the summoning officer and the court are tied to excusal on the grounds of the Third Schedule which currently only specifies 'illness' as a relevant ground for excusal. Proposal 46 in Chapter Six amends this schedule to make clear that the power to excuse may apply to 'a person who … because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror'. Excuses will of course continue to be assessed on a case-by-case basis on the provision of relevant evidence.

PHYSICAL INCAPACITY

As discussed above, the Commission has taken the approach that people should only be disqualified from jury service on the basis that they are not impartial (ie, those with certain criminal histories) or are not competent to discharge the duties of a juror (ie, those who cannot understand English or who have a mental incapacity that brings them within the terms of Proposal 42 above). In the Commission's view, a person should not be disqualified from jury service merely because of the existence of a physical disability. A physical disability will rarely affect a person's *competency* to discharge the duties of a juror; although it may—for reasons of inadequate facilities, the particular circumstances of the trial, or extreme inconvenience or hardship to the individual—be sufficient to excuse a person from serving as a juror.[27]

In 2006 the New South Wales Law Reform Commission (NSWLRC) released a report which examined the issues surrounding jury service by blind or deaf jurors. Like the Commission, it concluded that blind or deaf people

21. Cases where a mental impairment is clearly apparent in the person's behaviour may, however, invoke a challenge from counsel.
22. See *Juries Act 2000* (Vic) sch 2; *Juries Act* (NT) s 10; *Juries Act 1981* (NZ) s 2; *Juries Act 1974* (Eng) as amended by the *Criminal Justice Act 2003* (Eng) sch 33.
23. See *Juries Act 2000* (Vic) sch 2, which refers to the *Mental Health Act 1986* (Vic), *Crimes (Mentally Impaired and Unfitness to be Tried) Act 1997* (Vic), *Disability Act 2006* (Vic) and *Guardianship and Administration Act 1986* (Vic).
24. *Mental Health Act 1996* (WA) s 3 defines 'involuntary patient' as a person detained in an authorised hospital pursuant to an order made under the Act or a person who has been placed on a community treatment order.
25. Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) defines a 'mentally impaired accused' as a person who is subject to a custody order under the Act. Such orders may be made where the accused has run a successful defence of insanity under s 27 of the Criminal Code or where he or she is found by the court to be mentally unfit to plead. As mentioned earlier, mentally impaired accused are usually 'flagged' on the electoral roll and would not usually be subject to selection for a jury list.
26. Section 43 of the *Guardianship and Administration Act 1990* (WA) provides that a guardianship order may be made by the State Administrative Tribunal where a person is, among other things, 'unable to make reasonable judgments in respect of matters relating to his person'.
27. See below 'Excusing physically disabled jurors' and Chapter Six.

should not be automatically excluded from jury service on the basis of their disability alone, but that their ability to discharge the duties of a juror in the circumstances of a particular trial should be considered on a case-by-case basis.[28] The NSWLRC recommended that, where practicable, reasonable adjustments or accommodation should be provided to assist blind or deaf jurors. Such adjustments might include the provision of sign language interpreters and computer-aided real-time transcription for deaf people, and Braille or computer-aided speech translation of documentary evidence for blind people.[29]

Accommodating physical disabilities

Physical disabilities may range from mobility difficulties to total or partial hearing or vision impairment. In many cases a person's physical disability may be able to be overcome by the provision of facilities to accommodate the relevant disability so that the person can properly discharge his or her duties as a juror. It is nonetheless acknowledged that in some cases a physical disability will be such that, even with the reasonable provision of facilities to accommodate the potential juror's needs, it will be difficult or uncomfortable for the person to discharge the duties required of him or her as a juror. There will also be cases where a person is so profoundly and relevantly disabled that his or her service as a juror may impact upon the fair trial of an accused. There must, therefore, be capacity for the court or summoning officer to excuse jurors with a relevant physical disability in certain circumstances.

Mobility difficulties

In recent years steps have been taken to improve the facilities in some Western Australian courts to accommodate jurors with mobility difficulties. For example, the new District Court building in Perth was designed to be wheelchair friendly and includes private lifts from the jury assembly room to the jury deliberation rooms and through to the various courts. However, jurors with mobility difficulties are not well catered for in older courts, such as the Supreme Court building and some circuit courts. Although public administration areas in most courts are adapted to accommodate people with disabilities (such as by provision of lifts, ramps and disabled toilets), the jury box or jury deliberation room is not always accessible to people who use wheelchairs or who have significant mobility issues. In Perth, such concerns are accommodated by excusing the juror from service (or returning the juror to the jury pool) if the juror is randomly selected on a panel that is to be held in a court, such as the Supreme Court, where adequate facilities for disabled jurors do not exist.

Deaf and hearing impaired

The hearing impaired are particularly well catered for in modern Western Australian courthouses. Most metropolitan courts now have amplification of proceedings with audio streamed to speakers throughout the court and including the jury box. New courts (such as the Perth District Court and Rockingham courthouse) have also installed a 'hearing loop' to enhance audio for wearers of hearing aids. This works by passing an electrical current from the amplifier through a wire loop which surrounds the courtroom walls. If jurors have a hearing aid, this audio is automatically inducted into their hearing aid without any requirements to physically connect cables. The Commission is informed that the District Court is currently purchasing two devices that can be used to connect to the hearing loop for those who have hearing problems but do not have a hearing aid.[30]

Currently, it appears that most hearing impaired people seek to be excused or claim disqualification at the summons stage. Those that do attend for jury service generally self-identify (as they are required to do under the Fourth Schedule) to the summoning officer who explains the facilities (if any) that the court may have to cater for their impairment. The potential juror is excused (or disqualified) by the summoning officer if the impairment is such that existing facilities are not sufficient to assist and the person will be unable to discharge their duties if selected as a juror. Where it is not clear whether the person will be able to effectively discharge their duties as a juror, they are asked to identify to the court upon selection if they have difficulties hearing the preamble in the courtroom at which time they may be excused by the judge or challenged by counsel.

While those with hearing impairments are well catered for, the same cannot be said for prospective jurors who are profoundly deaf. While it is possible for the jury to have recourse to written records and transcript of proceedings to assist understanding,[31] this will not assist the profoundly deaf to understand jury deliberations, which are undertaken in secrecy and are not transcribed. In its 2006 report into this issue the NSWLRC recommended that, where practicable,[32] reasonable adjustments such as the provision of sign language

28. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) recommendation 1.
29. Ibid 48–50.
30. Gavin Whittome, Operations Manager for the District Court Building, Western Liberty Group, telephone consultation (20 August 2009).
31. Should the trial judge order it pursuant to s 110 of the *Criminal Procedure Act 2004* (WA).
32. That is, where facilities are available and where the sheriff has been advised in advance of the need to provide for reasonable adjustments to accommodate the disability.

interpreters should be made to accommodate the needs of deaf jurors.[33] Sign language interpreters would be required to be accredited,[34] to swear an oath to faithfully interpret proceedings, and to comply with requirements pertaining to the secrecy of jury deliberations.[35] It was noted that because of the physical demands of the role of a sign language interpreter, a deaf juror would need two such interpreters who would be required to take turns (in blocks of approximately 40 minutes) to interpret proceedings.[36] The NSWLRC received a number of submissions that suggested this would add to the cost and length of a trial and would be impracticable in longer trials.[37] The difficulties of securing the services of the required two interpreters for the duration of a trial also figured as a legitimate concern. The NSWLRC conceded that it would be likely that in consequence deaf people would only be able to be empanelled on short trials.[38]

Blind and vision impaired

It appears that it is relatively standard in all Western Australian courthouses for television screens to be installed in the jury box to enable jurors to more easily see any video evidence (such as video records of interview or crime scene video). This may assist those jurors who have vision that is only partially impaired and can be reasonably corrected with eyeglasses. It is more difficult to cater for people with significant visual impairments in a trial setting.

The most often raised concern with severely visually impaired or blind jurors is that they cannot observe the demeanour of witnesses. In its 2006 report on this subject the NSWLRC found that this was not a significant impediment to comprehension of evidence. Indeed, it noted that recent High Court cases have downplayed the importance of demeanour and observation of a witness as a determinant of credibility[39] and that this had also been supported by scientific evidence.[40] It is worth noting that current Western Australian law appears to accept that it is not always necessary to observe a witness's demeanour by permitting courts to take evidence by audio link.[41] In its submission to the NSWLRC's report, the Royal Blind Society stated that:

> One of the main misconceptions … is that people who are blind will not be able to observe the demeanour of witnesses. We accept that people who are blind will not be able to observe all visual aspects of a witness's demeanour but we assert that there are many aspects of a person's demeanour which are non-visual and which are just as important and relevant.[42]

Another concern raised regarding blind jurors is that they cannot observe and assess visual evidence; in particular, crime scene video evidence, photographic evidence (that cannot be adequately described in speech) and jury views. It should, however, be noted that much of the evidence in a typical criminal trial is oral in nature, which, if you accept that demeanour is not necessarily an issue, presents no difficultly for a blind juror. Even trials where there is a small amount of documentary evidence would not be problematic. In such cases the documents would be able to be read in open court or may be translated into Braille form by a computer and printed by a Braille printer. Many blind people also have computer adaptive technology that can scan documents and read them out in high quality synthetic speech.[43] However, in trials where it is apparent that there will be crucial visual evidence that cannot be comprehended by a blind or severely visually impaired juror (even where reasonable adjustments have been made to accommodate the juror), the Commission proposes that the trial judge may on his or her own motion, excuse a blind juror for the purposes of that particular trial.[44]

Provision of relevant facilities

Noting the concerns raised above, the Commission nonetheless agrees with the NSWLRC that deaf or blind (and, by extension, other physically disabled) jurors who wish to answer a jury summons should not be automatically denied the possibility of performing this civic duty.[45] Although there is no 'right' (as distinct from duty) attached to jury service, enabling, where practicable, physically disabled jurors to serve on juries can only enhance a jury's representative nature.[46] Any decision to exclude a physically disabled juror must

33. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) recommendation 1.
34. The National Accreditation Authority for Translators and Interpreters has developed accreditation standards for Australian sign language (otherwise known as Auslan).
35. Section 56B of the *Juries Act 1957* (WA) makes it an offence punishable by a fine of $5000 for a 'person' (which would include non-jurors, such as interpreters) to disclose any protected information, which includes the content of jury deliberations and the identity of jurors in a trial. Amendments may need to be contemplated to pt 4, div 6 of the *Criminal Procedure Act 2004* (WA) to permit a sign language interpreter to enter the jury room and to communicate with other jurors on behalf of the deaf juror.
36. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) 35.
37. Ibid.
38. Ibid.
39. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) 51, citing *Fox v Percy* (2003) 214 CLR 118, among other cases.
40. Ibid 52–3.
41. So long as the court is satisfied that it is in the interests of justice to do so: *Evidence Act 1907* (WA) s 121.
42. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) 53–4.
43. Ibid 49.
44. See below Proposal 43.
45. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) recommendation 1; see also, Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 153.
46. Auld, ibid 152–3. See also the Commission's Guiding Principle 2.

therefore lie in an assessment of facilities required and available to accommodate the person's disability and whether, considering the provision of facilities, the person can effectively discharge their duties as a juror.

In order to enable the summoning officer to give consideration to whether adequate facilities are able to be provided for the person on the return of summons, the summoning officer must be given notice of the prospective juror's requirements as soon as possible after receipt of the summons. The court should be made aware in advance of empanelment that the pool includes a prospective juror (identified by number) who has a disability for which facilities have been provided. Should the person be selected during the empanelment process, it would be a question for the trial judge in the circumstances of the particular case whether the evidence in the trial would be able to be sufficiently comprehended by the person using the facilities provided. If that is not possible, the prospective juror would have to be excused by the judge.[47]

Excusing physically disabled jurors

Although the Commission believes that a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability alone, it nonetheless acknowledges that physical disabilities may ground a valid excuse from jury service and, in some cases, may ground a permanent excuse from liability for jury service.[48] Further, the Commission recognises that some disabilities may, in the circumstances of a particular trial, render a person unable to properly discharge the duties of a juror. For example, where a trial involves a large amount of documentary or video evidence (such as crime scene video) or where a 'view' is to be undertaken by a jury,[49] it may be inappropriate for a totally blind person to serve on the jury in that particular trial.

The Commission agrees with its New South Wales counterpart that the fairness of a trial and the interests of justice 'must take precedence over the potential rights of a prospective juror'.[50] Under the Commission's proposed amendments to the Third Schedule, either the summoning officer[51] or the judge[52] will, on their own motion, have the power to excuse a person from serving where it appears that the person's physical disability in the circumstances of the case (and despite the provision of facilities to assist) would render him or her unable to properly discharge the duties of a juror.[53] A full discussion of the power and circumstances of excuse from jury service is found in the following chapter.

PROPOSAL 43

Physical incapacity

1. That a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability. However, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason to be excused from jury service by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).

2. That a person who has a physical disability that may impact upon his or her ability to discharge the duties of a juror—including mobility difficulties and severe hearing or visual impairment—must notify the summoning officer upon receiving the summons so that, where practicable, reasonable adjustments may be considered to accommodate the disability.

3. That the sheriff should develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror's physical disability.

4. That, where a physically disabled juror for whom relevant facilities to accommodate the disability have been provided is included in the jury pool, the court should be made aware of, in advance of empanelment, the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.

47. Under the *Juries Act 1957* (WA) s 32 with reference to the Commission's proposed amendments to the Third Schedule.
48. *Juries Act 1957* (WA) s 34A(2).
49. Pursuant to *Criminal Procedure Act 2004* (WA) s 109.
50. NSWLRC, *Blind or Deaf Jurors,* Report No 114 (2006) 11.
51. Under the power found in s 27(1) of the *Juries Act 1957* (WA).
52. Under the power found in s 32 of the *Juries Act 1957* (WA). Such power is also grounded in the common law in cases such as *Mansell* (1857) 8 E&B 54, 80–1; *Ford* [1989] QB 868, 871; and *Jago v District Court of New South Wales* (1989) 168 CLR 23, 25.
53. This is an important function of the court as it is the judge's duty to ensure that the accused receives a fair trial. See eg, *Crofts* (1996) 186 CLR 427, 451; *Pemble* (1971) 124 CLR 107, 117.

Chapter Six

Excused from Jury Service

Contents

Excused from jury service

IN the preceding three chapters the Commission has examined the law in relation to liability, eligibility and qualification for jury service. The proposals made in relation to these three categories largely reflect the Commission's first two guiding principles: that juries should be impartial, independent and competent and that juries should be randomly selected and broadly representative. In summary, the Commission has proposed that people who are enrolled to vote and aged between 18 and 75 years should be liable for jury service. In order to ensure independence and impartiality, the Commission has also proposed that people holding positions that are closely connected to the justice system should be ineligible for jury service. Further, people who are not competent (because of a lack of understanding of English or mental incapacity) should be disqualified from serving as should people who may be perceived as impartial as a result of their criminal history or current obligations in the criminal justice system.

In practice, people summoned for jury service may be ineligible or not qualified for jury service because the process of compiling jury lists only takes into account liability (because only those who are liable are included in the original jury books) and qualification based on criminal history (because the sheriff undertakes a process of checking criminal convictions before summonses are issued). Hence, a person summoned may be excused from further attendance after completing a statutory declaration and returning it to the sheriff's office on the basis that they are not eligible or not qualified to serve.[1] Statistics provided to the Commission by the Sheriff's Office show that 6.5% of people summoned for jury service in Perth for the 2008 calendar year were released from the obligation to attend on the summons date because they were ineligible or disqualified from serving.[2] A person summoned may also be excused from further attendance when they attend court on the summons date. During induction, prospective jurors are told that they must disclose to the jury pool supervisor or the court any incapacity, a lack of understanding of English, any relationship with people involved in the trial or any other reason why they may be biased. If so, the person may be excused from further attendance.

In addition, people summoned for jury service may apply to be excused from attendance because they fall within the categories of people who are entitled to be excused 'as of right' or because of good cause such as illness, pre-booked holidays, work commitments or recent jury service. These excuses generally reflect the concepts of hardship or inconvenience to the person, their family, or the public. Applications to be excused for these reasons can also be made by statutory declaration or by applying in person to the summoning officer or the judge. For the 2008 calendar year, 52% of people summoned for jury service in Perth were excused either as of right or for cause.[3]

In this chapter, the Commission examines the categories of excuse as of right and excuse for cause. However, because in practice the process of excusing prospective jurors from further attendance takes into account other circumstances (eg, disqualification or potential bias) the proposals in this chapter are designed to accommodate all of the possible reasons why the summoning officer or the court may need to excuse a prospective juror from further attendance.

1. The summons form includes information about eligibility and qualification for jury service and directs persons summoned to complete the statutory declaration if they believe that they are ineligible or disqualified.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
3. Ibid. The statistics show that 74% of people summoned were excused from jury service but this figure includes those people who were excused because they were ineligible or disqualified from jury service; because they did not receive the summons at all or in sufficient time; because they were excused following an investigation of why they did not attend court; or because they were no longer required to attend.

Excuse as of right

THERE are several categories of people who are otherwise liable, eligible and qualified to serve as jurors but who are currently entitled to be excused from jury service. People who fall within these categories have a choice: to make themselves available for jury service or claim a statutory exemption. In Western Australia, people falling within certain occupational groups, people with family or carer responsibilities, people in religious orders and people who are aged 65 years or more are entitled to be excused as of right. Most Australian jurisdictions include categories of excuse or exemption as of right; however, over time the trend has been to reduce or abolish the right to be excused.[1] No one is excused as of right in Victoria or South Australia. In Queensland only those people who have attended in response to a jury summons in the previous year have the right to be excused.[2] Tasmania also has a single category of excuse as of right: people aged 70 years or more.[3] Broader categories (similar, although not identical, to Western Australia) exist in New South Wales,[4] the Northern Territory[5] and the Australian Capital Territory.[6]

The rationale for providing a right to be excused is that the particular circumstances (ie, occupational or personal) are of such a nature that jury service would be unduly onerous or inconvenient. Thus the justification is no different than the justification for being excused for good cause – it is only the mechanism by which the person is excused that is different. An application to be excused for good cause requires consideration of the merits of the individual case. But, for those claiming an excuse as of right all that is required is that the person establishes that they belong to one of the specified categories.[7] Underpinning all of the categories of excuse as of right is the assumption that membership of the category alone is sufficient to establish undue hardship or substantial inconvenience. However, as is discussed below, this is not necessarily always the case.

CATEGORIES OF EXCUSE AS OF RIGHT

Section 5(c)(i) of *Juries Act 1957* (WA) provides that a person who is otherwise liable for jury service is excused from serving as a juror 'as of right, if he or she is a person within the classes of person listed in Part II of the Second Schedule and claims to be excused by virtue of that fact'. Part II of the Second Schedule provides:

> **1. Emergency services.**
>
> Full-time operational staff of the State Emergency Service.
>
> Officers and firemen of permanent fire brigades.
>
> Pilots employed by the Royal Flying Doctor Service.
>
> **2. Health.**
>
> Medical practitioners registered under the *Medical Practitioners Act 2008* if actually practising.
>
> Dentists registered under the *Dental Act 1939* if actually practising.
>
> Veterinary surgeons registered under the *Veterinary Surgeons Act 1960* if actually practising.
>
> Psychologists registered under the *Psychologists Act 2005* if actually practising.
>
> Midwives and nurses registered under the *Nurses and Midwives Act 2006* if actually practising.
>
> Chiropractors registered under the *Chiropractors Act 2005* if actually practising.
>
> Physiotherapists registered under the *Physiotherapists Act 2005* and in private practice.
>
> Pharmaceutical chemists registered under the *Pharmacy Act 1964* and actually in business whether as principal or manager for a principal.
>
> Osteopaths registered under the *Osteopaths Act 2005* if actually practising.

1. For example, the *Juries Act 1967* (Vic) provided for a number of categories of excuse as of right including doctors, dentists, pharmacists, teachers, masters of crews, international airline pilots, mayors, town clerks, persons who reside more then 32 km from the courthouse and members of statutory corporations. But now, under the *Juries Act 2000* (Vic), there are categories of persons who are disqualified from jury service and categories of persons who are ineligible. There is no entitlement to be excused; instead, a person seeking to be excused must demonstrate a 'good reason'. Also, the categories of excuse as of right have been reduced over time in New South Wales: see NSWLRC, *Jury Service*, Issues Paper No 28 (1996) 74.
2. *Jury Act 1995* (Qld) s 23.
3. *Juries Act 2003* (Tas) s 11.
4. *Juries Act 1977* (NSW) sch 3 and s 39.
5. *Juries Act* (NT) s 11 and sch 7.
6. *Juries Act 1967* (ACT) s 11(2) and sch 2, pt 2.2.
7. In practice this is usually done by signing a statutory declaration.

3. Religion.

Persons in holy orders, or who preach or teach in any religious congregation, but only if they follow no secular occupation except that of a schoolteacher.

4. Family.

Pregnant women.

Persons residing with, and having full-time care of, children under the age of 14 years.

Persons residing with, and having full-time care of, persons who are aged, in ill-health, or physically or mentally infirm.

5. Age.

Persons who have reached the age of 65 years.

Occupations

Various emergency services personnel and health professionals are entitled to be excused from jury service because of the importance of their roles in the community.[8] Providing a right to be excused for emergency services personnel and health professionals reflects the view that members of these occupational groups cannot be spared from their usual occupations to undertake jury service. In its 1980 report on jury selection, the Commission concluded that people employed in emergency services should be excused as of right because of the risk to the community if they were unavailable in the event of a major emergency.[9] Similarly, it was observed that health professionals need to be available for emergencies and in some cases (especially in regional areas) it would be difficult to find a locum.[10]

However, most emergency services personnel and health professionals take leave[11] (such as annual leave, long service leave and parental leave) and therefore the temporary and planned absence of these workers does not necessarily put the safety of the community in jeopardy. As the New South Wales Law Reform Commission (NSWLRC) observed, '[m]ost professionals are able, as a matter of course, to arrange for their duties to be performed by locums or substitutes when they take various forms of leave'.[12] Moreover, medical and health services are, today, delivered in a variety of ways; medical practices exist with a large number of doctors and allied health professionals and these practices often accommodate part-time workers. In such practices, existing patients can potentially access any available doctor or other health professional if required.

Further, the Commission notes that the current occupational categories are not entirely consistent. For example, pharmacists, chiropractors, physiotherapists, optometrists and osteopaths are included in Part II of the Second Schedule but various other allied health professionals (eg, podiatrists, radiographers, dieticians, opticians and occupational therapists) are not. Similarly, ambulance officers and paramedics employed by St John Ambulance are not entitled to claim an excuse as of right whereas certain State Emergency Services employees, fire-fighters employed in permanent brigades and Royal Flying Doctor Service pilots are included in the list of categories under Part II of the Second Schedule. In this regard, it has been observed that:

> [I]it is extremely difficult to draw the line between those whose work is and is not so crucial that it would be against the public interest to compel them to serve as jurors. Invidious choices of that sort can be avoided, and the jury strengthened, by replacing excusal of right in such cases with discretionary excusal or deferral. [13]

The Commission acknowledges that many emergency services personnel and health professionals will justifiably seek to be excused from jury service. In many cases it would be inconvenient to the public to require emergency services personnel and health professionals to undertake jury service. However, membership of the particular occupational group should not of itself be a sufficient basis to be excused. The person's specific work responsibilities and commitments and their specialist skills should be considered along with the availability of suitable substitutes during the likely jury service period.[14]

Family

Family circumstances (ie, pregnancy; the need to care for children; and the need to care for aged people, people who are ill and people with physical or mental disabilities) is the second largest category of excusal in Western Australia. Just over 12% (6,849 people) of people summoned for jury service in Perth in 2008 were excused from serving on this basis.[15]

Currently, in order for a pregnant woman to be excused from jury service all that is required is the completion of a

8. See VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.144].
9. LRCWA, *Exemption from Jury Service*, Report No. 71 (1980) 25.
10. Ibid.
11. See NSWLRC, *Jury Selection*, Report No.117 (2007) 115.
12. Ibid 110.
13. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 150.
14. Later in this chapter the Commission proposes a system for deferral of jury service. In the majority of cases, this will enable emergency services personnel and health professionals to defer jury service to a more suitable time.
15. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).

statutory declaration.[16] Hence, there is no consideration of the stage of pregnancy or likely impact on the general health and comfort of the woman if she was required to serve. In the 2008 calendar year 281 women who were summoned for jury service in Perth were excused because of pregnancy. This constitutes less than 0.5% of all people summoned.[17] It may well be that some pregnant women elect to remain available for jury service because during the early and middle stages of pregnancy it is unlikely that there would be any difficulty in undertaking jury service.[18] Instead of providing a right to be excused, pregnant women who have specific health issues or risks could seek to be excused in the same way as people who are ill (ie, by producing a medical certificate).[19] The Commission does not see any reason for providing pregnant women with an absolute right to be excused – pregnancy should be dealt with on a case-by-case basis.

Persons residing with and having full-time care of children under the age of 14 years are also entitled to be excused as of right. The Commission supported this approach in its 1980 report because of the difficulty in arranging substitute care.[20] In 1986 the NSWLRC concluded that:

> The proper care and supervision of young children is, we believe, a more important responsibility than jury service. People who have such responsibilities should not be compelled to abandon them for the sake of jury service.[21]

However, today there are many families with both parents working and single working parents[22] and, as a result, their children are placed in child care or attend after-school care. In some cases, other family members or paid babysitters look after children while their primary carers are at work. The Commission has been told that in Western Australia there are people who exercise their right to be excused on this basis even though they are working part-time or full-time.[23]

The NSWLRC concluded in its 2007 report that child care needs should be assessed on a case-by-case basis and people should be excused for good cause if 'reasonable alternative arrangements cannot be made, or where a particular need is demonstrated for the care of the child by the person having the responsibility for the child's care, custody or control'.[24] The Commission agrees but also emphasises that a parent or guardian should not be compelled to place their child in alternative care. A case-by-case approach would enable consideration of not only the availability of child care but also the parent or guardian's view about the suitability of any available alternative care.

The Commission is of the view that if reasonable and suitable alternative care is available, then jury service should be undertaken, subject to one condition. A parent or guardian should not be out-of-pocket for any reasonable child care expenses that are incurred directly as a result of jury service.[25] If, for example, a person put their child in after-school care for extra days than is normally the case, those additional fees should be reimbursed. Although there is currently no legislative provision for reimbursement in Western Australia, the Commission understands that as a matter of policy child care expenses are reimbursed.[26] Similarly, reasonable child care fees are reimbursed in Tasmania.[27] In South Australia a juror can claim monetary loss (including child care) up to a maximum of $108 per day.[28] In the Northern Territory there is no direct child care reimbursement but jurors can generally apply for an extra $30 per day if they suffer financial loss.

The same reasoning applies to people who reside with and have the full-time care of persons who are aged, in ill health, or physically or mentally infirm. In some

16. Carl Campagnoli, Jury Manager (WA), consultation (5 June 2009).
17. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
18. See VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.172]; NSWLRC, *Jury Selection*, Report No 117 (2007) 120.
19. NSWLRC, ibid 120.
20. LRCWA, *Exemption from Jury Service*, Report No.71 (1980) 26.
21. NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1996) [4.38].
22. Census statistics show that in Western Australia in 2006 there were 114,778 families with two working parents (including full-time and part-time work) and 40,357 single parent families where the parent works either full-time or part-time. These figures have increased over time: in 1996 there were 103,074 families with two working parents and 27,364 single parent families where the parent works: ABS, *Family Composition and Labour Force Status of Parent(s)/Partners by Gross Family Income (Weekly) for Time Series*, 2006 Census Tables.
23. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
24. NSWLRC, *Jury Selection*, Report No 117 (2007) 121.
25. In its 2007 report the NSWLRC recommended reimbursement of reasonable child care or substitute care expenses: ibid, Recommendation 62.
26. In the 2008–2009 financial year there were 20 inquiries to the Sheriff's Office regarding reimbursement of child care expenses and nine claims actually submitted: Carl Campagnoli, Jury Manager (WA), consultation (11 September 2009). The *Juror Information Sheet* attached to the juror summons notes that child care costs may be reimbursed.
27. Supreme Court of Tasmania, *Jury Duty* (2008). In New Zealand the Ministry of Justice website states that a juror can claim the 'reasonable cost of childcare provided to children in your care while you are serving as a juror': <http://www.justice.govt.nz/publications/global-publications/j/jury-service-information-on-jury-service>.
28. <http://www.courts.sa.gov.au/sheriff/jury_duty/content.html>.

instances, these people will be assisted by paid carers such as Silver Chain or may be assisted by other family members. The Victorian Parliamentary Law Reform Committee (VPLRC) noted that those who have care of an elderly parent may be in a position to serve.[29] Similarly, the NSWLRC recommended that these circumstances should be considered on a case-by-case basis but highlighted that when assessing applications to be excused on the basis of carer obligations, the risk that the person requiring care may be upset or worried if a substitute carer is used should be taken into account.[30] Again, any expenses incurred to obtain substitute care as a result of jury service should be reimbursed.

The Commission believes that the provision for reimbursement of reasonable child care expenses or other expenses incurred for carers should be contained in legislation – this reflects the Commission's Guiding Principle 4: that the law should seek to prevent or reduce any adverse consequences resulting from jury service.[31] Presently, s 58B(2) of the *Juries Act* provides that a person who attends in response to a summons or serves on a jury is entitled to be paid the prescribed allowances and expenses. As discussed further in Chapter Seven, regulation 5 of the *Juries Regulations 2008* (WA) provides for allowances and expenses for travel costs. The Commission proposes that a new regulation be enacted to provide for the reimbursement of out-of-pocket child care or other carer expenses incurred as a consequence of jury service.[32]

PROPOSAL 44

Child care or other carer expenses

1. That the *Juries Regulations 2008* (WA) be amended to insert a new regulation 5B to cover reimbursement of child care and other carer expenses.
2. That this regulation provide that, for the purpose of s 58B of the *Juries Act 1957* (WA), the reasonable out-of-pocket expenses incurred for the care of children who are aged under 14 years, or for the care of persons who are aged, in ill health, or physically or mentally infirm are prescribed as an expense provided that those expenses were incurred solely for the purpose of jury service.

29. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.172].
30. NSWLRC, *Jury Selection*, Report No 117 (2007) 122.
31. See above Chapter One, 'Guiding principles for reform of the juror selection process'.
32. Some people are eligible for child care rebates from the government. Jurors should only be reimbursed for those expenses that are not otherwise claimable or reimbursed.

Religion

Currently, persons in holy orders or who preach or teach in any religious congregation are entitled to be excused as of right if they follow no other secular occupation (other than being a school teacher). Different rationales have been suggested for providing a right to be excused for ministers of religion including that they should be available to carry out pastoral responsibilities; that they may have confidential information about the accused or the victim; that they may be too compassionate to remain objective; and that may have a conscientious objection to jury service.[33]

The VPLRC concluded that ministers of religion should not have a right to be excused from jury service, emphasising that they 'will usually have knowledge, experience and gifts which would be very useful inside a jury room'.[34] It was concluded that ministers of religion should be able to apply to be excused on the basis of conscientious objection, undue hardship or the possibility of bias. In particular, it was noted that in smaller regional communities it may not be possible for ministers of religion to undertake jury service because it will be difficult to find suitable replacements and it will be more likely that the minister will know the parties involved in case.[35]

Age

The Commission has examined age in Chapter Three. Currently, a person aged 65 years or more may claim an excuse as of right while those aged 70 years or older are not eligible to serve. In the 2008 calendar year, 2.6% of people summoned for jury service in Perth exercised their right to be excused on the basis of age.[36] After considering the position in other jurisdictions the Commission has proposed that the maximum age for liability for jury service should be raised to 75 years of age and that persons who have reached the age of 65 years should no longer have a right to be excused.[37] The Commission is of the view that there is no valid reason for providing a right to be excused for those people who have reached the age of 65 years. Individual circumstances such as hardship, illness or infirmity can easily be accommodated by an excuse process that enables the summoning officer or the judge to take into account the individual circumstances of the case.

33. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.92]–[3.94]. See also LRCWA, *Exemption from Jury Service*, Report No 71 (1980) 26.
34. VPLRC, ibid [3.96].
35. NSWLRC, *Jury Selection*, Report No.117 (2007) 111–12.
36. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
37. See Proposal 10.

THE COMMISSION'S VIEW

Based on information provided by the Sheriff's Office, it appears that approximately 18% of people (just over 10,000 individuals) summoned for jury service in Perth in 2008 were excused as of right before the jury summons date.[38] It is impossible to know how many of these people would have had a sufficient reason to be excused over and above their membership of one of the categories in Part II of the Second Schedule of the *Juries* Act.

Providing an automatic right for certain groups to be excluded from jury service potentially undermines the representative nature of juries. The goal of representation is to obtain a jury of diverse composition; that is, people with different backgrounds, knowledge, perspectives and personal experiences.[39] According to media reports, the current Western Australian Attorney General plans to remove the categories of excuse as of right in order to ensure that juries are more representative of the community.[40] Likewise, the NSWLRC noted that automatic categories jeopardise the representative nature of the jury[41] and 'can have the effect of limiting the collective skill and experience of the jury'.[42]

The available empirical evidence suggests that juries in Perth are reasonably representative and diverse. For example, responses to the juror survey in Perth for 2008–2009 shows that of 1,985 people who responded approximately 82% were employed (including those employed in private sector, public sector and self-employed).[43] As noted in Chapter Four, jurors employed in the private sector or self-employed appeared to come from a wide range of occupations including professionals, managers, supervisors and administrators, tradespersons, technicians, salespeople and apprentices.[44] But whether people who fall within the excuse as of right occupational categories are adequately represented on juries is unknown. A breakdown of occupations for 667 jurors, who submitted claims for reimbursement of lost income for the first three months of 2009, shows that only one health professional listed in Part II of the Second Schedule undertook jury service (a psychologist). Also the list includes only two pastors and one fire-fighter. However, this list does not cover the public sector so the number of public sector health professionals and emergency service personnel undertaking jury service is not able to be determined.[45]

Consistent with the Commission's Guiding Principle 3—that wide participation in jury service should be encouraged—it is important that members of the community share the responsibility of jury service. The NSWLRC explained in its 2007 report that the continuation of automatic categories of excuse may cause resentment among other members of the community.[46] Providing certain members of the community with an absolute right to be excused, irrespective of their individual circumstances, means that the burden of jury service is not being shared equitably.[47]

In support of retaining the categories of excuse as of right it has been argued that abolishing the categories would increase the work load of the Sheriff's Office.[48] However, the Commission notes that the practice in Western Australia is for people summoned for jury service to fill out a statutory declaration explaining their reasons for being unable to undertake jury service. This includes people who are entitled to claim an excuse as of right. If the categories of excuse as of right are abolished, the number of people seeking to be excused is unlikely to increase. If anything, the number of people seeking to be excused is likely to fall because of the requirement to demonstrate good cause. For example, a pregnant woman currently only has to fill out a statutory declaration stating that she is pregnant. If excuses were assessed on a case-by-case basis a woman who was two-months pregnant and not experiencing any significant health issues may not have any grounds for applying to be excused. Similarly, a medical practitioner who works two afternoons per week in a large metropolitan practice or a mother of two school-aged children who works full-time and ordinarily places her children in after-school care may find it difficult to demonstrate a sufficient cause for excuse.

38. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
39. See above Chapter One, 'Objectives of juror selection' and the Commission's Guiding Principle 2.
40. Banks A, 'Tighter Rules To Make It Harder to Skip Jury Duty', *The West Australian,* 5 August 2009, 7.
41. NSWLRC, *Jury Selection*, Report No 117 (2007) 106.
42. Ibid 110.
43. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009).
44. Ibid. These results are consistent with an earlier study in New South Wales in 1994 which found that unemployed persons only constituted 1.2% of jurors; over 50% of jurors were categorised as employed in professional/executive positions; and between 35–40% of jurors indicated that they have achieved tertiary level education: Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 61.
45. Regulation 6 of the *Juries Regulations 2008* (WA) provide that for the purposes of s 58B(4) of the *Juries Act 1957* (WA) persons employed by a state instrumentality, state trading concern or a government department are not able to claim reimbursement of income.
46. NSWLRC, *Jury Selection*, Report No. 117 (2007) 106.
47. Ibid 110.
48. NSWLRC, ibid 107; NSWLRC, *Criminal Procedure: The jury in a criminal trial*, Report No 48 (1996) [4.34].

As the VPLRC observed, those who are entitled to be excused as of right invariably exercise that right.[49] Similarly, the NSWLRC noted that the problem with exemptions as of right is that people 'may regard it as an invitation to be excused from jury service, which they will readily accept, without giving any consideration to the wider public interest involved in that form of service'.[50] The Commission acknowledges that the administrative burden on the Sheriff's Office may increase to some extent because the processing of applications may take longer (as a result of the need to assess whether the person has demonstrated good cause). However, the Commission notes that the Jury Manager in Western Australia supports the removal of the categories under Part II of the Second Schedule.[51] In addition, during initial consultations for this reference a number of judges stated that they did not support the continuation of excuses as of right.[52]

In its 2007 report, the NSWLRC recommended that no person should be entitled to be excused from jury service as of right solely because of their occupation, profession or calling or because of personal characteristics or situations. Instead, they should be able to apply, on a case-by-case basis, to be excused for good cause.[53] The Commission agrees and therefore proposes that Part II of the Second Schedule of the *Juries Act* should be repealed. Emergency services personnel, health professionals, pregnant women and those with carer responsibilities will be able to apply to be excused from jury service on a case-by-case basis on the grounds stipulated in the Third Schedule (discussed below). And ministers of religion or people aged over 65 years will similarly be able to apply to be excused on the basis of hardship or inconvenience. Furthermore, at the end of this chapter the Commission proposes a system for deferral of jury service; this will enable prospective jurors who previously had a right to be excused to arrange jury service around their work and family responsibilities. If deferral does not alleviate inconvenience or hardship, then it will still be possible for the summoning officer or the court to excuse that person from further attendance.

PROPOSAL 45

Abolition of 'excuse as of right'

That Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.

49. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.146].
50. NSWLRC, *Jury Selection*, Report No 117 (2007) 106.
51. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
52. Chief Judge Kennedy, consultation (17 January 2008); Judge Yeats, consultation (20 December 2007); Justice McKechnie, consultation (19 December 2007). The Commission notes that the Western Australian Jury Advisory Committee indicated its support for the removal of excuse as of right categories in 2007: Carl Campagnoli, Jury Manager (WA), consultation (11 September 2009).
53. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendations 26 & 27.

Excuse for good cause

A person summoned for jury service is able to apply to be excused for cause either before or on the jury summons date. Currently, the grounds for seeking to be excused on this basis cover illness; undue hardship to the person summoned or another person; circumstances of sufficient weight, importance or urgency; and recent jury service.[1]

From statistics provided by the Sheriff's Office it appears that work-related excuses are the most frequent reason for excusing people from jury service. In the 2008 calendar year, over 18% of people summoned for jury service in Perth were excused for work-related reasons before the jury summons date.[2] The Commission highlights that because jurors either continue to be paid their usual salary or are fully reimbursed for loss of income, any applications for excusal that are tied to loss of income are promptly rejected.[3] Other common excuses (not including those who are excused as of right) included health issues (5%), circumstances of sufficient weight, importance or urgency (4.4%) and pre-booked holidays (2.9%). Only 0.38% of people summoned for Perth were excused because of recent jury service.[4] Excuse for cause constitutes approximately 65% of all excusals (ie, excuse as of right and excuse for cause).

As noted in Chapter One the Commission is of the view that, in order to ensure wide participation, people should only be excused from jury service if they can demonstrate good cause. But, as mentioned at the beginning of this chapter, people summoned for jury service may also need to be excused from further attendance if they are unable to discharge the duties of a juror (eg, because of a lack of understanding of English, a physical disability or prior knowledge of the parties involved in the trial).[5] In these circumstances, a person may be released by the summoning officer or the court from the obligation to serve as a juror even though the person has not actually made an application to be excused. In this section, the Commission therefore considers the power to excuse a person who has been summoned for jury service from further attendance (either because the person has made an application to be excused or because the summoning officer or the court is of the view that the person should not undertake jury service in the particular circumstances). The Commission has approached this topic with a view to ensuring that people who are summoned for jury service are not excused from further attendance too readily – it is vital that jury service is shared among the community as equitably as possible and that juries represent a broad range of people with different skills, backgrounds and life experiences.

THE JURIES ACT: THIRD SCHEDULE

Section 5(c)(ii) of *Juries Act 1957* (WA) provides that a person who is otherwise liable for jury service is excused from serving as a juror 'if, pursuant to the provisions of this Act, the court, judge, sheriff or summoning officer excuses him or her from serving as a juror'.

The Third Schedule of the *Juries Act* provides for the grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the by the court, namely:

- illness,
- undue hardship to himself or another person,
- circumstances of sufficient weight, importance or urgency, or
- recent jury service.

Pursuant to ss 27(1) and 32 of the *Juries Act* the summoning officer and the trial judge have the power to excuse from further attendance a member of a jury panel (ie, the group of people assembled in the courtroom and from which the final jury will be selected). This power is tied to the grounds specified in the Third Schedule.

In addition, the summoning officer has the power to excuse from further attendance any person who has been summoned for jury service.[6] This power enables the summoning officer to excuse people summoned before the jury summons date or before a jury panel is assembled. There is also a general power vested in the court (before which a pool precept is returnable) to excuse from attendance any person whose name is included in

1. *Juries Act 1957* (WA) sch 3.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
3. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007). See further discussion below Chapter Seven, 'Reimbursement of lost income'.
4. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
5. See above Chapter One, Guiding Principle 3(iii).
6. *Juries Act 1957* (WA) s 32D(3).

the jury panel.[7] Neither of these provisions specifies the grounds on which a person may be excused and they appear to accommodate reasons other than those set out in the Third Schedule.

Currently, applications for excuse are assessed subjectively by the Sheriff's Office. There are no guidelines although the Western Australian Jury Manager explained that he stresses to staff the importance of ensuring that people seeking to be excused have demonstrated 'real hardship' not just minor inconvenience.[8] Most people seek to be excused before the jury summons date; however, there are also some people who seek to be excused when they attend court. Obviously, circumstances may change from the time a person receives a summons to the time that they attend court.[9]

The grounds for excusal for cause

Currently, there are four (somewhat overlapping) grounds on which a person summoned can seek to be excused for cause:

Illness: The Commission has been advised that a medical certificate is typically required if a person seeks to be excused on the basis of illness but in some instances the Sheriff's Office has accepted a statutory declaration without a medical certificate.[10] Similarly, the trial judge may require a person whom he or she excuses to provide a medical certificate at a subsequent time. While viewing the empanelment of a jury in a five-week trial, the Commission observed a number of jurors who applied to the trial judge to be excused. In one instance, the person explained that he had a medical condition that made it difficult to concentrate for long periods of time. The judge excused this person but ordered that documentary proof be submitted to the Sheriff's Office within a specified period.

Undue hardship: This ground covers hardship to the person summoned but also hardship to any other person. For example, in the above five-week trial a man was excused because he was required to accompany his wife, who was ill with cancer, to a number of appointments during the jury service period.

Circumstances of sufficient weight, importance or urgency: There is a significant degree of overlap between this ground and the ground of undue hardship. During the abovementioned jury empanelment a number of prospective jurors were excused including a person who was due to depart for a pre-booked holiday; a self-employed stockbroker who would be unable to maintain his client base if required to undertake jury service for five weeks; a person due to attend a pre-paid one-off conference; and a person who was accommodating elderly relatives from interstate. These excuses fall under both concepts (ie, undue hardship or circumstances of sufficient weight, importance or urgency).

Recent jury service: A person is usually excused on this basis if they have served on a jury within the previous 12–18 months.[11] The Commission notes that some jurisdictions provide an automatic right to be excused for jurors who have undertaken recent or lengthy jury service.[12] The VPLRC concluded that persons who have served for a lengthy period should be entitled to an exemption in order to ensure that 'the burden of jury duty is spread more evenly among the community'.[13] Similarly, recent jury service was the only category of exemption as of right that was recommended to be retained by NSWLRC.[14] While the Commission acknowledges that people who have undertaken recent or lengthy jury service may have a very strong basis for being excused, the Commission favours a case-by-case approach because it enables the individual circumstances to be considered. Specifically, in Western Australia 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. Bearing in mind the Commission's Guiding Principle 6—that reforms should take into account local conditions—it would not be feasible to provide an automatic right to be excused on the basis of jury service because in these jury districts members of the community are sometimes required to serve on a jury more than once a year.

The formulation of the grounds for excuse varies between jurisdictions. In some jurisdictions the legislation contains extensive criteria[15] but in others the legislation merely states that jurors can be excused for good or sufficient cause.[16] Western Australia, like South Australia and the Australian Capital Territory, defines the grounds

7. *Juries Act 1957* (WA) s 32H(5).
8. Carl Campagnoli, Jury Manager (WA) consultation (7 December 2007).
9. Carl Campagnoli, Jury Manager (WA) consultation (6 July 2009).
10. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007).
11. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009). Although in some regional areas this is not necessarily the case because of a lack of available jurors: see Chapter Two, 'Regional issues'.
12. *Jury Act 1995* (Qld) s 23; *Juries Act 1977* (NSW) s 39; *Juries Act 1967* (ACT) s 18A.
13. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1 [3.181].
14. NSWLRC, *Jury Selection*, Report No 117 (2007) 106.
15. See *Juries Act 2003* (Tas) s 9; *Juries Act 2000* (Vic) ss 8 &12; *Jury Act 1995* (Qld) s 21.
16. *Juries Act 1977* (NSW) s 38; *Jury Act* (NT) s 15.

for excusal in fairly general terms.[17] After examining the legislation in other jurisdictions the Commission has formed the view that two concepts—hardship and inconvenience—encompass all of the potential reasons a person would seek to be excused from jury service. However, it is vital that the degree of hardship or inconvenience that must be demonstrated is sufficiently high so that people are not excused from jury service too readily. In this regard, the Commission is attracted to two expressions used by the Law Reform Commission of Hong Kong. In addition to the presence of bias or beliefs that are incompatible with jury service, it was recommended that a person should only be exempted, excluded or deferred from jury service 'where substantial inconvenience to the public may result' or 'where undue hardship or extreme inconvenience may be caused to the person'.[18] The Commission agrees with the distinction between inconvenience to the public and inconvenience to the person. This is especially the case bearing in mind the Commission's proposed abolition of the categories of excuse as of right for emergency services personnel and health professionals. The test for these types of occupational groups should not be as strict as it is for an individual because jury service may potentially impact upon a significant number of people.

In addition, as mentioned above, the summoning officer or the judge may also need to excuse a person summoned from further attendance if the particular circumstances indicate that they are unable to discharge their duties as a juror. For example, the summoning officer may notice that a prospective juror in the jury assembly room is unable to sufficiently understand English. Also, a person may advise the court that they know the accused and the judge may need to release this person from the jury panel. The NSWLRC recommended that the concept of 'good cause' should be defined to cover the following situations:

> (a) service would cause undue hardship or serious inconvenience to an individual, to his or her family, or to the public;
>
> (b) some disability associated with that individual would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror; and
>
> (c) a conflict of interest or some other knowledge, acquaintance or friendship exist that may result in the perception of a lack of impartiality in the juror.[19]

Based partly on this formulation and the concepts used by the Law Reform Commission of Hong Kong, the Commission proposes that the Third Schedule be amended to make absolutely clear the circumstances in which the summoning officer or the judge may excuse or release a person summoned from further attendance. Consistent with the Commission's Guiding Principle 5, that the law should be simple and accessible,[20] this proposal enables all those who are potentially involved in the jury system to understand the grounds on which a person may seek to be excused from jury service or otherwise relieved of the obligation to serve.

PROPOSAL 46

Third Schedule: grounds on which a person may be excused from jury service

That the Third Schedule of the *Juries Act 1957* (WA) be amended to provide that the grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court are:

- Where service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person.
- Where a person who, because of an inability to understand and communicate in English or because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror.
- Where a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.

Guidelines

In some jurisdictions, guidelines are available for the summoning officer or the court to assist in determining applications for excuse. The benefit of guidelines is increased consistency and direction to ensure that

17. Under ss 16(1) & (2) of the *Juries Act 1927* (SA) a person may be excused by sheriff or judge from further attendance for the following reasons: the person has served within the previous three years; the person is one of two or more partners or two or more employees from the same establishment who have both or all been summoned on the same days; ill-health, conscientious objection or matter of special urgency or importance; or any reasonable cause. In the Australian Capital Territory, a judge or the sheriff has power to excuse a person summoned for jury service because of illness; pregnancy; the need to care for children, aged persons or ill persons; circumstances of sufficient importance or urgency; or two or more partners or employees of the same establishment have been summoned on the same day: *Juries Act 1967* (ACT) ss 14 & 15.
18. Law Reform Commission of Hong Kong, Juries Sub-Committee, *Criteria for Service as Jurors*, Consultation Paper (2008) 107, Recommendation 8.
19. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 31.
20. See above Chapter One, Guiding Principle 5.

prospective jurors are not too readily excused from their important civic responsibility. In England, guidelines cover both excuses and deferral. It is stated that deferral should always be considered first and, hence, a person should only be excused from jury service in 'extreme circumstances'. [21]

In New South Wales there are formal guidelines but these guidelines are not publicly available.[22] A New South Wales study in 1994 observed that written guidelines in the form of a three-page memorandum had been distributed to staff of the Sheriff's Office in order to promote consistency in determining applications to be excused for good cause.[23] The study also noted that the following reasons were usually sufficient to grant an application for excuse: illness of the person summoned or illness of a family member; a pre-planned holiday or overseas trip; a pre-planned business meeting; the need to prepare or sit for exams or complete assignments; the need for teachers or lecturers to supervise exams; attendance at a job interview; very recent commencement of a new job and genuine financial hardship. It was also explained that applications based on ordinary work commitments and reluctance or lack of interest in participating in jury service would normally be rejected.[24]

Despite noting that the provision of publicly available guidelines might 'provide a template of potential excuses that could be abused by those who set out to avoid jury service'[25] the NSWLRC recommended that guidelines should be published. It also recommended that the guidelines should take into account a number of matters including:

- where illness, pregnancy, poor health or disability would make jury service unreasonably uncomfortable or incompatible with good health;
- undue hardship (both personal and business);
- excessive court travelling time;
- inconvenience to the public or functioning of the government;
- care-giving obligations where no reasonable substitute care available;
- where a person is one of two or more partners in the same business or one of two or more employees of same business establishment (with less than 25 employees) who have been summoned at the same time;
- objectively demonstrated religious or conscientious beliefs that would be incompatible with jury service;
- existence of possible bias because of previous relationship with the accused or the victim;
- where age would make jury service unduly onerous;
- where the person has a high public profile and jury service may pose a security risk;
- pre-existing commitments such as holidays, weddings, funerals, graduations, exams, etc;
- where a teacher or lecturer is scheduled to supervise exams; or
- any other matter of special or sufficient weight, importance or urgency.[26]

Similarly, the VPLRC concluded in its 1996 report that 'the criteria governing excusal for good reason should be generally known and consistently applied'.[27] It was recommended that guidelines should be developed by the judges of the Supreme Court and District Court and published as a practice direction.[28]

During consultations for this reference it was suggested to the Commission that guidelines for excusal should not be publicly available. It was noted that if people became aware of guidelines they may adjust their application to fit the criteria.[29] The Commission considers that guidelines would be useful for those who are required to assess applications for excusal but does not consider that it is necessary for guidelines to be made publicly available. The legislative criteria (substantial inconvenience to the public or undue hardship or extreme inconvenience to a person) are sufficient to enable a prospective juror to complete a statutory declaration or apply in person for excusal on the jury summons date. Guidelines should be prepared by the Sheriff's Office (in consultation with the

21. Her Majesty's Courts Service, *Guidance for Summoning Officers When Considering Deferral and Excusal Applications:* see <http://www.hmcourts-service.gov.uk>. Deferral of jury service is discussed below.
22. 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) 20. See also NSWLRC, *Jury Selection*, Report No 117 (2007) 129.
23. Findlay M, *Jury Management in New South Wales* (Carlton: Australian Institute of Judicial Administration, 1994) 41.
24. Ibid 41–2.
25. NSWLRC, *Jury Selection*, Report No 117 (2007) 134.
26. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 33.
27. VPLRC, *Jury Service in Victoria*, Final Report (1996) vol 1, [3.190].
28. Ibid, Recommendation 48. Section 8 of the *Juries Act 2000* (Vic) stipulates criteria for determining 'good reason' and including illness or poor health; incapacity; excessive travelling time; substantial hardship; substantial financial hardship; substantial inconvenience to the public; the need to care for dependants where no alternative care reasonably available; advanced age; incompatible religious beliefs; and any other matter of special urgency or importance.
29. Judge Yeats, consultation (20 December 2007); Justice McKechnie, consultation (19 December 2007).

judiciary) to ensure that applications are assessed in a consistent and rigorous manner.[30] In order to emphasise this, the Commission suggests that the guidelines should contain specific reference to two important principles – that juries should be broadly representative and that jury service is an important civil duty to be shared by the community.

The Commission notes that the Attorney General has suggested that a selection of excuse applications should be objectively verified by testing a sample of approximately 15–20% of all excuse applications.[31] The Commission emphasises that properly prepared guidelines that include useful examples of undue hardship and substantial or extreme inconvenience and that also contain information about the nature or degree of evidence required to support a successful application in particular circumstances may alleviate the need for such a costly testing process. Furthermore, guidelines should include relevant information to assist the summoning officers and judges in determining if a person summoned for jury service is unable to discharge the duties of the juror and should therefore be released from the obligation to serve.

PROPOSAL 47

Guidelines

That the Sheriff's Office in consultation with Supreme Court and District Court judges should prepare guidelines for determining whether a person summoned for jury service should be excused from further attendance and that these guidelines should include:

1. guidance for determining applications to be excused by persons summoned for jury service on the basis of substantial inconvenience to the public or undue hardship or extreme inconvenience to a person including specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected;

2. that applications for excuse should be assessed with reference to two guiding principles – that juries should be broadly representative and that jury service is an important civil duty to be shared by the community;

3. guidance for determining if a person summoned for jury service should be excused from further attendance because he or she is unable to understand and communicate in English, including guidelines for dealing with literacy requirements in trials involving significant amounts of documentary evidence;[32]

4. guidance for determining whether a person summoned is unable to discharge the duties of a juror because of sickness, infirmity or disability (whether physical, mental or intellectual) bearing in mind the nature of the particular trial or the facilities available at the court;

5. guidance for determining whether a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror;

6. guidance about the type and nature of evidence required to support an application to be excused (eg, medical certificate, copies of airline tickets, student identification card); and

7. relevant procedures such as enabling prospective jurors to record their reasons for seeking to be excused where those reasons are of a private nature.[33]

Right of review

While the provision of comprehensive guidelines will promote greater consistency, it is recognised that applications for excuse (and deferral) will still be determined on a discretionary basis and hence there is the potential for applications to be unreasonably rejected. The Commission is not suggesting that applications are currently not processed in a fair and reasonable manner. However, because of the Commission's proposal to abolish the categories of excuse as of right there will be many more applications made on the basis of undue hardship or substantial or extreme inconvenience. The NSWLRC noted that any inconvenience to members of occupations previously excused as of right can be alleviated by ensuring that applications for excusal are dealt with in writing before the juror's attendance date and by also providing for a right of review if the application is refused.[34] It was explained that a right to

30. Guidelines will be particularly useful in regional areas because the summoning officer is the registrar of the court and has a variety of different responsibilities over and above the selection of juries.
31. Western Australia Parliamentary Debates, *Legislative Assembly*, 26 May 2009, 162–178 (Attorney General, Mr CC Porter).
32. See Proposal 40.
33. The practice occurs now in Western Australia. The NSWLRC noted that it may be embarrassing for prospective jurors to air their reasons in open court so it was recommended that the practice of enabling jurors to write down on a document their grounds for seeking to be excused should be encouraged: NSWLRC, *Jury Selection*, Report No.117 (2007) 131.
34. Ibid 113.

a redetermination should be available before the day of the trial because

> providing an avenue to seek a redetermination from a duty judge in advance of the date on the summons would provide greater certainty for those who, if their applications to be excused are not successful, may need to make alternative arrangements with respect to work, or other commitments.[35]

Some jurisdictions provide for a right of appeal or review against the decision of a summoning officer to reject an excuse application. For example, s 16(5) of the *Juries Act 1927* (SA) provides for a right of review to judge against a decision of the sheriff to refuse an application for excuse or deferral. This right of review is separate to a judge's power to excuse or defer at first instance. In Victoria, there is a right to appeal a decision of the Juries Commissioner to reject an application for excuse or deferral.[36] The Commission has been advised that there have been no appeals under this provision. But if a juror is disgruntled, the Juries Commissioner simply refers the matter to the judge who then determines the application.[37]

The Commission's preliminary view is that it would be useful if the *Juries Act* provided a mechanism for a person to apply to a judicial officer to be excused before the jury summons date. This would mean that in the event that the application was unsuccessful, the person would be in a better position to arrange alternative work or carer substitutes or cancel other commitments. As it currently stands, a person whose application has been rejected by the summoning officer must attend court and seek to be excused on the jury summons date. In regional areas, it would be difficult for an application to be made before the jury summons date because the circuit judge would not usually arrive in the location until that day. Therefore, it may be preferable to enable an application to be made to either a judge or magistrate in the relevant court. Because the Commission is not aware of any complaints about the current process of assessing and determining applications, submissions are sought about whether a right to apply to the court before the jury summons date is necessary and appropriate.

INVITATION TO SUBMIT I

Right to apply to the court to be excused from jury service before the jury summons date

The Commission invites submissions about whether the *Juries Act 1957* (WA) should be amended to enable a person who has been summoned for jury service to apply to the court (either a judge or magistrate) to be excused at a time before the date on which the person is due to attend court in response to the summons.

35. Ibid, Recommendation 35.
36. *Juries Act 2000* (Vic) s 10.
37. Rudy Monteleone, Juries Commissioner (Vic), consultation (16 June 2009). See also *Juries Act 2000* (Vic) s 11.

Deferral of jury service

MANY people apply to be excused from jury service for temporary reasons such as holidays, illness, exams, specialist medical appointments, weddings, or pressing work commitments (eg, a scheduled business trip or end of financial year responsibilities for accountants). In other cases, the reason for applying to be excused may be ongoing (eg, carer responsibilities or important professional responsibilities such as those undertaken by emergency services personnel). In these types of situations the ability to undertake jury service will depend on the availability of substitute carers or workers. For both temporary and ongoing reasons, the capacity to postpone jury service is likely to facilitate greater participation in jury service. This will in turn ease the burden on other members of the community and increase the representative nature of juries.

In Western Australia, people summoned for jury service are currently not permitted to defer jury service; however, deferral is available in other jurisdictions (Victoria, South Australia, Tasmania and the Northern Territory). One potential concern with a system of deferral is that it may undermine the principle of randomness (because the person is electing to undertake jury service at a specified time). However, the Commission emphasises that those who seek to defer jury service have already been randomly selected.[1] Therefore, deferral is not the same as volunteering for jury service. It is only after people have been randomly selected for jury service that they can seek to postpone their service.

THE BENEFITS OF DEFERRAL OF JURY SERVICE FOR WESTERN AUSTRALIA

In Perth for the 2008–2009 financial year, approximately 56,935 people were summoned for jury service. Of these people, less than 10% (5,647 people) actually served as jurors.[2] Thus, a substantial number of people are required to respond to a jury summons by either submitting a statutory declaration or attending court on the jury summons date. The ability to defer jury service would reduce the number of people required to be summoned for each court sitting because the Sheriff's Office would have a number of people flagged in the system who had postponed their jury service to that time. This would be particularly beneficial for regional Western Australia. The Commission notes that seasonal work such as tourism or farming is conducive to deferral. Deferral of jury service would assist in alleviating some of the pressures in those regional areas where the number of available jurors is limited.[3] Instead of being excused, seasonal workers could be available for jury service during the off-peak season and this will relieve the burden on other members of the local community.

It appears that the majority of jurors who have served in Perth would support a system of deferral. In the juror survey for Perth in 2008–2009, jurors were asked if they would prefer to have a say about when they performed jury service within a 12-month period. Of the 1,985 people who responded to the survey approximately 62% said that they would like to be able to determine when they undertook jury service.[4] It is also noted that a number of Western Australian judges have indicated their support for deferral during initial consultations for this reference.[5] The Western Australian Jury Manager also supports deferral of jury service because it will ease problems in regional trial courts and generally reduce the number of people excused from jury service.[6] Further, from consultations with those responsible for managing systems of deferral in other jurisdictions it appears that deferral is viewed extremely favourably.[7]

The Commission believes that a system of deferral should be introduced in Western Australia because it will result in a more equitable sharing of the responsibility of jury service and it will increase the representative nature of Western Australian juries. Furthermore, the ability to postpone jury service will ensure that any inconvenience caused by jury service is minimised because those people

1. NSWLRC, *Jury Selection*, Report No 117 (2007) 134.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Juror usage 2008–2009.*
3. See above Chapter Two, 'Regional issues'.
4. Thirty-two per cent replied 'no' and 6% did not answer this question: Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (June 2009).
5. Justice McKechnie, consultation (19 December 2007); Judge Mazza, consultation (19 December 2007); Judge Yeats, consultation (20 December 2007); Chief Judge Kennedy, consultation (18 January 2008).
6. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007) and (6 July 2009).
7. Rudy Montelone, Juries Commissioner (Vic) consultation (16 June 2009); Neil Iversen, Jury Manager (SA) consultation (17 June 2009); Mary Anne Warren (Jury Manager (NT) consultation (8 September 2009); Peter Graham, Jury and Security Coordinator (Tas) consultation (8 September 2009).

who defer jury service will have additional time to organise their affairs and reduce any inconvenience to themselves, to their families or to the public.

CRITERIA FOR DEFERRAL

As mentioned above, deferral of jury service is available in four Australian jurisdictions.[8] It also exists in England and is soon to commence in New Zealand.[9] In 2001 the New Zealand Law Commission recommended that people summoned for jury service should have an absolute right to defer jury service on one occasion to a specified period at any time within the following 12 months. In other words, it was proposed that the person seeking deferral would not be required to provide any reasons.[10] After examining the system for deferral in the various jurisdictions it appears that in all cases deferral of jury service is tied to excuse. For example, in South Australia a person can be excused from jury service on condition that their name is included in a list of people to be summoned at a later time or that they attend for jury service on a specified date.[11] Thus, the reason for any deferral must fit within the statutory criteria for excusal. The Commission has been told that an application for excuse that is based on temporary grounds is refused and the person is instead encouraged to defer jury service.[12] A similar provision exists in the Northern Territory.[13] In Victoria and Tasmania the legislation does not expressly stipulate that a person must demonstrate a good reason to be granted a deferral but in practice the Commission understands that this is the case.[14] In England, a person seeking deferral must show 'good reason' – the same terminology used in the provision enabling jurors to be excused from further attendance.[15]

In Victoria, there is a two-stage pre-attendance deferral process. Initially, a person who has been randomly selected for jury service is sent a Notice of Selection and questionnaire. In response to this notice, a person can indicate availability during the specified period (and will therefore be summoned), seek to excused or seek postponement of jury service. At this stage of the process (for the 2007–2008 financial year) approximately 11% of people postponed jury service. At the summons stage, 24% of people deferred jury service.[16] The Commission has been advised that approximately 10% of people summoned for jury service in South Australia apply for deferral.[17] A study in England in 1999 found that about 17% of people summoned for jury service had their jury service deferred to a later date.[18] The Commission notes that approximately 52% of people summoned for jury service in Perth are currently excused before the summons date and if deferral was available a significant proportion of these people could be deferred to a later time instead of being totally excused.

The Commission has concluded that deferral of jury service should be tied to excuse. In order for jury service to be deferred the person should first have demonstrated a valid reason to be excused from attending on the jury summons date. If it were otherwise, people may seek deferral simply to avoid minor inconvenience. If the majority of people summoned sought to postpone their jury service on this basis (ie, as of right) a deferral system would not assist in reducing the number of people required to be summoned; instead it would mean that more people would have to be summoned to accommodate deferrals. Thus, deferral of jury service should operate as a sub-category of excuse so that some people who would otherwise have been excused can be deferred instead.

Accordingly, the Commission proposes that the criteria for deferral should be tied to the grounds for excuse specified in the Third Schedule. Generally, this will mean that a person will need to demonstrate that at the relevant time jury service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person in order for jury service to be postponed.[19]

8. *Juries Act 2003* (Tas) s 8; *Juries Act 2000* (Vic) s 7; *Juries Act 1927* (SA) s 16(4); *Juries Act* (NT) s 17A.
9. *Juries Act 1974* (Eng) s 9A; Section 11 of the *Juries Amendment Act 2008* (NZ) inserts ss 14B & 14C into the *Juries Act 1981* (NZ) and provides for deferral of jury service to a period within the next 12 months. Sections 14B and 14C have not yet been proclaimed.
10. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 193.
11. *Juries Act 1927* (SA) s 16(4).
12. Jo Edwards, Sheriff's Office (SA), consultation (18 June 2009).
13. *Juries Act* (NT) s 17A.
14. Section 7 of the *Juries Act 2000* (Vic) provides that a person may apply to the Juries Commissioner for deferral. However, the *Jury Eligibility Questionnaire* sent to prospective jurors includes a question as to whether the person wishes to seek to be excused for at least 12 months. Another question asks if the person seeks to postpone jury service because they have a valid reason why they cannot serve during the jury service period. The Commission has also been told that in Tasmania a person seeking deferral must provide a valid reason: Peter Graham, Jury and Security Coordinator (Tas), consultation (8 September 2009).
15. *Juries Act 1974* (Eng) s 9A.
16. Rudy Monteleone, Juries Commissioner (Vic), consultation (2 July 2009).
17. Neil Iversen, Jury Manager (SA), consultation (17 June 2009).
18. Airs J & Shaw A, 'Jury Excusal and Deferral', *Home Office Research, Development and Statistics Directorate Research Findings No. 102* (1999) 2.
19. If it appeared to the summoning officer that a person was unable to discharge the duties of a juror that person would usually be excused. However, if the inability to discharge the duties of a juror was linked to the actual trial (eg, person unable to read or write in a trial involving a significant amount of documentary evidence or a person discloses knowledge of the one of the parties) the summoning officer could order that that person's juror service be deferred.

Deferral in practice

In Victoria, Northern Territory and Tasmania the time period for deferral is 12 months. The South Australian legislation is silent in relation to the time period but the Commission has been advised that in practice a person is usually deferred to a stipulated time during the following 12 months.[20] In its 2007 report the NSWLRC recommended that prospective jurors should be able to defer jury service to a suitable time within the next 12 months.[21] The Commission agrees that 12 months is an appropriate period but emphasises that a person who successfully applies for deferral cannot in practice have an unrestricted right to nominate the deferral date. At the time of deferral, the person should be permitted to nominate the most suitable date from a list of available options. However, available court sitting dates for the next 12 months will not always be known and are sometimes subject to change. In Perth, criminal sittings of the District Court and the Supreme Court commence every month. But in regional areas, criminal sittings vary and usually take place three to five times each year. The Commission is of the view that if jury service is postponed the person should be provided with an opportunity to select the most suitable date for their deferred jury service. But because the court sitting dates for the next 12 months will not always be known at the time of deferral it should be possible for the summoning officer to further defer jury service in the event that the date selected is a date on which the relevant court is not sitting.

Other than in those circumstances, the Commission believes that deferral of jury service should only be permitted on one occasion. In this regard, it has been observed that enabling a person to defer jury service on several occasions 'does not foster public respect for the jury system'.[22] The NSWLRC also recommended that a person who is 'otherwise eligible to be excused, should be allowed one opportunity to defer' jury service.[23] Having said that, the Commission emphasises that a person who is summoned to attend on the deferral date will still be entitled to apply to be excused for good cause because circumstances may have changed since the time that the person deferred jury service.[24] The Commission is of the view that the guidelines proposed above in relation to excusal[25] should incorporate relevant guidelines about deferral, including guidelines for excusing people on the deferral date.

PROPOSAL 48

Deferral of jury service

1. That the *Juries Act 1957* (WA) be amended to provide that:
   (a) The summoning officer may, instead of excusing a person from further attendance on the grounds specified in the Third Schedule defer a person's jury service to a specified time within the next 12 months.
   (b) When the person whose jury service has been deferred is summoned to attend on the specified date, the summoning officer is not permitted to again defer that person's jury service unless the date on which the person is due to attend is not a date on which the relevant court is sitting.
   (c) When the person whose jury service has been deferred is summoned to attend on the specified date, the court or the summoning officer may excuse that person from further attendance on the grounds specified in the Third Schedule.
2. The Sheriff's Office in consultation with Supreme Court and District Court judges prepare guidelines for determining whether a person summoned for jury service should be permitted to defer jury service and that these guidelines should include guidance about the circumstances in which it would be appropriate to excuse a person from further attendance on the subsequent deferral date.

20. Neil Iversen, Jury Manager (SA), consultation (17 June 2009).
21. NSWLRC, *Jury Selection*, Report No 117 (2007) Recommendation 32.
22. Report to the Chief Judge of the State of New York, *The Jury Project* (1994) 36, as cited in NSWLRC, ibid 133.
23. NSWLRC, ibid, Recommendation 32.
24. The NZLC stated that it 'would expect that excusals would not be readily granted to a juror who has already had the opportunity to defer to a more convenient time. However, circumstances may have arisen after deferral which necessitate excusal and it should be granted where appropriate': see NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 193.
25. Proposal 47.

Chapter Seven

Allowances, Protections and Penalties

Contents

Juror allowances

INADEQUACY of remuneration for jurors is a common complaint in many jurisdictions[1] and anecdotally it appears that many people have the perception that jurors are not properly compensated for their loss of income in Western Australia. This is perhaps the most widespread misconception about jury service in Western Australia and it may be a significant barrier to participation in jury service. In fact, Western Australia has the most generous system of juror allowances in Australia (and perhaps worldwide), covering actual loss of earnings for all jurors.[2] In the 2008–2009 financial year, the Sheriff's Office processed 3,777 claims for loss of income from jurors attending in Perth. This resulted in a total payment to jurors of $2,487,770 for the year.[3]

ALLOWANCES AND EXPENSES

Under s 58B of the *Juries Act 1957* (WA) a person who attends court pursuant to a jury summons (even if the person is not ultimately empanelled as a juror) is entitled to be paid an allowance by the state. The *Juries Regulations 2008* (WA) provide for the following payments to be made to jurors.[4]

Table of allowances for doing jury service[5]	
If the time of attendance does not exceed one half-day	$10.00
If the time of attendance exceeds one half-day but does not exceed 3 days, for each day	$15.00
If the time of attendance exceeds 3 days, for each day after the third day	$20.00

A further allowance for travel is also automatically paid to jurors.[6] This is calculated on the basis of the cost of return public transport from the juror's suburb of residence to the court. Where public transport is not available (eg, in regional areas) jurors are reimbursed for return travel from their place of residence to the court at an amount of 37.5 cents per kilometre.[7] This is comparable to travel allowances in other jurisdictions.[8] Unlike some jurisdictions,[9] meal allowances are not paid to Western Australian jurors unless the meal falls during a period when they are required to stay together.[10]

Although there is currently no legislative provision for reimbursement of child care expenses in Western Australia, the Commission understands that as a matter of policy child care expenses are reimbursed by the Sheriff's Office. However, in the 2008–2009 financial year there were only nine claims submitted for child care expenses.[11] Currently, people with the responsibility for children under the age of 14 years are entitled to be excused from jury service and this may explain the low number of claims. In Chapter Six the Commission proposes that all excuses as of right be repealed (including those categories that relate to child care or other carer responsibilities).[12] Accordingly, the Commission has also proposed that the *Juries Regulations* be amended to provide for the reimbursement of reasonable out-of-pocket child care and other carer expenses incurred as a direct consequence of jury service.[13]

1. See Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (2008) xiv; NSWLRC, *Jury Selection,* Report No 117 (2007) 213; VPLRC, *Jury Service in Victoria,* Final Report (1996) vol 1, 135; Sheriff's Office (SA), *South Australian Jury Review* (2002) 18; Department of Justice (Tas), *Review of the Jury Act 1899,* Issues Paper (1999) ch 4.
2. So long as the loss is actual and can be substantiated. See below, 'Application for reimbursement'.
3. Carl Campagnoli, Jury Manager (WA), email (2 September 2009).
4. *Juries Regulations 2008* (WA) reg 4; *Juries Act 1957* (WA) s 58B(6).
5. *Juries Regulations 2008* (WA) reg 4.
6. Jurors are required to complete their bank details on the bottom of the summons so that payment of allowances can be made directly to their bank accounts.
7. *Juries Regulations 2008* (WA) reg 5.
8. For example, New South Wales pays 30.07 cents per kilometre and Queensland pays 35 cents per kilometre. South Australia has the most generous travel allowance at 60 cents per kilometre. However, South Australian jurors may be required to drive very long distances to attend court because jury districts cover the entire state.
9. For example, luncheon allowances range from $6.60 in New South Wales to $12 in Queensland. In other states, such as South Australia, the sheriff must provide refreshments to jurors.
10. For example, when the jury has retired to consider its verdict.
11. Carl Campagnoli, Jury Manager (WA), consultation (11 September 2009).
12. See above Chapter Six, 'Excuse as of right' and Proposal 45.
13. Proposal 44.

REIMBURSEMENT OF LOST INCOME

The attendance allowances described above generally apply to people who have no employment-based income; that is, people who are unemployed, or who are students or retirees. This accounts for approximately 7% of empanelled jurors.[14] However, if the summoning officer is satisfied that a person doing jury service has lost income in an amount greater than the prescribed allowance, the person may be paid an amount that equals the loss.[15]

The *Juries Act* requires jurors who are employed (whether full-time, part-time or casual) to be paid their normal wages or expected earnings by their employer for the period of their jury service.[16] Non-government[17] employers may then apply to be reimbursed the wage paid to the juror for the period of jury duty.[18] Self-employed jurors are entitled to be paid for loss of actual earnings. There is no upper limit to reimbursement of wages or loss of income, so long as the claim is for actual loss and can be adequately substantiated.

Application for reimbursement

Regulation 8 of the *Juries Regulations* provides that applications may be made by employers for reimbursement of the employee-juror's wages[19] under statutory declaration and by providing the following evidence in support of the claim:

- the employer's Australian Business Number;[20]
- the earnings paid by the employer to the juror for any period that the juror did jury service;
- the name of the juror;
- the juror's occupation with the employer;
- the hourly rate paid by the employer to the juror;
- the number of hours of service of the juror lost by the employer as a result of the juror doing jury service.

As noted above, self-employed jurors can only claim loss of income where an actual financial loss is substantiated. Deferral of work is not enough to substantiate a claim for loss of income. Self-employed jurors must sign a statutory declaration and provide details of work lost and not regained as a result of jury service to enable the Sheriff's Office to assess whether an actual financial loss has occurred. In practice, evidence of lost income may be shown by provision of:

- a letter from the juror's client or regular contractor stating how much would have been earned from that client or contractor had the juror been available to work when performing jury service;
- a letter from the juror's accountant stating the juror's daily rate of pay and total income lost because of jury service; or
- a copy of the juror's personal income tax return[21] from the previous year showing gross income earned (from which a daily fee will be extrapolated).[22]

Claims are assessed by the Sheriff's Office and, once authorised, are effected by direct transfer to the employer's or self-employed juror's nominated bank account.[23] In regional areas, the claims are assessed and authorised by the summoning officer of the regional court and payment is effected through the Sheriff's Office in Perth.

In the Commission's view, the allowances and reimbursement of lost income provided for under the current *Juries Act* and *Juries Regulations* are appropriate. The Commission is not aware of any problems with the current reimbursement system or of any difficulties experienced by jurors or employers applying for reimbursement; however, it invites submissions, in particular from people who have served as jurors, as to whether there are any issues for reform.

14. Sheriff's Office (WA), *Results of Juror Feedback Questionnaire 2008–2009* (2009).
15. *Juries Regulations 2008* (WA) reg 4(2). This enables self-employed jurors to apply for reimbursement of income lost by reason of their jury service.
16. *Juries Act 1957* (WA) s 58B(3). Employers who fail to comply with this provision are subject to a fine of $2,000, which is equivalent to the fine provided for in s 83(4) of the *Industrial Relations Act 1979* (WA) for the breach by an employer of an award or industrial, employee–employer agreement.
17. Government employers (including government departments, state instrumentalities and state trading concerns) are not entitled to reimbursement and must continue to pay their employees whilst performing jury service: *Juries Regulations 2008* (WA) reg 6. Further, government employees are not entitled to be paid the allowance prescribed under the regulations: *Juries Act 1957* (WA) s 58B(6).
18. *Juries Act 1957* (WA) s 58B(4); *Juries Regulations 2008* (WA) reg 8.
19. For employers the amount paid is reimbursement of wages paid to the juror. Money paid to temporarily replace an employee whilst he or she is performing jury service is not reimbursable.
20. Provision of the employer's ABN obviates the need to withhold income tax and generate payment summaries for all jurors.
21. A company or partnership tax return is not acceptable for this purpose.
22. The self-employed juror must also provide his or her ABN to avoid income tax withholding as reimbursement of lost income is assessable for income tax purposes.
23. Section 58B(7) of the *Juries Act 1957* (WA) provides that any amount paid in respect of a juror is to be charged to the Consolidated Account.

INVITATION TO SUBMIT J

Reimbursement of lost income

The Commission invites submissions on whether there are any issues with the current system for reimbursement of lost income or the process of application for reimbursement.

NEED FOR COMMUNITY AWARENESS

As mentioned above, there is an apparent perception in the community that performing jury service will impose a financial burden on the juror or the juror's employer. This is clearly not the case; however, continuing misconceptions in this regard can discourage prospective jurors from serving or cause them to seek to avoid jury service by claiming an excuse that they might not otherwise have claimed. The Sheriff's Office receives a large number of excuses each year which are claimed on the basis that jury service will cause the juror or their employer undue financial hardship. While these excuses will very rarely succeed, they do generate an unnecessary amount of work for the Sheriff's Office in assessing and responding to the claim.

In May 2008 the Sheriff's Office undertook a jury awareness campaign in two areas of the state (the Kimberley and the Pilbara) where there are not always enough people on the electoral roll to cover the required juror quota and where attendance rates for jury service were in decline. It was found that many people were unaware that jury duty would not impose on them greatly in terms of time (the average length of service being just three days in duration)[24] and that their income could be reimbursed.[25] The awareness campaigns were particularly effective in educating communities about the importance of jury service and what the role of a juror is, and in dispelling popular misconceptions in the community in regard to loss of income. The Commission is advised that following these campaigns there was a significant increase in juror attendance rates in these areas.[26]

In the Commission's opinion it is important that awareness is raised in the community about the fact that the state reimburses jurors for actual loss of income and that in many cases jury service does not impose significantly on people's time. An awareness campaign would also provide a valuable opportunity to communicate the importance of jury service as a civic duty and vital part of Western Australia's criminal justice process.

PROPOSAL 49

Jury service awareness raising – reimbursement of lost income

That the Western Australian government provide resources for the Sheriff's Office to conduct regular jury service awareness raising strategies in metropolitan and regional areas to dispel any misconceptions that performing jury service will impose a financial burden on the juror or the juror's employer.

24. Information provided by Carl Campagnoli, Jury Manager (WA). It should be noted that Western Australia has one of the lowest lengths of jury service in Australia. Under s 42 of the *Juries Act 1957* (WA) jurors have a statutory limit of five days' attendance (unless they are serving as jurors in a part-heard case) and are only required to serve on one jury (if empanelled) even where the case is completed within the five days. In many other jurisdictions (eg, South Australia, Queensland, Australian Capital Territory and Northern Territory), jurors are on call for a full month with minimal compensation and may serve on up to four juries.
25. Information provided by Carl Campagnoli, Jury Manager (WA).
26. Carl Campagnoli, Jury Manager (WA), telephone consultation (2 September 2009).

Protection of employment

JURIES legislation in most Australian jurisdictions provides for protection of jurors' employment by creating an offence for unfair dismissal or prejudice to employees summoned for jury service.[1] South Australia is the only jurisdiction that does not provide such protection in its Juries Act,[2] while in Western Australia the protection is limited to payment of wages while doing jury service.[3] In its 2007 study into matters that influence juror satisfaction in Australia, the Australian Institute of Criminology found that security of employment was a significant concern for people performing jury service.[4] It recommended that legislation be enacted in all jurisdictions to protect the income and jobs of jurors.[5]

The Commission has been advised by the Jury Manager in Perth that on occasion prospective jurors have complained that their employer has threatened them with dismissal if they perform jury service or has applied undue pressure on the employee to seek excusal.[6] Because there is currently no express offence in the *Juries Act 1957* (WA), the Sheriff's Office can only telephone the juror's employer and warn that interference with a person's jury service may constitute a contempt of court punishable by a fine or imprisonment.[7] The Commission's Guiding Principle 4 supports reforms to the current law that will prevent or reduce any adverse consequences resulting from jury service. Western Australia is currently out of step with other Australian jurisdictions in relation to legislating for the protection of jurors who may be unfairly dismissed or whose employment may in anyway be prejudiced by their performance of jury service. The Commission is advised that the Courts' Jury Advisory Committee supports amendment of the *Juries Act* to provide for an offence to protect jurors' employment.[8] Indeed this course was suggested as early as 1981 by the Full Court of the Supreme Court of Western Australia as being preferable to controlling such conduct by actions for contempt of court.[9] The Commission agrees that a legislated offence is the appropriate course.

Having examined the legislative models currently existing in Australian jurisdictions, the Commission favours the legislative formulation found in s 76 of the *Juries Act 2000* (Vic):

> **Employment not to be terminated or prejudiced because of jury service**
>
> (1) An employer must not—
>
> (a) terminate or threaten to terminate the employment of an employee; or
>
> (b) otherwise prejudice the position of the employee—
>
> because the employee is, was or will be absent from employment on jury service.
>
> Penalty: In the case of a body corporate, 600 penalty units; In any other case, 120 penalty units or imprisonment for 12 months.
>
> (2) In proceedings for an offence against subsection (1), if all the facts constituting the offence other than the reason for the defendant's action are proved, the onus of proving that the termination, threat or prejudice was not actuated by the reason alleged in the charge lies on the defendant.
>
> (3) If an employer is found guilty of an offence against subsection (1), the court may—

1. See eg, *Juries Act 2003* (Tas) s 56; *Juries Act 2000* (Vic) s 76; *Jury Act 1995* (Qld) s 69; *Jury Act 1977* (NSW) s 69; *Jury Act 1967* (ACT) s 44AA; *Juries Act* (NT) s 52.
2. It is, however, noted that threatening an employee with loss of employment or income may fall under the offence of preventing or dissuading a person from performing jury service in the *Criminal Law Consolidation Act 1935* (SA) s 245(3).
3. Section 58B(3) of the *Juries Act 1957* (WA) provides that it is an offence for an employer not to pay the normal wage or earnings of an employee for the period that the employee is serving as a juror, whether or not the jury service breaches the contract of employment. The provision applies to any employee that is under a 'contract of service', which would include full-time, part-time and casual employees and possibly also independent contractors. The penalty ascribed to the offence is $2,000.
4. Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia,* Research and Public Policy Series No 87 (2008) 29.
5. Ibid 178.
6. Carl Campagnoli, Jury Manager (WA), email (11 September 2009).
7. In *Lovelady ex parte Medcalf* (1981) 5 A Crim R 197 the Full Court of the Supreme Court of Western Australia found that to dismiss a person from his or her employment because of jury service was directly to impinge on the administration of justice and would amount to contempt of court if it were proven beyond reasonable doubt.
8. Carl Campagnoli, Jury Manager (WA), email (11 September 2009).
9. *Lovelady ex parte Medcalf* (1981) 5 A Crim R 197, 200 (Burt CJ, Wickham & Kennedy JJ agreeing).

(a) order the employer to pay the employee a specified sum by way of reimbursement for the salary or wages lost by the employee; and

(b) order that the employee be reinstated in his or her former position or a similar position.

(4) If the court considers that it would be impracticable to re-instate the employee, the court may order the employer to pay the employee an amount of compensation not exceeding the amount of remuneration of the employee during the 12 months immediately before the employee's employment was terminated.

(5) An order under subsection (3)(a) or (4) must be taken to be a judgment debt due by the employer to the employee and may be enforced in the court by which it was made.

(6) The amount of salary or wages that would have been payable to an employee in respect of any period that his or her employer fails to give effect to an order under subsection (3)(b) is recoverable as a debt due to the employee by the employer in any court of competent jurisdiction.

However, the Commission believes that it is important that the offence extend also to anyone acting on behalf of an employer as adverted to in its New South Wales counterpart.[10] The Commission therefore makes the following proposal. The appropriate penalty for the proposed offence is discussed below.

PROPOSAL 50

Protection of employment

That a new provision be inserted into the *Juries Act 1957* (WA) modelled on the *Juries Act 2000* (Vic) s 76 and making it an offence for an employer or anyone acting on behalf of an employer to terminate, threaten to terminate or otherwise prejudice the position of an employee because the employee is, was or will be absent from employment on jury service.

INDEPENDENT CONTRACTORS

The above provision would cover part-time, full-time and casual employees; however, a question arises whether persons engaged as independent contractors under a contract of service should also be protected. The NSWLRC considered this issue and determined that it was appropriate for the protection provided under s 69 of the *Jury Act 1977* (NSW) to be extended to make it an offence to terminate the contract for services or otherwise prejudice an independent contractor where the contractor 'provides services on a continuing basis equivalent to employment'.[11] It was considered that such extension was essential in the contemporary workplace where many industries have moved from traditional employment structures to service contracts.[12] It is the Commission's preliminary view that the protection of employment should extend to independent contractors. Without this protection, many contractors who work for clients on a regular and ongoing basis may have no recourse under their contract for breach of contract where it is terminated solely by reason of the contractor performing his or her civic duty as a juror. However, before recommending this course the Commission seeks submissions as to whether there are any matters that it should have regard to in relation to independent contractors and jury service.

INVITATION TO SUBMIT K

Protection of employment – independent contractors

The Commission invites submissions about whether independent contractors who provide services on a continuing basis equivalent to employment should be statutorily protected from termination of their contract for service or from any prejudice to their position as contractor where they are required to perform jury service? Are there any matters to which the Commission should have particular regard in relation to protection of employment for independent contractors?

APPROPRIATE PENALTY

Penalties for employers who unfairly dismiss an employee, threaten to dismiss an employee or prejudice an employee's position as a result of performing jury service vary widely. Table C on page 130 sets out the current[13] penalties in Australian jurisdictions.

In addition, the legislation in New South Wales, Tasmania, the Australian Capital Territory and Victoria (upon which the Commission's proposed offence is modelled) provides for orders to be made to reinstate the unfairly dismissed employee and reimburse lost wages. Such orders are standard in unfair dismissal legislation and are reflected in the *Industrial Relations Act 1979* (WA) s 23A.

10. *Jury Act 1977* (NSW) s 69.

11. NSWLRC, *Jury Selection,* Report No 117 (2007) recommendation 68.

12. Ibid 246.

13. As at 7 September 2009.

Table C: Penalties attaching to protection of employment provisions in Australian jury legislation

	Penalty amount	Legislative provision
QLD	Maximum 1 year's imprisonment	*Jury Act 1995* (Qld) s 69
NSW	Fine of $2,200	*Jury Act 1977* (NSW) s 69
ACT	Maximum fine of $5,000 (individual) or $25,000 (corporation) or 6 months' imprisonment or both	*Juries Act 1967* (ACT) s 44AA
NT	Fine of $5,000 or 12 months' imprisonment	*Juries Act* (NT) s 42
TAS	Maximum fine of $14,400 (individual) or $72,000 (corporation) or 12 months' imprisonment	*Juries Act 2003* (Tas) s 56
VIC	Fine of $14,018 (individual) or $70,092 (corporation) or 12 months' imprisonment	*Juries Act 2000* (Vic) s 76

An appropriate penalty for an offence under the *Juries Act* for dismissal or prejudice to employment by reason of the employee's service as a juror must acknowledge that jury service is an important civic duty that should be respected by the community. In Western Australia employers can have little reason to threaten a person's employment on the basis of jury service because they are fully reimbursed their employee's wages. In these circumstances, the Commission favours a high penalty reflecting the seriousness of the offence.

The Commission notes that the current penalty for failure to pay an employee performing jury service in Western Australia[14] is $2000. While this is a reasonably low penalty, it intentionally reflects the penalty for breach by an employer of an employer–employee contract under s 83(4) of the *Industrial Relations Act.*[15] However, unfair dismissal or prejudicing an employee's position by reason of the employee's jury service is, in the Commission's opinion, a much more serious offence. In light of this, and in order to act as a deterrent, the Commission believes that the offence should carry both a fine and an alternative penalty of imprisonment. The Commission's preliminary view is that the fine should be in the range of $5,000 to $10,000 with an alternative penalty of 12 months' imprisonment. The Commission seeks submissions on this matter.

INVITATION TO SUBMIT L

Penalty for employers

The Commission invites submissions as to what level of fine is appropriate for employers who breach the offence created under Proposal 50 by terminating, threatening to terminate or otherwise prejudicing the position of an employee because the employee is, was or will be absent from employment on jury service? Should the penalty include an alternative term of imprisonment?

14. That is, the offence created under s 53B(3) of the *Juries Act 1957* (WA).
15. As explained in the explanatory memoranda to the amending Act: *Acts Amendment (Justice) Act 2008* (WA) s 67.

Penalties for failure to comply with a juror summons

IN the preceding section the Commission discusses the allowances and protections available to jurors. Juror allowances are designed to ensure that jurors are adequately reimbursed for financial loss resulting from jury service. The Commission has also proposed that a new offence be inserted into the *Juries Act 1957* (WA) to ensure that jurors' employment status is not prejudiced as a consequence of undertaking jury service. Providing jurors with adequate allowances and ensuring the protection of employment reflects the Commission's Guiding Principle 4: that the law should prevent or reduce any adverse consequences resulting from jury service.[1] On the other hand, it is equally important that members of the community do not ignore or trivialise their responsibility to participate in jury service. In this section, the Commission considers the consequences of failing to comply with a juror summons.

PROCESS FOR DEALING WITH NON-COMPLIANCE

The juror summons directs the person summoned to attend on a particular date and at a specified time and place. The summons form states that the person summoned is required to attend daily from that time until discharged. It is also clearly noted on the summons that failure to attend as required 'may result in a fine'. Statistics provided to the Commission by the Sheriff's Office show that for the 2008 calendar year approximately 16% of people summoned for jury service in Perth did not attend court or otherwise respond to the summons. Of these, 4% of people summoned had not been served with the juror summons and 3.6% of people received the summons late. A further 7.6% of people were excused after the Sheriff's Office conducted an investigation into why they did not attend and just less than 1% of people were referred to the District Court for action in respect of the non-compliance.[2]

In the metropolitan area, the Sheriff's Office compiles a list of people who did not attend ('DNA') for jury service. After waiting for approximately two weeks (in order to see if anyone contacts the Sheriff's Office because they received the summons late) the names on the list are checked against current addresses on police records. If the address on this database is different to the address to which the summons was originally sent (ie, the address on the electoral roll) the person is given the benefit of the doubt – it is assumed that the summons was not received. For those remaining, the Sheriff's Office endeavours to make contact by phone or letter in order to determine if there was a valid reason for non-attendance. Following this process, those people who have not responded or who have not demonstrated a valid excuse are referred to the District Court to be dealt with in accordance with the provisions of the *Juries Act*. The Chief Judge of the District Court then imposes a fine in accordance with s 55(2) of the *Juries Act* (which provides that a court may, after receiving a report from the summoning officer, impose summarily 'such fine as the court thinks fit'. The Sheriff's Office then notifies those people who have been fined that they have 28 days in which to pay or, alternatively, show cause (by affidavit or appearance in court) why the fine should not be enforced. After considering such an affidavit, a judge may 'remit or reduce the fine but in default of any order to that effect recovery of the full amount of the fine shall be enforced'.[3] The fine imposed is then enforced through the Fines Enforcement Registry.[4]

The procedure appears to be different in regional courts because s 56(1) of the *Juries Act* provides that if a circuit court has imposed a fine for non-compliance with a juror summons, the person must show cause to the Supreme Court (as distinct from any court) why payment of the fine should not be enforced.

Section 59(1) of the *Juries Act* provides that a fine imposed under the Act is to be enforced under the provisions of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA). The fine is taken to be imposed on the date when the judge makes an order under s 56 to remit or reduce the fine or on the date a summons was issued to the person to show cause why the fine should not be enforced (whichever is the later).[5] Therefore, in order to enforce the fine through the *Fines, Penalties and Infringement Notices Enforcement Act* it is necessary for a

1. See above Chapter One, 'Guiding principles for reform of the juror selection process'.
2. Sheriff's Office (WA), *Jury Information System Statistic Report: Breakdown of juror excusals – Perth Jury District 2008* (2009).
3. *Juries Act 1957* (WA) ss 56(2) & (3).
4. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007) and (6 July 2009).
5. *Juries Act 1957* (WA) s 59(2).

summons to first be issued by the court calling on the juror to show cause.

During consultations for this reference the Commission was advised by the Jury Manager and the Chief Judge of the District Court that the process for imposing and enforcing fines for non-compliance is cumbersome and inadequate.[6] The Commission agrees. The process involves multiple stages: a DNA investigation by the Sheriff's Office; referral of matters to the District Court; imposition of a fine by a judge; issuing of summons and notices to the person fined; consideration by a judge of any affidavits in relation to why the fine should not be enforced; and finally a decision to remit or reduce the previous fine imposed. And, after all of this takes place, outstanding fines are enforced under the *Fines, Penalties and Infringement Notices Enforcement Act* (which contains a series of options and stages for enforcing fines including possible licence suspension, seizure of goods and, ultimately, imprisonment). The Commission is of the view that the enforcement of fines for non-compliance should be simplified and streamlined. In particular, the Commission is of the view that the current process for imposing and enforcing fines for non-compliance creates an unnecessary burden on judicial resources.

The Commission's consultations have suggested that the best way of dealing with non-compliance is by an automatic infringement notice for non-compliance with a juror summons issued by the Sheriff's Office. The Commission agrees that a fine by way of infringement notice is appropriate, though it questions whether such a fine should apply 'automatically'. In this regard, the Commission notes the following:

- There are a significant number of people summoned who do not receive the juror summons at all or in time (eg, in 2008 approximately 7.6% of people summoned for jury service in Perth).
- That in certain regional locations there is no postal delivery service and therefore, unless mail is regularly collected from the post office, the person is unlikely to receive the juror summons[7] in time and may not receive the relevant notices from the Fines Enforcement Registry.
- That if an infringement is registered with the Fines Enforcement Registry and a licence suspension order has been made in default of payment, an application has to be made to a magistrate to cancel the licence suspension order.

6. Carl Campagnoli, Jury Manager (WA), consultation (7 December 2007); Chief Judge Kennedy, consultation (17 January 2008).
7. See above Chapter Two, 'Problems with the jury selection process'.

Therefore, in order to minimise any potential unfairness to members of the community who were genuinely unaware of the requirement to attend for jury service, the Commission supports a continuation of the existing practice of a DNA investigation by the Sheriff's Office.[8] This investigation process will identify some jurors who should not be penalised and will avoid the negative consequences of an automatic infringement for these people. Following the DNA investigation, the Commission proposes that the Sheriff's Office (or the summoning officer) issue an infringement notice in those cases where it appears that the person has failed to comply without a reasonable excuse.[9]

PROPOSAL 51

Penalties for non-compliance with a juror summons

That the *Juries Act 1957* (WA) be amended to provide that:

1. It is an offence to fail to comply with a juror summons without reasonable excuse.
2. If the summoning officer has reason to believe that a person has, without reasonable excuse, failed to comply with a juror summons, the summoning officer may issue an infringement notice in the prescribed form.[10]

APPROPRIATE PENALTY

The Commission understands that, in practice, fines in the amount of $250 are generally imposed on non-attending jurors in the metropolitan area, although in

8. The Jury Manager has indicated his support for a system where a preliminary investigation is undertaken before an infringement is issued: Carl Campagnoli, Jury Manager (WA), consultation (20 August 2009).
9. The offences of failing to comply with a juror summons in Victoria, Queensland, New South Wales and the Australian Capital Territory each adopt a similar phrase (eg, 'without reasonable excuse' or 'without valid and sufficient excuse': *Juries Act 2000* (Vic) s 71; *Jury Act 1995* (Qld) s 28; *Juries Act 1977* (NSW) s 63(3); *Juries Act 1967* (ACT) s 41.
10. Under the *Juries Act 1957* (WA) a fine may be imposed on a person who fails to attend a court or fails to attend the jury assembly room. Likewise, a talesman may be fined for failing to attend court or wilfully withdrawing him or herself from the court (s 55(1)(b)). Section 55 also provides that a person may be summarily fined by the court if he or she 'personates or attempts to personate a juror whose name is on a jury panel for the purpose of sitting as that juror' or if he or she knowingly receives any sum over and above the amount allowed as fees or remuneration for attending a trial. The Commission notes that these other offences may need to be reconsidered in light of the Commission's proposal; it may not be appropriate to issue an infringement notice for all of these offences and instead separate offences could be created with a specified maximum penalty.

Table D: Penalties for non-compliance with a juror summons in Australian jurisdictions[11]

	Maximum penalty	Legislative provision
WA	No set maximum amount (usually $250)	Juries Act 1957 (WA) s 55
NSW	If person elects to pay first notice – $1100 If not, but elects to pay penalty notice – $1650 If dealt with by court, up to $2200[12]	Juries Act 1977 (NSW) ss 63(1), 64 & 66
VIC	$3,504[13] or 3 months' imprisonment	Juries Act 2000 (Vic) s 71(1)[14]
QLD	$1,000[15] or 2 months' imprisonment	Jury Act 1995 (Qld) s 28(1)
SA	$1,250	Juries Act 1927 (SA) s 78(1)
TAS	$3,600[16] or 3 months' imprisonment	Juries Act 2003 (Tas) s 27(4)
ACT	$500[17]	Juries Act 1967 (ACT) s 41(1)
NT	$500	Juries Act (NT) s 50

some instances fines up to $1200 have been given in regional courts.[18] Table D above sets out the current penalties for non-compliance with a juror summons in other Australian jurisdictions. Although the Commission is unaware of the level of fines imposed in practice in other jurisdictions, it is noted that Western Australian penalties appear to be more lenient than elsewhere.

In its 2001 report, the New Zealand Law Commission (NZLC) discussed what the appropriate level of fine should be for failing to comply with a jury summons. At that time the maximum penalty in that jurisdiction was a fine of $300. It was observed that this penalty 'is no disincentive to, for example, a busy professional or businessperson, who may well see it as cost-effective to incur the fine rather than lose a day's working time'.[19]

In order to provide for greater deterrence the NZLC recommended that the maximum penalty be increased to $1000 and seven days' imprisonment. During Parliamentary debates in New South Wales it has been acknowledged that the penalty of $220 (which existed in New South Wales until 1999) was probably an inadequate deterrent. However, it was also contended that the subsequently enacted penalties (eg, $1100 for an infringement notice issued by the Sheriff) were too severe, especially for otherwise law-abiding citizens whose non-compliance is a result of an oversight rather than wilful disregard.[20]

The NSWLRC expressed the view that 'it would be undesirable if an impression was gained that the offence was not regarded by the courts as serious, or that jury service could be avoided by acceptance of a modest court-imposed fine or penalty'.[21] The Commission agrees that the penalty for failing to comply with a juror summons should reflect the seriousness of the offence and provide a sufficient incentive for jurors to attend for jury service. At the same time, the Commission recognises that community support for the jury system may be weakened if otherwise law-abiding citizens are penalised too harshly. For this reason, and bearing in mind that failure to attend for jury service will often occur as a result of oversight,[22] the Commission does not consider that imprisonment should be available as a penalty. However, the monetary penalty should be set at a sufficiently high level to act as a deterrent. Taking into account the penalties imposed in other jurisdictions, the

11. As at 7 September 2009.
12. The penalty for failing to comply under s 63 is expressed as a maximum of 20 penalty units – by virtue of s 17 *Crimes (Sentencing Procedure) Act 1999* (NSW) one penalty unit is $110.
13. The amount of the fine is stipulated as 30 penalty units – by virtue of s 5(2) of the *Monetary Units Act 2004* (Vic) one penalty unit is equal to $116.82.
14. Section 71(3) of the *Juries Act 2000* (Vic) also provides that for an offence of failing to attend court once empanelled as a juror the penalty is a fine of $7,009 or six months' imprisonment.
15. The amount of the fine is stipulated as 10 penalty units – by virtue of s 5(1)(c) of the *Penalties and Sentences Act 1992* (Qld) one penalty unit is equal to $100.
16. The amount of the fine is stipulated as 30 penalty units – by virtue of ss 4 & 4A of the *Penalty Units and Other Penalties Act 1987* (Tas) one penalty unit is currently equal to $120.
17. The amount of the fine is stipulated as five penalty units – by virtue of s 133 of the *Legislation Act 2001* (ACT) one penalty unit is equal to $100.
18. Carl Campagnoli, Jury Manager (WA), consultation (6 July 2009).
19. NZLC, *Juries in Criminal Trials*, Report No 69 (2001) 67. This recommendation was implemented in part in 2008, s 32 of the *Juries Act 1981* (NZ) provides for a maximum fine of $1000.
20. New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 November 2001, 18225 (Mr M Richardson).
21. NSWLRC, *Jury Selection,* Report No 117 (2007) 165.
22. In contrast, the offence of threatening a juror's employment as set out in Proposal 50 involves much more wilful behaviour.

Commission's preliminary view is that the infringement notice penalty should be somewhere in the vicinity of $600–$800. If the person elected to have the matter dealt with in court rather than paying the modified infringement penalty, the maximum penalty available would need to be higher.

INVITATION TO SUBMIT M

Penalty for failing to comply with a juror summons

The Commission invites submissions about what level of fine should be prescribed for an infringement notice issued by the Sheriff or the summoning officer to a person who has failed to comply with a juror summons. Further, what level of fine should be available for the offence of failing to comply with a juror summons if that offence is dealt with by a court?

Appendices

Contents

Appendix A: List of proposals

1 PROPOSAL 1 Page 22

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.

2 PROPOSAL 2 Page 23

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.

3 PROPOSAL 3 Page 34

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.

4 PROPOSAL 4 Page 38

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.

5 PROPOSAL 5 Page 40

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.

6 PROPOSAL 6 Page 43

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.

7 PROPOSAL 7 Page 43

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.

8 PROPOSAL 8 Page 44

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.

9 PROPOSAL 9 Page 53

Overseas and itinerant electors not liable for jury service

That provision be made in s 4 of the *Juries Act 1957* (WA) to remove the liability for jury service of people who are registered under the *Electoral Act 1918* (Cth) as eligible overseas electors or as electors with no fixed address and are recognised as such pursuant to ss 17A or 17B of the *Electoral Act 1907* (WA).

10 PROPOSAL 10 Page 55

Raise the maximum age for jury service

1. That the excuse as of right for persons who have reached the age of 65 years currently found Part II of the Second Schedule to the *Juries Act 1957* (WA) be abolished.

2. That the maximum age for liability for jury service be raised to 75 years.

11 PROPOSAL 11 Page 56

Amend juror liability provision

That s 4 of the *Juries Act 1957* (WA) be amended to read:

Liability to serve as juror

1. Each person residing in Western Australia —
   (a) who is enrolled on any of the rolls of electors entitled to vote at an election of members of the Legislative Assembly of the Parliament of the State; and
   (v) who is not above the age of 75 years,
   is, subject to this Act, liable to serve as a juror at trials in the jury district in which the person is shown to live by any of those rolls of electors.

2. A person who is an elector who has left Australia and who is enrolled pursuant to s 17A of the *Electoral Act 1907* (WA) or an elector with no fixed address and who is enrolled pursuant to s 17B of the *Electoral Act 1907* (WA) is not liable to serve as a juror.

12 PROPOSAL 12 Page 61

Permanence of occupational eligibility

That no occupation or office should render a person permanently ineligible for jury service.

13 PROPOSAL 13 Page 65

Ineligibility for jury service – judicial officers

1. That judges and magistrates should remain ineligible for jury service while holding office and for a period of five years from the date of the termination of their last commission as a judicial officer.

2. That this same ineligibility should extend to those holding acting or auxiliary judicial commissions in any of the state's courts and to commissioners of the Supreme Court and District Court.

14 PROPOSAL 14 Page 66

Ineligibility for jury service – masters

That masters of the Supreme Court and those holding acting commissions as masters of the Supreme Court should remain ineligible for jury service while holding office and for a period of five years from the date of the termination of their last commission as a master.

15 PROPOSAL 15 Page 67

Ineligibility for jury service – state coroner

That the state coroner should be ineligible for jury service while holding office and for a period of five years from the date of the termination of his or her commission as state coroner.

16 PROPOSAL 16 Page 68

Ineligibility for jury service – justices of the peace

That the exclusion of justices of the peace from jury service be confined to justices of the peace who have exercised the jurisdiction of the Magistrates Court at any time within a period of five years before being summoned to serve as a juror.

17 PROPOSAL 17 Page 70

Ineligibility for jury service – practising lawyers

That the exclusion of lawyers from jury service be confined to Australian legal practitioners, within the meaning of that term in the *Legal Profession Act 2008* (WA) s 5(a).

18 PROPOSAL 18 Page 71

Ineligibility for jury service – Supreme Court and District Court registrars

That registrars, and those holding acting commissions as registrars, in the Supreme Court or District Court should remain ineligible for jury service while holding office.

19 PROPOSAL 19 Page 71

Eligibility for jury service – Family Court registrars

That Family Court registrars be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(b) of the *Juries Act 1957* (WA).

20 PROPOSAL 20 Page 72

Ineligibility for jury service – judges' associates and ushers of the Supreme Court and District Court

That associates and ushers of judges of the Supreme Court or District Court should remain ineligible for jury service during their term of employment.

21 PROPOSAL 21 Page 72

Eligibility for jury service – judges' associates and ushers of the Family Court

That judges' associates and ushers of the Family Court be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(g) of the *Juries Act 1957* (WA).

22 PROPOSAL 22 Page 72

Ineligibility for jury service – Sheriff and sheriff's officers

That the Sheriff of Western Australia and deputies or officers of the Sheriff of Western Australia should remain ineligible for jury service during their term of employment and for a period of five years following termination of their employment as Sheriff or deputy sheriff.

23 PROPOSAL 23 Page 73

Ineligibility for jury service – bailiffs and assistant bailiffs

That a bailiff or assistant bailiff appointed under the *Civil Judgments Enforcement Act 2004* (WA) should remain ineligible for jury service during their term of employment.

24 PROPOSAL 24 Page 73

Ineligibility for jury service – Members of Parliament

That a duly elected member of the Legislative Assembly or Legislative Council should remain ineligible for jury service during their term of office and for a period of five years thereafter.

25 PROPOSAL 25 Page 73

Eligibility for jury service – officers of Parliament

That officers of the Legislative assembly and Legislative Council be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(a) and 2(b) of the *Juries Act 1957* (WA).

26 PROPOSAL 26 Page 74

Ineligibility for jury service – Commissioner of Police and police officers

1. That the Commissioner of Police should be ineligible for jury service during his or her term as Commissioner of Police and for a period of five years thereafter.
2. That a police officer should remain ineligible for jury service during his or her term of employment as a police officer and for a period of five years thereafter.

27 PROPOSAL 27 Page 76

Ineligibility for jury service – Corruption and Crime Commission

That the following officers of the Corruption and Crime Commission be ineligible for jury service during their term of employment, secondment or contract for services and for a period of five years thereafter:

- the Commissioner of the Corruption and Crime Commission (or any person acting in this role);
- the Parliamentary Inspector of the Corruption and Crime Commission (or any person acting in this role); and
- officers, seconded employees and contracted service providers of the Corruption and Crime Commission and of the Parliamentary Inspector of the Corruption and Crime Commission who are, in the opinion of the Commissioner of the Corruption and Crime Commission, directly involved in the detection and investigation of crime, corruption and misconduct or the prosecution of charges.

28 PROPOSAL 28 Page 76

Ineligibility for jury service – members of review boards

That members of the Mentally Impaired Accused Review Board, the Prisoners Review Board and the Supervised Release Review Board should be ineligible for jury service for the term of their membership of the relevant board and for a period of five years thereafter.

29 PROPOSAL 29 Page 77

Ineligibility for jury service – officers and employees of the Department of the Attorney General and the Department of Corrective Services

That those officers, employees and contracted service providers of the Department of the Attorney General and the Department for Corrective Services, other than clerical, administrative and support staff, whose work involves:

- the detection, investigation or prosecution of crime;
- the management, transport or supervision of offenders;
- the security or administration of criminal courts or custodial facilities;
- the direct provision of support to victims of crime; and
- the formulation of policy or legislation pertaining to the administration of criminal justice

should be ineligible for jury service during the term of their employment or contract for services and for a period of five years following termination of their employment or contract for services.

30 PROPOSAL 30 Page 77

Eligibility for jury service – ombudsman

That the Parliamentary Commissioner for Administrative Investigations (the ombudsman) be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 1(d) of the *Juries Act 1957* (WA).

31 PROPOSAL 31 Page 78

Eligibility for jury service – officers of the Department for Child Protection

That officers of the Department for Child Protection be removed from the list of ineligible occupations in the Second Schedule, Part I, clause 2(k) of the *Juries Act 1957* (WA).

32 PROPOSAL 32 Page 88

Qualification for jury service: unconvicted accused

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that an accused who is currently remanded on bail or in custody awaiting trial is not qualified for jury service.

33 PROPOSAL 33 Page 88

Qualification for jury service: unsentenced offenders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a convicted accused who is currently on bail or remanded in custody awaiting sentence is not qualified for jury service.

34 PROPOSAL 34 Page 88

Current orders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she is currently subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution but) including any of the following orders:

(a) a Conditional Release Order or a Community Based Order (with community work only) under the *Sentencing Act 1995* (WA);

(b) a Pre-Sentence Order under the *Sentencing Act 1995* (WA); and

(c) A Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA).

35 PROPOSAL 35 Page 89

Traffic offenders

That s 5(b) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she is currently subject to a drivers licence disqualification for a period of 12 months or more.

36 PROPOSAL 36 Page 90

Disqualification from jury service on the basis of criminal history

That ss 5(b)(i) and 5(b)(ii) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified for jury service if he or she:

1. Has *at any time* been convicted of an indictable offence (whether summarily or on indictment) and been sentenced to death; strict security life imprisonment; life imprisonment; or imprisonment for a term exceeding 2 years or for an indeterminate period.

2. Has in the *past 10 years* been convicted of an indictable offence (dealt with either summarily or on indictment) and been the subject of a sentence of imprisonment (including an early release order such as parole, suspended imprisonment or conditional suspended imprisonment).

3. Has in the *past 5 years*:
   (a) been convicted of an offence on indictment (ie, by a superior court);
   (b) been the subject of a sentence of imprisonment (including parole or another early release order, suspended imprisonment or conditional suspended imprisonment); or
   (c) been subject to a sentence of detention (including a supervised release order) of 12 months or more in a juvenile detention centre

4. Has in the *past 3 years*:
   (a) been subject to a community order under the *Sentencing Act 1995* (WA); or
   (b) been subject to a sentence of detention (including a supervised release order).

5. Has in the *past 2 years* been convicted of an offence and been subject to a Youth Community Based Order, an Intensive Youth Supervision Order or a Youth Conditional Release Order under the *Young Offenders Act 1994* (WA).

6. Is *currently*:
   (a) on bail or in custody in relation to an alleged offence;
   (b) on bail or in custody awaiting sentence;
   (c) subject to imprisonment for unpaid fines; or
   (d) subject to an ongoing court-imposed order following conviction for an offence (excluding compensation or restitution) but including:
      (i) a Conditional Release Order or a Community Based Order (with community work only) under the *Sentencing Act 1995* (WA);
      (ii) a Pre-Sentence Order under the *Sentencing Act 1995* (WA);
      (iii) a Good Behaviour Bond or a Youth Community Based Order (with community work only) imposed under the *Young Offenders Act 1994* (WA); or
      (iv) a drivers licence disqualification for a period of 12 months or more.

Taking into account convictions, sentences and court-imposed orders in other Australian jurisdictions

That a new s 6 of the *Juries Act 1957* (WA) be inserted to provide that for the purposes of s 5(b) a person is not qualified for jury service in Western Australia

1. if he or she has been sentenced to or placed on an order that is of a similar nature to any one of the sentences or orders referred to in s 5(b) provided that the person was subject to that similar sentence or order in the relevant time period as set out above;
2. if he or she has been convicted of an offence on indictment in the past five years in another Australian jurisdiction; or
3. if he or she is currently on bail in relation to an alleged offence or awaiting sentence in another Australian jurisdiction.

37 PROPOSAL 37 Page 94

English language requirement

That section 5(b)(iii) of the *Juries Act 1957* (WA) be amended to provide that a person is not qualified to serve as a juror if he or she is unable to understand and communicate in the English language.

38 PROPOSAL 38 Page 95

Provision of information in different languages

That the jury summons and the Juror Information Sheet be updated to provide that if the person summoned does not understand or cannot read English, translated versions are available online or by telephoning the Sheriff's Office and that this information should be provided in at least the 10 most commonly spoken languages in Western Australia.

39 PROPOSAL39 Page 95

Jury service awareness raising – people from culturally and linguistically diverse backgrounds

That the Western Australian government provide resources for the Sheriff's Office to conduct regular jury service awareness raising strategies specifically targeted to people from culturally and linguistically diverse backgrounds.

40 PROPOSAL 40 Page 95

Guidelines for assessing English language requirements

1. That the sheriff develop guidelines to assist staff and judges in assessing whether prospective jurors can understand and communicate in English to a sufficient degree to enable them to discharge their duties as jurors.

2. That these guidelines include standardised questions to be asked if a person self-identifies as not understanding English; circumstances where further inquiries might be warranted (eg, juror appears unable to follow verbal instructions from jury officers); and specific processes to be used in cases involving a significant amount of documentary or written evidence.

41 PROPOSAL 41 Page 96

Statistics in relation to jurors from culturally and linguistically diverse backgrounds

That the Sheriff's Office should revise its juror feedback questionnaire to ensure that data is recorded in relation to the number of jurors who state that they speak a language other than English at home. For those people who respond that they do speak a language other than English at home, there should be an additional question asking if the other language is their first language.

42 PROPOSAL 42 Page 100

Disqualification for mental incapacity

That s 5(b) be amended to read:

Notwithstanding that a person is liable to serve as a juror by virtue of section 4 that person –

…

(b) is not qualified to serve as a juror if he or she –

…

(iv) is an involuntary patient within the meaning of the *Mental Health Act 1996* (WA);

(v) is a mentally impaired accused within the meaning of Part V of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA); or

(vi) is the subject of a Guardianship Order under s 43 of the *Guardianship and Administration Act 1990* (WA).

43 PROPOSAL 43 Page 103

Physical incapacity

1. That a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability. However, a physical disability that renders a person unable to discharge the duties of a juror in a particular trial will constitute a sufficient reason to be excused from jury service by the summoning officer or the trial judge under the Third Schedule to the *Juries Act 1957* (WA).
2. That a person who has a physical disability that may impact upon his or her ability to discharge the duties of a juror—including mobility difficulties and severe hearing or visual impairment—must notify the summoning officer upon receiving the summons so that, where practicable, reasonable adjustments may be considered to accommodate the disability.
3. That the sheriff should develop guidelines for the provision of reasonable adjustments, where practicable, to accommodate a prospective juror's physical disability.
4. That, where a physically disabled juror for whom relevant facilities to accommodate the disability have been provided is included in the jury pool, the court should be made aware of, in advance of empanelment, the nature of the disability and the facilities provided to accommodate or assist in overcoming the disability.

44 PROPOSAL 44 Page 111

Child care or other carer expenses

- That the *Juries Regulations 2008* (WA) be amended to insert a new regulation 5B to cover reimbursement of child care and other carer expenses.
- That this regulation provide that, for the purpose of s 58B of the *Juries Act 1957* (WA), the reasonable out-of-pocket expenses incurred for the care of children who are aged under 14 years, or for the care of persons who are aged, in ill health, or physically or mentally infirm are prescribed as an expense provided that those expenses were incurred solely for the purpose of jury service.

45 PROPOSAL 45 Page 113

Abolition of 'excuse as of right'

That Part II of the Second Schedule of the *Juries Act 1957* (WA) be abolished.

46 PROPOSAL 46 Page 116

Third Schedule: grounds on which a person may be excused from jury service

That the Third Schedule of the *Juries Act 1957* (WA) be amended to provide that the grounds on which a person summoned to attend as a juror may be excused from such attendance by the summoning officer or the court are:

- Where service would cause substantial inconvenience to the public or undue hardship or extreme inconvenience to a person.
- Where a person who, because of an inability to understand and communicate in English or because of sickness, infirmity or disability (whether physical, mental or intellectual), is unable to discharge the duties of a juror.
- Where a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror.

47 PROPOSAL 47 Page 119

Guidelines

That the Sheriff's Office in consultation with Supreme Court and District Court judges should prepare guidelines for determining whether a person summoned for jury service should be excused from further attendance and that these guidelines should include:

1. guidance for determining applications to be excused by persons summoned for jury service on the basis of substantial inconvenience to the public or undue hardship or extreme inconvenience to a person including specific examples of applications that should ordinarily be granted and examples of applications that should ordinarily be rejected;
2. that applications for excuse should be assessed with reference to two guiding principles – that juries should be broadly representative and that jury service is an important civil duty to be shared by the community;

3. guidance for determining if a person summoned for jury service should be excused from further attendance because he or she is unable to understand and communicate in English, including guidelines for dealing with literacy requirements in trials involving significant amounts of documentary evidence;

4. guidance for determining whether a person summoned is unable to discharge the duties of a juror because of sickness, infirmity or disability (whether physical, mental or intellectual) bearing in mind the nature of the particular trial or the facilities available at the court;

5. guidance for determining whether a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror;

6. guidance about the type and nature of evidence required to support an application to be excused (eg, medical certificate, copies of airline tickets, student identification card); and

7. relevant procedures such as enabling prospective jurors to record their reasons for seeking to be excused where those reasons are of a private nature.

48 PROPOSAL 48 page 122

Deferral of jury service

1. That the *Juries Act 1957* (WA) be amended to provide that:
   (a) The summoning officer may, instead of excusing a person from further attendance on the grounds specified in the Third Schedule defer a person's jury service to a specified time within the next 12 months.
   (b) When the person whose jury service has been deferred is summoned to attend on the specified date, the summoning officer is not permitted to again defer that person's jury service unless the date on which the person is due to attend is not a date on which the relevant court is sitting.
   (c) When the person whose jury service has been deferred is summoned to attend on the specified date, the court or the summoning officer may excuse that person from further attendance on the grounds specified in the Third Schedule.

2. The Sheriff's Office in consultation with Supreme Court and District Court judges prepare guidelines for determining whether a person summoned for jury service should be permitted to defer jury service and that these guidelines should include guidance about the circumstances in which it would be appropriate to excuse a person from further attendance on the subsequent deferral date.

49 PROPOSAL 49 Page 127

Jury service awareness raising – reimbursement of lost income

That the Western Australian government provide resources for the Sheriff's Office to conduct regular jury service awareness raising strategies in metropolitan and regional areas to dispel any misconceptions that performing jury service will impose a financial burden on the juror or the juror's employer.

50 PROPOSAL 50 Page 129

Protection of employment

That a new provision be inserted into the *Juries Act 1957* (WA) modelled on the *Juries Act 2000* (Vic) s 76 and making it an offence for an employer or anyone acting on behalf of an employer to terminate, threaten to terminate or otherwise prejudice the position of an employee because the employee is, was or will be absent from employment on jury service.

51 PROPOSAL 51 Page 132

Penalties for non-compliance with a juror summons

That the *Juries Act 1957* (WA) be amended to provide that:

1. It is an offence to fail to comply with a juror summons without reasonable excuse.
2. If the summoning officer has reason to believe that a person has, without reasonable excuse, failed to comply with a juror summons, the summoning officer may issue an infringement notice in the prescribed form.

Appendix B: List of invitations to submit

A INVITATION TO SUBMIT A Page 34

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?

B INVITATION TO SUBMIT B Page 35

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.

C INVITATION TO SUBMIT C Page 40

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.

D INVITATION TO SUBMIT D Page 44

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?

E INVITATION TO SUBMIT E Page 67

Ineligibility for jury service – industrial relations commissioners

Taking into account the desire for broad participation in jury service and the proposition that occupational ineligibility should be confined to those occupations that have an integral connection to the administration of justice, most particularly criminal justice, should the president and commissioners of the Industrial Relations Commission remain ineligible for jury service while holding office? If so, why?

F INVITATION TO SUBMIT F Page 70

Length of lawyers' ineligibility for jury service

Should lawyers remain ineligible for jury service for a five-year period after they cease practising law? If so, why?

G INVITATION TO SUBMIT G Page 86

Permanent disqualification from jury service

The Commission invites submissions about whether s 5(b)(i)(IV) of the *Juries Act 1957* (WA) (which currently provides that a person is not qualified for jury service if he or she has been convicted of an offence in Western Australia and sentenced to imprisonment for a term exceeding two years) should be amended and the period of two years increased (eg, to three years).

H INVITATION TO SUBMIT H Page 97

Participation in jury service by people from culturally and linguistically diverse backgrounds

That Commission invites submissions about the best way to increase the opportunity for people from culturally and linguistically diverse backgrounds to participate in jury service.

I INVITATION TO SUBMIT I Page 119

Right to apply to the court to be excused from jury service before the jury summons date

The Commission invites submissions about whether the *Juries Act 1957* (WA) should be amended to enable a person who has been summoned for jury service to apply to the court (either a judge or magistrate) to be excused at a time before the date on which the person is due to attend court in response to the summons.

J INVITATION TO SUBMIT J Page 127

Reimbursement of lost income

The Commission invites submissions on whether there are any issues with the current system for reimbursement of lost income or the process of application for reimbursement.

K INVITATION TO SUBMIT K Page 129

Protection of employment – independent contractors

The Commission invites submissions about whether independent contractors who provide services on a continuing basis equivalent to employment should be statutorily protected from termination of their contract for service or from any prejudice to their position as contractor where they are required to perform jury service? Are there any matters to which the Commission should have particular regard in relation to protection of employment for independent contractors?

L INVITATION TO SUBMIT L Page 130

Penalty for employers

The Commission invites submissions as to what level of fine is appropriate for employers who breach the offence created under Proposal 50 by terminating, threatening to terminate or otherwise prejudicing the position of an employee because the employee is, was or will be absent from employment on jury service? Should the penalty include an alternative term of imprisonment?

M INVITATION TO SUBMIT L Page 134

Penalty for failing to comply with a juror summons

The Commission invites submissions about what level of fine should be prescribed for an infringement notice issued by the Sheriff or the summoning officer to a person who has failed to comply with a juror summons. Further, what level of fine should be available for the offence of failing to comply with a juror summons if that offence is dealt with by a court?

Appendix C: Summons

JURIES ACT 1957 CRIMINAL PROCEDURE RULES 2005
Sheriff's Office, Level 2, 500 Hay Street
PERTH WA 6000
Tel: (08) 9425 2481 Fax: (08) 9425 4406

JURY DUTY
Your valued contribution to justice in Western Australia

SUMMONS TO JUROR

Please do not detach this slip

NAME

ATTENDANCE DATE

Summons number:

ATTENDANCE DETAILS

You are hereby summoned to attend on the date and at the time and place specified below to serve as a juror at the criminal sittings of the Supreme Court and the District Court:

Location: ***District Court Building***
Level 2, 500 Hay Street, Perth WA 6000

Date: ***Time:***

and to attend daily from then on at that place until you are discharged.

Date of birth:

Failure to attend may result in a fine

IMPORTANT INFORMATION

1. You are to bring this **summons** and **valid identification** (e.g. photo ID) with you on the date above.
2. You will be required to attend until you are discharged - usually for between **one to five days.**
3. You should **advise your employer** of this summons and the dates of service as soon as possible.
4. You should contact the Sheriff's Office if you no longer live in the **metropolitan area** (contact details below).
5. You should read the attached **juror information sheet** carefully. It will answer most of the questions you may have about this summons.

INELIGIBILITY, LACK OF QUALIFICATION AND EXCUSE

Some people may be ineligible, not qualified or excused from jury duty. In some cases, people have a right to be excused. More information is available on the back of the summons.

If you wish to apply to be excused (whether or not as a matter of right) or believe that you are ineligible or not qualified, you must complete the **statutory declaration** on the back of this summons.

This must be signed, witnessed by an authorised person and sent to:
The Sheriff
Level 2, 500 Hay Street
PERTH WA 6000
or by email or fax (details below) - send both sides of the page.

ENQUIRIES

Questions not answered in this summons or the enclosed **juror information sheet**, can be directed to the **Sheriff's Office.**

Phone: 9425 2481 Email: jurors@justice.wa.gov.au
Fax: 9425 4406 Website www.justice.wa.gov.au/ag

SUMMONS TO JUROR

PERSONAL BANK DETAILS ONLY *(please complete for payments)*	
Bank/Credit union name	Branch address
Branch code or BSB	Account number
Account name	Your daytime phone number
EMPLOYER'S NAME	

Date of issue: _____ Sheriff / District Court Registrar

Ineligibility, lack of qualification and excuse

Some people may be ineligible, not qualified or excused from jury duty. In some cases, people have a right to be excused. Some examples for each category are provided below.

Ineligible

You are not permitted to serve as a juror if you:

- are aged 70 years or older.
- are, or have been in the last five years, a justice of the peace; a member or officer of the Legislative Assembly or Legislative Council; a member of the Prisoners Review Board; a police officer; an employee of the Department of the Attorney General (unless working for the Public Trust office or the Registry of Births, Deaths and Marriages), Department of Corrective Services or Department for Community Development.
- an Australian lawyer (within the meaning of that term in the *Legal Profession Act 2008 Section 3).*

Not qualified

You are not permitted to serve as a juror if you:

- do not understand English.
- have any disease or infirmity of mind or body that will affect your ability to be a juror.
- have been convicted of an offence and sentenced to more than two years of imprisonment.
- have in the last five years, been the subject of a probation order or community order, been imprisoned or been detained in a juvenile institution.

Excused as of right

You have the right to be excused for reasons of:

- being a registered and practising medical practitioner, dentist, osteopath, nurse, midwife, vet, chiropractor, pharmacist, physiotherapist or psychologist.
- being an emergency services staff member.
- religion – people in holy orders.
- family – pregnancy; a person living with and providing full-time care to A) children aged under 14 years B) an aged person or C) a person in ill-health or who is physically or mentally infirm.
- age – between 65 and 70 years.

Other circumstances

You may be excused for the following reasons:

- illness (medical certificate required)
- undue hardship to yourself or another person due to jury service (evidence required)
- circumstances of sufficient importance or urgency (evidence required)
- recent jury duty.

TO APPLY TO BE EXCUSED FROM JURY DUTY OR IF YOU BELIEVE YOU ARE INELIGIBLE OR NOT QUALIFIED, YOU MUST COMPLETE THE STATUTORY DECLARATION BELOW.

STATUTORY DECLARATION	
I (print full name)	Date of birth / /
of (address)	Occupation
Date summoned	Daytime phone number
I sincerely declare, I claim not to be eligible, not qualified or apply to be excused from attending jury duty on the following grounds (please state whether you are applying to be excused as a matter of right or other circumstances):	
This declaration is true and I know that it is an offence to make a declaration knowing that it is false in a material particular. This declaration is made under the *Oaths, Affidavits and Statutory Declarations Act 2005*.	
At (place)	Signature of summoned person
This day of 20	Before me (witness)

This declaration must be made before a justice of the peace or other authorised person such as a teacher, chemist, accountant, bank manager, doctor or post office manager. For a full list of authorised persons go to www.dotag.wa.gov.au then click on Jury Duty, Excusal from Jury Duty and Statutory Declaration forms.

Please send completed, signed and witnessed form to:
The Sheriff, Level 2, 500 Hay Street, PERTH WA 6000 or Fax: 9425 4406 (fax both sides of the page).

Appendix D: Information sheet for jurors

Government of **Western Australia**
Department of **the Attorney General**

JURY DUTY Your valued contribution to justice in Western Australia

about jury duty

Your name has been randomly selected from the Western Australian electoral roll for possible participation in jury duty.

- You must attend jury selection at the time and place stated on the summons.
- If you think you have a good reason to be excused from jury duty, you can apply using the statutory declaration found on the back of the jury summons and lodge it in person or by mail to the Sheriff's Office. This should be done as soon as possible.
- The statutory declaration must be completed, signed, witnessed by an authorised person and lodged before you are due to attend for service.
- Failure to attend jury selection or to submit a statutory declaration may result in a court fine.

jury selection – how it works

What is a jury?

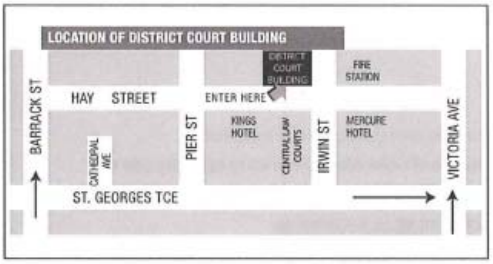
A jury is a group of 12 people who are randomly chosen to decide if an accused person is 'guilty' or 'not guilty', based on evidence given in a criminal trial.

Who is eligible to serve on a jury?

People aged between 18 and 70 years, who are listed on the electoral roll in each jury district can be selected for jury duty. There are 15 jury districts in Western Australia.

How long does jury duty last?

Jury duty may last from one to five days, but sometimes a trial may run longer. The judge will advise you of how long the hearing is expected to take. Courts usually sit on weekdays during normal business hours, with lunch and other breaks. Under normal circumstances, jurors are not required to stay over night and are expected to provide their own lunch.



How are jurors selected on the day?

- A number of potential jurors are selected from the jury assembly room and escorted to the courtroom by a jury officer. If an accused person pleads 'not guilty', 12 jurors are then chosen randomly for the trial.
- On some occasions, up to six extra jurors may be selected if a lengthy trial is expected.
- A lawyer may challenge the selection of any juror. No reason will be given for a juror challenge so you should not be concerned if it happens to you.
- After all jurors are chosen, the remaining participants will return to the jury assembly room for instructions regarding further jury duty during the week.

Where do I go?

The District Court Building is located at 500 Hay Street, Perth. When you enter you will be required to move through a security checkpoint before attending the Jury Assembly Room on level 2. If you are carrying any unauthorised items, such as drugs or weapons, they will be detected at the checkpoint. See map left.

A jury officer will greet you when you arrive on level 2 and ask for identification to support the details shown on your summons.

Government of **Western Australia**
Department of **the Attorney General**

JURY DUTY Your valued contribution to justice in Western Australia

frequently asked questions

Will I get paid for jury duty?

- In accordance with the *Juries Act 1957* your employer is required to continue to pay you your normal wages while you attend jury duty.
- Your employer may then apply to be reimbursed those wages. Please complete your employer's details on the front of the summons.
- Claim forms will be made available when you attend or they can be downloaded from our website, www.dotag.wa.gov.au
- Self-employed people may apply to be reimbursed loss of income that can be substantiated.
- If you are not working you will receive a small attendance fee for your time served as a juror.
- An attendance certificate for your employer will be provided on request.
- Public transport costs are reimbursed based on your current address. The money will be deposited in your bank account when you have completed jury duty. You will not be reimbursed for parking fees or fines incurred during jury duty.
- You need to complete your bank account details on the jury summons to ensure that payments are processed quickly.
- If you are not selected to attend court as a juror, you are expected to return to work as soon as possible.

What if my work commitments prevent me from attending jury duty?

If you believe you have a good reason for being excused from jury duty because of work commitments, you should:

- describe the hardship that would be caused if you were absent from work.
- use the statutory declaration on the back of the jury summons to record this information and apply to be excused.
- list your ABN if you are self-employed, otherwise you must attach a letter from your employer that supports your claim.

What if I have children to care for?

If you have children under the age of 14 you may be excused from jury duty. You must complete the statutory declaration on the back of the jury summons. If you wish to attend jury duty, childcare costs may be reimbursed – call the Sheriff's Office to discuss this further.

What if I am not well enough to attend jury duty?

If you are not well you must state this in the statutory declaration on the back of the jury summons, and attach a medical certificate. If you are ill on the date you are required in court, you must contact the Sheriff's Office for further instructions.

What if I will be away at the time I am required?

If you will be away at the time of jury duty you must state this in the statutory declaration and attach a copy of a travel itinerary or ticket.

What should I wear?

A neat standard of dress, including shoes, is required in court. The air-conditioning is quite cool in some courtrooms, so you may wish to bring a jacket.

What if I do not have a good understanding of English?

If you do not have a good understanding of English you must state this in the statutory declaration on the back of the jury summons.

IF YOU ARE UNABLE TO READ THIS INFORMATION, TAKE THIS PAGE AND THE JURY SUMMONS TO AN INTERPRETER

Nếu không ðọc ðýợc, xin mang tờ giấy này cùng với giấy triệu tập làm bồi thẩm ðến nhờ một thông ngôn viên giúp ðỡ.

如果你无法阅读本篇讯息的话，请你拿着本页及陪审团传票，找口译员帮忙。

若你不明白這些資料，就拿着這張紙和陪審團傳票去找翻譯員

SE NON POTETE LEGGERE QUESTA INFORMAZIONE, PORTATE QUESTA PAGINA E LA CITAZIONE DELLA GIURIA AD UN INTERPRETE

Appendix E: List of people consulted

The Commission thanks the following people for their input during the initial consultation phase of this reference.

Andrew Marshall, Department of the Attorney General (WA)
Ann Brown, Associate to Master Sanderson, Supreme Court of Western Australia
Associate Professor Judith Fordham, University of Western Australia
Carl Campagnoli, Jury Manager, Sheriff's Office (WA)
Chief Judge Antoinette Kennedy, District Court of Western Australia
Debbie Cooper, Aboriginal Fines Liaison Officer, Kununurra Magistrates Court
Gavan Jones, Director Higher Courts, Department of the Attorney General (WA)
Gavin Whittome, Operations Manager District Court Building, Western Liberty Group
Ian Norrish, Jury Summoning Officer, Jury Central Summoning Bureau, Her Majesty's Court Service (UK)
Jim Adair, Regional Manager, Broome Magistrates Court
Jim Johnson, Deputy Juries Commissioner (Victoria)
Joanne Edwards, Project Officer, Sherriff's Office (SA)
Joseph Waugh, Legal Officer, New South Wales Law Reform Commission
Judge Mary Ann Yeats, District Court of Western Australia
Judge Robert Mazza, District Court of Western Australia
Justice John McKechnie, Supreme Court of Western Australia
Keith Chapman, Principal Registrar, Supreme Court of Western Australia
Mary Anne Warren, Jury Manager (NT)
Michael Gething, Principal Registrar, District Court of Western Australia
Mike Silverstone, Executive Director, Corruption and Crime Commission of Western Australia
Neil Iversen, Jury Manager, Sherriff's Office (SA)
Owen Deas, Clerk of Courts, Kununurra Magistrates Court
Paul Calabrese, Jury Supervisor, Sheriff's Office (WA)
Peta Smallshaw, Clerk of Courts, Derby Magistrates Court
Peter Graham, Jury and Security Coordinator, Supreme Court of Tasmania (Hobart)
Peter Hennessy, Executive Officer, New South Wales Law Reform Commission
Peter Scotchmer, A/Manager, Justice of the Peace Branch, Department of the Attorney General (WA)
Professor Michael Tilbury, Commissioner, New South Wales Law Reform Commission
Richard Hooker, Barrister, Francis Burt Chambers
Rick Pugh, Registry Manager, Broome Magistrates Court
Robert Cock QC, Director of Public Prosecutions (WA)
Rudy Monteleone, Juries Commissioner (Victoria)
Teresa Sullivan, Jury Officer, Sheriff's Office (WA)
Tony Mylotte, Administrative Officer, Legal Practice Board (WA)
Vicki Wilson, Operations and Performance Officer, Juror Branch, Her Majesty's Court Service (UK)
Warren Richardson, Manager Enrolment Group, Electoral Commission (WA)

Appendix F: List of abbreviations used

ABS	Australian Bureau of Statistics
ALRC	Australian Law Reform Commission
DPP	Office of the Director of Public Prosecutions
LRCWA	Law Reform Commission of Western Australia
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
QCJC	Queensland Criminal Justice Commission
QLRC	Queensland Law Reform Commission
VPLRC	Victorian Parliament Law Reform Committee